



**EMM v Republic (Criminal Appeal E026 of 2021)  
[2024] KEHC 1831 (KLR) (28 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1831 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CRIMINAL APPEAL E026 OF 2021  
GMA DULU, J  
FEBRUARY 28, 2024**

**BETWEEN**

**EMM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(From the conviction and sentence in Sexual Offence Case No. 5 of 2019 delivered on 10th February, 2021 at Makueni Law Court by Hon. Sagero (SRM))*

**JUDGMENT**

1. The appellant was convicted of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006 – the particulars of which being that on diverse dates between May 2018 and 27<sup>th</sup> October 2018 within Machakos County intentionally caused his penis to penetrate the vagina of PNM (name withheld) who was to his knowledge his daughter, a child of 13 years.
2. On conviction, he was sentenced to twenty (20) years imprisonment.
3. Aggrieved by the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds:-
  1. The learned Magistrate erred in convicting him without observing that penetration was not proved beyond reasonable doubt.
  2. The learned Magistrate erred in failing to observe that the evidence fell short of the standard required in this kind of criminal case.
  3. The trial Magistrate erred by shifting the burden of proof to the appellant contrary to the rule of law.



4. The learned Magistrate erred by failing to observe that the prosecution evidence was untenable, unworthy, contradictory, inconsistent and full of lies which required him to resolve the doubt in favour of the appellant.
5. The trial Magistrate erred when he dismissed his defence which alleged possibility of being framed up due to an existing grudge without giving cogent reasons.
4. The appeal was canvassed through written submissions. In this regard, I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.
5. This being a first appeal, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno = Versus = Republic* [1972] EA 32.
6. In proving their case, the prosecution called four (4) witnesses. On his part, the appellant tendered sworn defence testimony, and called two other witnesses.
7. Under the provisions of Section 107 of the *Evidence Act* (cap.80) the prosecution had the burden of proving the elements of the offence. This being a criminal case, the standard of proof is beyond any reasonable doubt.
8. I start with the age of the complainant PW1. She stated in evidence that her birthday was 4<sup>th</sup> February 2006, and that she schooled upto Standard 5. I note that DNM the mother of the complainant who had testified before the first Magistrate before the case started de novo before another Magistrate did not testify, and no explanation was given by the prosecution for that, thus the evidence on age from family was that of PW1 the complainant alone.
9. In addition to the above scenario, no document of birth was relied upon, and no age assessment of PW1 was done.
10. In those circumstances, I find that the prosecution did not prove the age of the complainant PW1 beyond any reasonable doubt.
11. The second element of the offence is the proof of the relationship between the complainant and the appellant as a daughter and a father. On this element also, the mother of the complainant did not testify in court to establish that she was married to the appellant, in view of the fact that the evidence on record is that the appellant was not the biological father of the complainant.
12. Thus by failing to bring the mother of the complainant to court to testify on her marital relationship with the appellant, the prosecution failed to prove that the appellant was the step-father of the complainant, as in my view, a mere love relationship between the appellant and the mother of the complainant did not convert the appellant to be the father or step-father of the complainant.
13. With regard to sexual penetration, in my view the DNA evidence tendered by the Government Chemist PW4 Kiptoo Sang, as well as the evidence of the complainant PW1 proved that the appellant indeed had sexual intercourse with the complainant, as the DNA test confirmed that the appellant was 99.9% scientifically the father of the child of the complainant.
14. However, since I have found that the prosecution did not prove the age of the complainant, and also did not prove the father and daughter relationship between the appellant and the complainant, the conviction for incest will not stand and the sentence will have to be set aside.
15. For the above reasons, I allow the appeal quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.



**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF FEBRUARY 2024 AT VOI VIRTUALLY.**

**GEORGE DULU**

**JUDGE**

**In the presence of:-**

Alfred – Court Assistant

Appellant

Mr. Kazungu for State

