



REPUBLIC OF KENYA



**KENYA LAW**  
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**JMA v Republic (Criminal Appeal E028 of 2023)  
[2024] KEHC 648 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 648 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CRIMINAL APPEAL E028 OF 2023**

**KW KIARIE, J**

**JANUARY 25, 2024**

**BETWEEN**

**JMA ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the original conviction and sentence in Sexual Offences  
Case No.32 of 2020 of the Senior Principal Magistrate's Court at  
Shanzu by Hon. David O. Odhiambo—Senior Resident Magistrate)*

**JUDGMENT**

1. JMA, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No.3 of 2006.
2. The particulars of the offence were that on diverse dates between November 2019 and February 2020 in Nyali sub-county, within Mombasa County, being a male person, caused his penis to penetrate the vagina PA, a female person who, to his knowledge was his daughter.
3. The appellant was sentenced to serve ten (10) years imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. The firm of M.K Oyaro & Company Advocates represented him. He raised grounds of appeal as follows:
  - a. That the learned trial magistrate erred in law and fact by failing to consider that the charge did not meet the requirements of law; hence, the conviction was unsustainable.
  - b. That the learned trial magistrate erred in law and fact by failing to consider the evidence of both the complainant and the appellant that besides the appellant, the complainant had also resided with Mary Loice Maloba, the stepmother of the complainant during the material time whose evidence would have assisted the trial court in reaching a different verdict.



- c. That the learned trial magistrate erred in law and fact by failing to appreciate that the testimony of the complainant was unsustainable and uncorroborated since the prosecution failed to avail Mary Loice Maloba, a crucial witness who was never called to testify despite recording a statement that was supplied to the appellant.
  - d. That the learned trial magistrate erred in law and fact by basing his conviction and sentence on the evidence of only the complainant, which was doubtful.
  - e. That the learned trial magistrate erred in law and fact by failing to appreciate that the offence could have been committed by persons other than the appellant.
  - f. That the learned trial magistrate erred in law and fact by failing to observe that the complainant and PW2 had given conflicting evidence, hence making the evidence incredible.
  - g. That the learned trial magistrate erred in law and fact by failing to observe that the hymen was broken with an old scar whose age was not ascertained.
  - h. That the learned trial magistrate failed to give the appellant's defence due consideration.
  - i. That the learned magistrate erred in law and fact by relying on incomprehensive prosecution evidence, after that the testimony of PW2 was largely hearsay evidence.
  - j. That the learned magistrate erred in law and fact by imposing a harsh, prolonged imprisonment sentence.
  - k. That learned magistrate failed to apprehend tenets of the law that whenever there is doubt in a trial, then the accused must be given the benefit of the doubt.
4. The state opposed the appeal through M/s Khalifa, learned counsel, though no submissions were filed.
  5. This court is an appellate court. As required, I have carefully reviewed and re-evaluated all the evidence presented in the lower court. Despite not having seen or heard any of the witnesses, I have concluded. In making my decision, I will be guided by the well-known case of *Okeno v Republic* [1972] EA 32.
  6. Section 20 (1) of the [Sexual Offences Act](#) provides:
 

Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest. She is liable to imprisonment for a term of not less than ten years:
  7. Flowing from provisions of this section, the ingredients for incest are as follows:
    - a. The accused must be a male;
    - b. The victim must be a female;
    - c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;
    - d. He must know the relationship; and
    - e. There must be penetration.
  8. There is no dispute that the appellant and the complainant are father and daughter. The only issue in dispute was that of penetration by the appellant.



9. The complainant's evidence was that she arrived home on Friday, 15<sup>th</sup> November 2019. On Sunday, the appellant asked her to pick up his shoes under the table. The appellant had a towel at the time because he wanted to shower. While picking them, he started to touch her breasts. He then asked her to go to bed. He then defiled her after removing her panty. This evidence contradicts what PC Florence Ngina (PW4) testified she told her. This is what PW4 said in her evidence:

She said there was a day her father came from work in the morning and told her to bend and pick his shoes under the bed. She asked him why he was doing that. Her father then advised her to lie in bed, and she refused. Her father pushed her to bed [sic] and removed her panty, and he also removed his. He then defiled her.

These two versions attributed to the complainant are contradictory. Were the shoes under the table or the bed? The testimony of the complainant in court does not indicate that she resisted the appellant's orders. However, the version attributed to her by PW4 indicates that she resisted.

10. In her evidence in chief, the complainant testified that after the defilement, the appellant gave her Kshs. 1,000/= to buy shoes. She went and bought shoes at Kshs.400/= and gave the appellant Kshs.600/= balance. However, during cross-examination, she said he offered her Kshs.50/= and bought her shoes. There was no attempt by the prosecution to reconcile the apparent contradictions.
11. The evidence of DW (PW2) introduced further contradictions. This is what she testified:

She called again and told me that the [sic] father had been forcing her to sleep with him. The father would then give her money to buy shoes.

This gave an impression that after defilement, she would severally be "awarded" with money to buy shoes, yet in her evidence, she testified only on one instance was she given money to purchase shoes.

12. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* [1979] KLR 283 (Madan, Miller and Potter JJA) held:

The witness in a criminal case upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a straightforward person, or raise a suspicion about his trustworthiness, or do (or say) something which indicates that he is a person of doubtful integrity, and therefore an unreliable witness which makes it unsafe to accept his evidence.

These contradictions are material to the credibility of the complainant and cannot be wished away.

13. It was argued for the appellant that a material witness, whose statement he had been supplied with, was not called. The Court of Appeal in the case of *Bukenya v Uganda* [1972] EA 549 (Lutta Ag. Vice President) held:

The prosecution must make available all witnesses necessary to establish the truth, even if their evidence may be inconsistent.

Where the evidence called is barely adequate, the Court may infer that the evidence of uncalled witnesses would have tended to be adverse to the prosecution.

14. I have checked the list of witnesses on the charge sheet, and I have ascertained that Mary Loice Maloba was listed as a witness. There was no explanation for why she was not called. The appellant has



contended that her evidence was adverse to the prosecution case. I am, therefore, persuaded to infer that had she been called, her evidence could not have supported the prosecution case.

15. Based on the preceding analysis of the evidence on record, I find the conviction unsafe. The same is quashed, and the sentence is set aside. The appellant is set at liberty unless otherwise lawfully held.

**DELIVERED AND SIGNED AT MOMBASA THIS 25<sup>TH</sup> DAY OF JANUARY 2024**

**KIARIE WAWERU KIARIE**

**JUDGE**

