



**HAP v Republic (Criminal Appeal 107 of 2023)  
[2024] KEHC 1727 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1727 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 107 OF 2023  
DR KAVEDZA, J  
FEBRUARY 26, 2024**

**BETWEEN**

**HAP ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered  
by Hon. P. Mutua (SPM) delivered in Chief Magistrates' Court  
(Kibera) S.O. Case No. 68 of 2015 on the 25th day of November 2020)*

**JUDGMENT**

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars were that on 24.10.2015 in Nairobi County, the appellant, being a male person, caused his penis to penetrate the vagina of DDA, a girl aged 12 years who was, to his knowledge, his daughter.
2. The appellant was sentenced to serve 20 years' imprisonment. He appeals against conviction and sentence in line with his petition of appeal dated March 10, 2022. The appellant raised twelve (12) grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted and contended that some key prosecution witnesses were not called, while some were unreliable. He urged the court to quash his conviction and set aside the sentence.
3. The appeal was canvassed by way of written submissions, which I have considered.
4. This is the first appellate court and in *Okeno v. R* [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.



5. With the above, I now proceed to determine the substance of the appeal. In his grounds and submissions, the appellant complains that the trial magistrate failed to appreciate the ingredients of the offence of incest. Some key witnesses, particularly Mama XXX to whom the complainant first reported the incident, and C, who made the report to the police, were not called yet they were key witnesses. He further complains that the reliability of the prosecution witnesses was questionable.
6. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. The critical ingredients for the offence of incest as defined in section 20 (1) of the Act are that; the victim and the accused fall within the prohibited degrees of consanguinity, the age of the complainant, proof of penetration, and positive identification of the perpetrator.
7. The prosecution case was as follows. The Complainant (PW1) gave sworn testimony after a *voire dire*. She stated that she was 14 years old and that the appellant was her biological father. On 24.10.2015, she was in the house with her sibling AA (PW2) when the appellant came home and scolded her for calling her mother. He asked them to pack their belongings as they were going to stay with their mother. While parking, the appellant called her to his bedroom, where she found him lying on the bed. He still scolded her over calling the mother and she left the room after he slept. Later, the appellant woke up and called PW1 to his bedroom. While in the room, he asked her to lie on the bed and locked the door. The appellant asked PW1 to remove her skirt and panty. She removed them out of fear of being killed, as the appellant had threatened her and even had a sword at the bedside. He unzipped his trousers, inserted his penis in her vagina, and, in her words, 'raped her'. The appellant repeated the act thrice and later asked her to go to sleep. When asked by PW2 about what happened, she did not respond. The next day she reported to a neighbour about the incident. The neighbour informed her friends who asked PW1 to narrate what happened. Among these neighbours were PW3 who reported to the police and PW5.
8. The first issue for consideration is the relationship between the victim and the perpetrator, and whether he was positively identified. In her testimony, PW1 stated that the appellant was her biological father. This was confirmed by PW1's birth certificate produced during the trial, showing the appellant registered as the father. On identification, PW1 gave clear and graphic testimony of the ordeal. She recalled the whole process from how the appellant scolded her, to how he threatened her and eventually sexually assaulted her three times. Though it was at night, the appellant was someone well-known to PW1. I therefore hold that the Appellant is not only PW1's father but also the one who committed the act of sexual assault.
9. PW 2's testimony did not require corroboration in accordance with the proviso to section 124 of the Evidence Act (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. In this case, the trial magistrate noted that PW1's testimony was not shaken on cross-examination and that it was consistent, as she told the others notably PW3, PW4, PW5, and PW6 the same story.
10. Regarding additional corroborating evidence, the prosecution called PW2 who confirmed that indeed, the appellant called PW1 to the bedroom and that he heard the appellant ask her to lie on the bed. He further stated that PW1 got out of the room crying. I hold that this testimony corroborates that of PW1 against the Appellant.
11. Lastly, there is the evidence of two Clinical Officers, PW4 and PW6 who carried out the medical examination of PW1 and produced the Post Rape Care (PRC) Form and P3 medical report respectively. PW4 told the court that the PW1's vagina was normal but with a swelling and inflamed vaginal walls. The hymen was freshly broken and there was a whitish discharge, which is attributed to candidiasis. He opined that there was suspected defilement. PW6 corroborated this and confirmed that PW1 had tears on the hymen and that her genital tissues were reddened, a sign of injuries. The features



were suggestive of sexual abuse. I hold that this opinion is consistent with the evidence of penetration, and corroborates PW1's testimony that the Appellant penetrated her.

12. The Appellant complains that essential witnesses were not called. The first witness is Mama XXX while the second witness is one, C. Section 143 of the Evidence Act provides that in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see *Bukenya and Others v Uganda* [1972] EA 549 and *Erick Onyango Odeng' v Republic* [2014] eKLR).
13. From the testimony of PW1, Mama XXX was the neighbour to whom she first reported the incident. C on the other hand, as mentioned in PW3's testimony, had initially reported the matter to the police but no action was taken. Both of these witnesses were not eyewitnesses to the incident, they only took action after the incident. It is my finding that given the totality of the evidence, the medical evidence presented was sufficient to convict the appellant. Therefore, it was not necessary and would neither add nor subtract anything from the prosecution case in line with the provision of section 124 of the Evidence Act.
14. Having found that the appellant was positively identified, coupled with the finding that he penetrated PW1 who is his daughter as registered in the birth certificate, I hold that the prosecution proved its case against the appellant beyond reasonable doubt. I accordingly affirm the trial court's conviction.
15. While age is a crucial factor in sentencing as provided for in section 20(1) of the Act, it is only required to prove that the victim was under 18 years old. In this case, the birth certificate revealed that PW1 was born on 19/10/2001, and had just turned 14 years at the time of the incident. Section 20(1) provides that a person who commits incest with a person below the age of 18 years shall upon conviction be sentenced to life imprisonment.
16. The prosecution proved that the child was 14 years old, hence the trial court ought to have imposed the sentence of life imprisonment. However, the court, while exercising discretion, considered the circumstances of the case and that the appellant was a first offender, and sentenced the appellant to 20 years' imprisonment. In this respect, the trial court did not err in imposing the sentence of 20 years imprisonment after considering the facts of the case. I therefore do not find any reason to interfere with the sentence. It is affirmed. The appeal is dismissed for lack of merit.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 26TH DAY OF FEBRUARY 2024**

.....

**D. KAVEDZA**

**JUDGE**

**In the presence of:**

Antony Leshom h/b for Amendi for the Appellant

Mutuma for the Respondent

Nelson Court Assistant

