



REPUBLIC OF KENYA



KENYA LAW
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**PGM v Republic (Criminal Appeal E013 of 2021)
[2024] KEHC 6500 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL E013 OF 2021**

WA OKWANY, J

MAY 30, 2024

BETWEEN

PGM APPELLANT

AND

REPUBLIC RESPONDENT

*(From the Conviction and Sentence in the Chief Magistrate's Court at Nyamira in CMCC
No. 54 of 2018 delivered by Hon. M.C. Nyigeti, Principal Magistrate on 13th May 2021)*

JUDGMENT

1. The Appellant was charged with the offence of incest contrary to Section 20 (1) of the [Sexual Offences Act](#) No. 3 of 2006. The particulars of the charge were that on the 6th day of October 2018, in Nyamira South sub-county within Nyamira County, intentionally and unlawfully caused his genital organ, penis to penetrate the genital organ, vagina of MKG (particulars withheld), alias S, a child aged 6 years old and a female person who was to his knowledge his daughter.
2. In the alternative, the Appellant was charged with the offence of committing an indecent act with a child contrary to Section 11 (1) of the [Sexual Offences Act](#). The particulars were that on the 6th day of October 2018, in Nyamira South sub-county within Nyamira County, intentionally and unlawfully touched the genital organ, vagina of MKG (particulars withheld) alias S, a child aged 6 years with his genital organ penis.
3. The Appellant pleaded not guilty to the charges and the matter proceeded to a full trial where the Prosecution called a total of seven (7) witnesses as follows: -
4. PW1 MKG testified that she was, on 6th October 2018, with her sisters I, C, B and F and was sleeping with B and F on the sofa set in the living room of their two-roomed house when, her father the Appellant herein, carried her to his room where he defiled her until morning. She explained that her



- mother was, at the time, away in hospital and that her other siblings were asleep. She stated her father promised to buy her a present the following day. She explained that the Appellant was later on arrested while drinking at a local den and that her mother escorted her to the hospital.
5. PW2, Mogesi Nyaoga, a Clinical Officer at Nyamira County Hospital examined the victim and filled the P3 form which he produced alongside the PRC Form.
 6. PW3 AN (particulars withheld) was the victim's mother. She testified she was in hospital when she received a call from her son one DM who informed her that he saw her husband (the Appellant) defiling the PW1. She later found the Appellant at a drinking den and that members of the public assisted her in arresting him before she took the victim to hospital. She later recorded her statement at the police station.
 7. PW4, DM, was the victim's brother, testified that he was, on 6th October 2018, asleep at their house when he heard the victim crying from the bedroom where his father (Appellant) slept. He stated that the Appellant left the house and warned them that he should not find them when he returned. He explained that their mother called the following day when his uncle, one WO, informed her that the Appellant had defiled PW1 but that he did not witness the same. He also testified that the victim was still crying in the morning and that their father would drink alcohol and beat them.
 8. PW5, WO, testified that the victim was his niece and that PW3 was his older sister. He testified that he was at his sister's house with her children when PW4 woke him up saying that the victim was crying from the bedroom. He added that DM went to the bedroom where the Appellant slept and found that he had removed the victim's clothes. They feared that the Appellant could wake up and beat them. He also stated that there was no light in the house and that DM took the victim from the bedroom and brought her into the sitting room.
 9. PW6, No. 2002xxxxxxx Cpl. Steven Oserio, received the incest report and the Appellant who was brought to the station while appearing drunk.
 10. PW7, No. 661xx Sgt. Jerida Nyatichi, was the Investigating Officer. She recorded witness statements, visited the scene and collected the following exhibits; the victim's green pant (P.Exh4) and the victim's immunization booklet (P.Exh 5). She then she charged the Appellant with the offence of incest.
 11. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer. He was consequently placed on his defence under section 211 of the Criminal Procedure Code. He elected to give a sworn testimony and did not call any witnesses.

The Appellant's (Defence) Case

12. The Appellant (DW1) testified that he was, on 6th October, at home planning to go to the hospital to check on his wife (PW3) when he heard a commotion outside his house where people were accusing him of defiling his daughter one MK who was deceased. He testified that the victim his second born among 7 children. He denied the offence and stated that he slept in his room with the two younger children B and OK on the material night, while the alleged victim slept with WO, DM and Wilfred on the sofas in the sitting room. He claimed that his wife was in hospital with the youngest child because he was born HIV Positive which his wife's family blamed him for and threatened that they would ensure he went to jail.
13. DW1 testified that on the following day, his wife came with a neighbour, one Rael Okinyi and motor cycle (boda boda) riders together with his parents-in-law who tied him up, beat him and made him drink surgical spirit before he was taken to Mabundi police post and later transferred to Nyamira Police



Station. He claimed that PW7, Sgt. Nyatichi, asked him to admit to the offence and record a statement to be released but that he refused.

14. In a judgement rendered on 15th May 2021, the trial court convicted the Appellant for the offence of defilement and sentenced him to 30 years' imprisonment.
15. Aggrieved by the conviction and sentence, the Appellant filed a Petition of Appeal on 26th May 2021 wherein he listed the following grounds of appeal as follows: -
 1. The learned trial magistrate erred in both law and fact in finding that penetration was not a key ingredient in proving the offence of incest.
 2. The learned trial magistrate erred in both fact and law in arriving at the conclusion that penetration was proved contrary to the clinical officer PW2's report and oral testimony that there was no penetration.
 3. The learned trial magistrate erred in both fact and law in construing partial penetration without evidentiary justification.
 4. The learned trial magistrate erred in both facts and law in ignoring medical evidence in support of alleged penetration, whether on the surface of the victim's organ or deep inside the organ, thus penetration was not proved.
 5. The learned trial magistrate erred in both fact and law in ignoring evidence that the victim confessed to being sexually assaulted by the Appellant through undue influence by her uncle (PW5).
 6. The learned trial magistrate erred both in law and fact in dismissing and totally failing to consider the Appellant's defence.
 7. The learned trial magistrate erred both in law and fact by convicting the Appellant on a farfetched set of facts which did not exist and which were proved to exist.
 8. The learned trial magistrate erred both in law and fact by failing to find that most of the evidence presented by the Prosecution comprised of a tall pyramid of hearsay with no probative value.
 9. The learned trial magistrate erred both in law and fact in failing to appreciate the compelling evidence that the case against the Appellant was driven by ill motive on the part of the complainant brought about by a raging family conflict between the Appellant on one side and the Appellant's wife and her family on the other.
 10. The learned trial magistrate erred both in law and fact in failing to find that the Prosecution's witnesses' testimonies were tainted and dented with massive inconsistencies and prevalent fabrications fatal to the Prosecution's case.
 11. The learned trial magistrate erred both in law and fact in fully disregarding the Appellant's testimony.
 12. The learned trial magistrate erred both in law and fact in finding that the Prosecution had proved its case beyond reasonable doubt without providing the thread of reasoning that she used to arrive at that conclusion.



13. The learned trial magistrate erred both in law and fact by failing to take into consideration the gravity of the offence against the Appellant as a result of which she failed to rigorously test the testimonies of the Prosecution witnesses to the appropriate criminal standard in the circumstances.
 14. The learned trial magistrate erred both in law and fact in failing to accord the accused any opportunity at mitigation to consider any mitigating circumstances applicable in the case before her.
 15. The learned trial magistrate erred both in law and fact in sentencing the Appellant to an excessive sentence in the circumstances.
16. The Appeal was canvassed by way of written submissions which I have considered. The main issues for my determination are: -
- i. Whether the conviction on the charge of incest was safe.
 - ii. Whether the sentence meted was legal and just.
17. It is trite that on a first appeal, the court is expected to rehash the circumstances and facts of a case and conduct a fresh analysis so as to arrive at its own independent findings while bearing in mind the fact that it neither heard nor saw the witnesses testify. In *Dinkerrai Remkrishan Pandya v Republic (1957) EACA 336*, the Court of Appeal for Eastern Africa held thus: -

“On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.”

i. Whether the Conviction on the charge of Incest was Safe.

18. The offence of incest is premised on the provisions of Section 20 of the *Sexual Offences Act* which stipulates as follows:-
- 20(1) 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 and is liable to imprisonment for a term of not less than ten years:
- Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of a female persons.
19. The ingredients of the offence are penetration or indecent act as defined by law and proof of consanguinity. It was not disputed that the Appellant was the victim’s father. Indeed, the Appellant



- confirmed that the victim was her 2nd child out of his 7 children. I find that the evidence of consanguinity or relationship between the Appellant and the victim was adequately established.
20. On the second ingredient of penetration, Section 2 of the Act defines Penetration as follows:-
- “penetration” means the partial or complete insertion of the genital organs of a person into the genital organs of another person;
21. Courts have taken the position that penetration need not be complete. (See *Erick Onyango Ondeng v Republic* [2014] eKLR). It was the Prosecution’s case that the Appellant defiled his daughter on the night of 7th October 2018. PW1 testified as follows: -
- “On the material day, I was sleeping with B and F . They are my sisters. We had slept on a sofa set at the living room. Our house had two rooms. My dad was sleeping in the bedroom. My dad came and carried me to his bedroom. My mum had gone to hospital. My dad then placed me on his bed. He then removed my clothes. I had worn a black skirt and a yellow top and a yellow underpant. My dad then removed his long trouser. My dad then inserted his ‘thing’ in my private parts. His ‘thing’ is the one he used to urinate. When he inserted his thing, I felt very painful. I cried. He did bad things to me until morning....In the morning my dad told me that he would buy me a present and left....”
22. PW2, Moseki Nyaoga, the Clinical Officer examined the victim and filled her P3 Form. He stated that the victim’s vagina was normal with mild bruises on the vulva region, the hymen was not intact but was not freshly broken, there was no presence of vaginal discharge, spermatozoa or puss cells, red blood cells were present (0 to 3) showing the severity of infection or bleeding. It was his view that there was no sexual penetration and that the vaginal irritation could have been caused by an infection arising from sexual penetration or bad hygiene. He stated that the bacteria on the victim’s vulva could have led her to itch thus resulting in the bruises.
23. On cross-examination, PW2 testified that if the child was defiled, there could have been some bleeding on the hymen and the sides of the vagina but that in this case. He explained that even though the hymen was not intact, it was not freshly broken.
24. PW2 testified that he also examined the Appellant and noted that there were no bruises on his genitalia. His opinion was that if indeed the Appellant had defiled the victim, then penetration would have resulted in bruises because of the size of his penis and the victim’s small size of vagina. He concluded that that there was no evidence of penetration.
25. My finding is that even though the complainant could have been a victim of defilement, as shown in the absence of the hymen, it was not clear if she was defiled on the night in question. It is instructive to note that the victim testified that father defiled her the whole night until morning. Clearly, the medical evidence does not support the victim’s evidence.
26. PW3 stated that her son DM (PW4) witnessed his father defiling his sister. In his testimony, however, PW4 stated that he only saw his father taking the victim to the bedroom and heard her cry but he did not see him defile his sister.
27. PW5 (WO), on the other hand, gave a different account and stated that the victim went to sleep in her father’s bedroom all by herself yet she ordinarily slept in the sitting room. PW5’s account of the events of the night in question does not tally with the evidence of PW4.



28. He stated that he also heard her crying and asked PW4 to go and inquire, that PW4 returned and told him that he found his father had removed the victim's clothes. He said that later, PW4 took the victim out of the bedroom and brought her to the sitting room where they slept until morning. He stated on cross-examination that there was also another child sleeping in that bedroom on the material night.
29. In his defence, the Appellant stated that he only slept with the two younger children in the bedroom that night and that the victim slept in the sitting room with the other older children.
30. From the above, it was not clear to this Court whether the victim was defiled the whole night by her father as she stated in her testimony or whether the incident occurred only for a moment and her brother PW4 went to rescue her from her father's hands. My analysis of the evidence also leads me to conclude that the Prosecution evidence in this regard was not truthful and the victim's testimony could not be relied upon because of her inconsistent account and the fact that she stated that she was defiled by her father only when PW5 threatened to leave her and not go with her to their home. Further, the Appellant's testimony that he shared a bed with the two younger children is more believable because even PW5, WO testified that there was another child in the bedroom with the Appellant on the material night. The fact that his testimony was corroborated by a Prosecution witness lends credence to his truthfulness.
31. Having stated the above, this Court has noted a number of other inconsistencies in the testimonies of the Prosecution evidence. The Court of Appeal of Nigeria in the case of *David Ojeabuo v Federal Republic of Nigeria* {2014} LPELR-22555(CA), explained what inconsistencies entailed: -

“Now, contradiction means lack of agreement between two related facts. Evidence contradicts another piece of evidence when it says the opposite of what the other piece of evidence has stated and not where there are mere discrepancies in details between them. Two pieces of evidence contradict one another when they are inconsistent on material facts while a discrepancy occurs where a piece of evidence stops short of, or contains a little more than what the other piece of evidence says or contains.”
32. I have considered the Prosecution evidence in respect of the underpant that was recovered from the victim that she allegedly wore on the night in question. PW1 testified that she wore a yellow pant the following morning after the incident and that this was the same pant she wore that night when she was allegedly defiled. The evidence adduced by PW5 the arresting officer was that the victim's mother showed up at the police station with a blood-stained green pant. The same green pant was produced as evidence before the trial court (P.Exh 4). In her testimony, PW3 stated that the victim wore her green pant on 7th October in the morning as she had washed the yellow pant. There was no evidence from PW1 stating that she bathed and washed her yellow panty on the night in question or the following morning. Her only evidence was that she wore her yellow pant the following day after the incident and that it was these yellow underpants that the doctor took and put in a brown bag. It was not clear to this Court how the yellow underpants turned to be the green underpants produced as evidence before the court or how the yellow blood-stained underpants which were kept by the doctor as evidence for analysis were the same pants she washed as stated by PW3.
33. Another contradictory evidence was the testimonies of PW4 and PW5 on the events following the incident in question. It was the testimony of PW4 that their father said he didn't want to see anyone leave the house then when he later left, he told them that he should not find anyone in the house. PW3 stated that when she returned home, she found the other children by the roadside as the Appellant had chased them away. PW5, the victim's uncle however stated that they did not talk to the Appellant that night and the Appellant never threatened them in any manner. It was not properly established by the



Prosecution evidence whether the Appellant chased away the children that night after the incident as it was alleged or the morning after before he left the house. The testimony of PW5 implies that there were no quarrels or threats from the Appellant that night which brings to doubt the evidence of PW4. It was also not clear who informed PW3 of the said incident. She stated in her testimony that her son DM (PW4) was the one who called her and informed her, while PW4 stated that it was his uncle PW5 who informed his mother.

34. This Court also takes issue with the testimony of PW3 who stated that the victim was also known by the name SB (particulars withheld) but that she named her MK after her daughter who died. In his evidence, DW1 stated that the victim who appeared before the court was his second-born daughter and was known as SB and not MK. He stated that MK died at 9 months and that the victim who was presented before the court was older than MK and had never been known by the name MK.
35. This Court is further puzzled by the fact that PW3 did not know when exactly her daughter MK died. This is information that would hardly escape the mind of a parent. It is therefore more difficult to believe beyond the shadow of a doubt the assertions made by PW3 and the evidence she adduced through the immunization card because there was a possibility it belonged to the late MK and not to the victim PW1.
36. I have also considered the issue of identification and found that none of the Prosecution witnesses saw the Appellant defiling the minor. PW4 stated that there was no light in the bedroom yet PW5 stated that he (PW4) told him that he had seen that his father had removed the victim's clothes. PW5 also stated that there was no light in the bedroom and sitting room, then later he said a light was on. This evidence brings to question the aspect of identification. The questions that linger on the mind of the Court are: If at all PW4 saw the victim naked in their father's bed, what source of light did he rely on to see her in such a state? If the light in the sitting room was on, what was the intensity in the bedroom for PW4's testimony to be plausible? I find PW4 and PW5's evidence unreliable and inconsistent to the extent that it is not clear who saw the victim being defiled. It was also not possible to see clearly in the darkness of the night since they both stated that there were no lights in the house.
37. My general analysis of the above inconsistencies, is that although Prosecution witnesses will not always give the exact account of facts in every case, at the very least, their account of the facts should be similar with negligible inconsistencies that can be overlooked by the court. In this case, the inconsistencies were too material and too glaring for this Court to disregard them as mere discrepancies and the residual effect is that they point to untruthfulness and create doubt in the mind of the Court. In arriving at these findings, I find merit in the decision of *Twehangane Alfred vs. Uganda*, Crim App. No. 139 of 2001, [2003] UGCA, 6 thus: -

“With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case.”

38. Similarly, the Court of Appeal in *Philip Nzaka Watu v Republic* [2016] eKLR, held that:-

“The first question in this appeal is whether the prosecution case was riddled with contradictions and inconsistencies of the magnitude that would make the conviction of the appellant unsafe. It cannot be gainsaid that to found a conviction in a criminal case, where the trial court has to be satisfied of the accused person's guilt beyond reasonable doubt, the prosecution evidence must be cogent, credible and trustworthy. Evidence that is obviously



self contradictory in material particulars or which is a mere amalgam of inconsistent versions of the same event, differing fundamentally from one purported eyewitness to another, cannot give the assurance that a court needs to be satisfied beyond reasonable doubt. However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomena exactly the same way. Indeed, as has been recognised in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question.”

39. I have considered all the discrepancies and contradictions in this case. It is my finding that the medical evidence did not prove penetration and that in totality, the Prosecution evidence was not watertight to prove the charge. Further, it is the finding of this Court that the testimony of the victim could not be relied upon under Section 124 of the *Evidence Act* and that the key Prosecution witnesses did not give an accurate or honest account of the events of the said night. It is the view of this Court that such contradictions and inconsistencies go to the root of the case and cannot be overlooked by the Court.
40. In the final analysis, the Prosecution failed to discharge its burden of proof to the required standard which is proof beyond reasonable doubt. It is my finding that the conviction by the trial court was unsafe and I therefore quash it. This Court finds merit in the Appeal and allows it. The Appellant is acquitted of the charge of incest and shall be set at liberty forthwith unless otherwise lawfully held.
41. Orders accordingly.

**JUDGEMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS
THIS 30TH DAY OF MAY 2024.**

W. A. OKWANY

JUDGE

