



**SWO v Republic (Criminal Appeal 140 of 2023)  
[2024] KEHC 6137 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6137 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIBERA  
CRIMINAL APPEAL 140 OF 2023**

**DR KAVEDZA, J**

**MAY 30, 2024**

**BETWEEN**

**SWO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Being an appeal against the original conviction and sentence delivered  
by Hon. E. Boke (SPM) on 3rd November 2022 at Kibera Chief  
Magistrate’s Court Sexual Offences case no. 102 of 2020 Republic vs SWO)*

**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 FNO, a girl aged 14 years who was, to his knowledge, his daughter.
2. The appellant was sentenced to serve twenty-five (25) years’ imprisonment. He appeals against conviction and sentence in line with his memorandum of appeal filed on 2<sup>nd</sup> May 2023 and the amended grounds of appeal canvassed together with the written submissions. The appellant raised grounds, which have been coalized as follows: He challenged the totality of the prosecution’s evidence against which he was convicted. He contended that there were contradictions in the prosecution witnesses. That the trial court failed to consider his defence. 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. The prosecution called four (4) witnesses in support of their case. PW1 the complainant herein gave evidence after voir dire examination. She stated that she was 14 years old and that the appellant was her biological father. She stayed with her father, brother, and her sister. The house had two beds, and she shared one of the beds with her sister. However, her sister had since run away because their father used to touch her. On 11<sup>th</sup> August 2020, her father cooked supper while in the company of a male friend. At the time, they were drinking alcohol in the house. When the male companion left, her father ordered her to bed and told her to remove her clothes. She did not oblige. He started touching her thighs and vagina. He then proceeded to undress her and undress himself. He then tried to insert his penis into her vagina. As he lay on her, the complainant's brother came into the room prompting him to stop. She then went to open the door for her brother who inquired what had happened. She explained to him and he went and told a neighbour. Later on, police arrived and arrested the appellant. The complainant was also taken to Nairobi Women's Hospital in Rongai for examination and treatment.
6. On cross-examination, she testified that it was the first time, the appellant had defiled her. She added that her brother PW2 had told her state that their father had been defiling them everyday and maintained that it had only happened once.
7. PW2, MO, told the court that he is the complainant's brother and the appellant's son. He stated that he lives in the same building as the appellant but in different houses. He confirmed that the appellant lived with the complainant and their elder sister. He gave evidence that on the material day, he heard noises from their house and went to inquire. On knocking on the door, the appellant opened the door and the complainant who was inside was crying. She was being canned. Neighbours outside were wondering if the appellant wanted to 'sleep with her'. There were rumours in the neighbourhood that the appellant having sex with his two female children. Police arrived at the scene after a report was made. The appellant was arrested and the complainant was taken to hospital for examination and treatment. It was his evidence that the lies arose over the premises on which they were living which was owned by the appellant.
8. During his testimony, PW2 was declared a hostile witness. He was questioned about discrepancies between his court testimony and his recorded statement to the police. Contradictions arose about who opened the door when he heard his sister crying. In his statement to the police, he indicated that he found the appellant wearing a t-shirt but no trousers. He insisted that he was telling the truth in court and that the police recorded his statement as he narrated it. He also stated that he did not report the incident to the police, as alleged; it was the neighbours who did. His statement to the police was later submitted as a prosecution exhibit. Throughout, he maintained that the appellant did not defile the complainant.
9. Cpl Peris Maiko, the investigating officer, testified about the report made by PW2. She interrogated PW2, who then recorded a statement. It was alleged that their father had attempted to defile the complainant, and PW2 had intervened and rescued her. Cpl Maiko took them to the hospital for examination, where a P3 form and a Post Rape Care form were filled out. She also requested an age assessment, which revealed the complainant to be 14 years old, and this report was produced as an exhibit. PW3 further testified that the complainant informed her that it was not the first time that the appellant had defiled her. He had been defiling her from 2019 to August 2020.
10. Dr. John Njuguna from Nairobi Women's Hospital testified on behalf of Joseph Mwanzia who examined the complainant on 12<sup>th</sup> August 2020 but had since left the hospital. The victim reported a history of sexual and physical assault and threats by her father, with the most recent incident occurring



on August 11, 2020. Upon examination, her outer genitalia appeared normal, but her hymen was torn, and there was increased redness around the labia minora. Laboratory tests revealed no signs of infection.

11. A conclusion was drawn that the observed features were consistent with blunt object vaginal penetration. Additionally, the clinician noted that the Examination Form (P3) corroborated the findings of the PRC, except for the presence of a bad-smelling discharge and indication of old hymen tears.
12. After the close of the prosecution's case, the appellant was found to have a case to answer and was put on his defence. He gave sworn evidence and called 2 witnesses. He testified that on August 11, 2020, at 8:00 PM, his child, the complainant herein returned home unexpectedly. He initially thought she was with her mother at their business. He questioned her for about five minutes, but she left abruptly. He was then surprised by the arrival of two police officers who arrested him without explanation. He only learned of the charges against him once in court.
13. DW2, RO, testified that he lives next to the appellant. He told the court that he heard the appellant questioning his child about coming home late, and the child protested and left after less than 30 minutes. DW2 claimed to be able to hear activities in the appellant's house. He also mentioned a rumour about the son wanting to sell the appellant's house.
14. 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. He further complains that the reliability of the prosecution witnesses was questionable.
15. 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.
16. 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. Although the birth certificate was not produced, the appellant did not dispute the evidence that he was the complainant's father.
17. On the age of the complainant, the age assessment report on record revealed that the child was 14 years old at the time of the incident. In the case of *P M M v Republic* [2018] e KLR the court had this to say when a birth certificate is not produced in court;

“What emerges from the authorities is that whilst the best evidence of age is the birth certificate followed by age assessment, the mother's evidence of the complainant's age together with the combination of all other evidence available can be relied on to determine the age of the complainant.”

18. I must acknowledge that, unlike this court, the trial court had the chance to see and hear the evidence of the witnesses. The trial court relied on the age assessment report which was conclusive proof that the complainant was a minor. It is not disputed that she was below 18 years which is the age described in law in the offence of incest.
19. The appellant challenged the decision of the trial court on the ground that the evidence adduced by the prosecution witnesses was contradictory in that the evidence of the complainant and PW2 who



arrived during the incident. He maintained that the witnesses gave contradictory evidence on whether the offence took place or not.

20. The way to treat contradictions and inconsistencies in a case was stated in the case of Philip Nzaka Watu v Republic (2016) CR. App. No. 29 of 2015 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 find 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 recognized 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.”

21. I am also guided on the issue by the Court of Appeal decision in Erick Onyango Odeng’ v. Republic [2014] eKLR citing with approval the Uganda Court of Appeal case of Twehangane Alfred v. Uganda Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held as follows:

“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 case.”

22. The complainant stated that the appellant attempted to defile her in the house. That it was the first time this was happening. However, he had previously touched her thighs and vagina. During cross-examination, she told the court that her brother PW2 had informed her to indicate that it was not the first time she had undergone this sexual assault. In her testimony, the investigating officer told the court that the complainant told her that her father had been defiling her from the beginning of 2019 to 2020. In addition, PW2 who was a hostile witness maintained that the incident did not take place as alleged. He maintained that the allegations against the appellant were framed by the neighbours who were curious about the appellant’s living arrangements. In addition, there was a property dispute over the premises they lived in which was owned by the appellant.

23. There is no doubt that these accounts present varying versions of the same incident. The question, then, is whether the alleged offense was committed only on that particular day, had been occurring over a period of more than a year, or if it ever happened at all.

24. Whereas the complainant said that the appellant attempted to defile her but did not manage to have full penetration, the P3 Form produced indicated that the complainant had reported having been defiled several times by her biological father. In addition, the P3 form indicated that she had hyperaemic labia



minora with a foul-smelling discharge noted from the hymen, which had old remnants. The P3 form did not specify whether the hymen was intact or torn. However, the PRC form indicated that the hymen was torn, while the outer genitalia was intact. Additional evidence from the prosecution was therefore needed to address the inconsistencies regarding whether the alleged offense occurred as stated. The medical evidence failed to establish this beyond reasonable doubt.

25. Having looked at the testimonies tendered by the prosecution witnesses including but not limited to the testimony of the victim child PW1 on what had transpired on that material day, I find the testimonies were not watertight. The inconsistencies and contradictions alluded to were the fact of whether the appellant defiled the complainant or not. In court, the complainant insisted that she was only defiled once on the material day. However, her evidence given on the day of the alleged incident to the investigating officer who testified and the medical examiner who examined her after the incident was contrary being that she had been defiled for over one year. In addition, PW2, who recanted the statement recorded at the police station as to the circumstances surrounding the appellant's arrest and whether he found the appellant in the house without a trouser raises further doubts.

26. The question is whether these discrepancies can be cured by section 382 of the Criminal Procedure Code. The court, in *Joseph Maina Mwangi vs Republic Criminal Appeal No. 73 of 1993*, held, inter alia, that: -

“In any trial there are bound to be discrepancies. An appellate court in considering those discrepancies, must be guided by the wording of section 382 of the criminal procedure code viz whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences”

27. The role of this court is to be in the shoes of the Trial Court in evaluating, assessing, and reconciling the evidence and to determine whether the said contradictions, discrepancies, and/ or inconsistencies are prejudicial to the Appellant. In my view, these are significant contradictions that cannot be cured by section 382 of the Criminal Procedure Code as they went to the core of the prosecution. They therefore have to be construed in favour of the appellant. This would therefore necessitate this court to overturn the trial court's decision.

28. For the above reasons, I find merit in the appeal. The appellant's conviction is quashed and the sentence imposed is set aside. The appellant is set at liberty unless otherwise lawfully held.

Orders accordingly.

**JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 30<sup>TH</sup> DAY OF MAY 2024**

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**D. KAVEDZA**

**JUDGE**

In the presence of:

Appellant present

Ms. Tumaini for the Respondent

Joy Court Assistant

