JIE v Republic (Criminal Appeal E014 of 2023)
[2024] KEHC 14946 (KLR) (28 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14946 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E014 OF 2023

WM MUSYOKA, J

NOVEMBER 28, 2024

BETWEEN

JIE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. Lucy Ambasi, Chief Magistrate, CM, in Busia CMCSOC No. 82 of 2020, of 10th March 2023)

JUDGMENT

1. The appellant, JIE, had been charged before the primary court, of the offence of incest, contrary to section 20(1) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 31st July 2020 within Busia County, being a male person caused his penis to penetrate the vagina of JI, a female person, who to his knowledge, was his daughter. The appellant denied the charges, and a trial ensued, where 4 witnesses testified.

2. PW1, JI, was the complainant. She testified that the appellant, her father, had defiled her many times between 2016 and 2020. PW2, ASO, was the mother of the complainant. She was informed by PW1 of the defilement by the appellant, her husband, ever since she was in Class 3. PW3, Clesensia Ogutu, was the clinical officer who presented the medical evidence. Defilement was alleged to have had happened on 31st July 2020, and PW1 was examined on 3rd August 2020. Hymen was missing, epithelial cells were noted and she was positive of syphilis. The child was traumatised. PW4, No. 48663 Police Corporal Newton Lumula, was the investigating officer. A report had been made by PW2, on 4th August 2020, of a defilement on 30th July 2020.

3. The appellant was put on his defence, vide a ruling that was delivered on 12th April 2022. He made a sworn statement, on 14th December 2022. He stated that he had marital differences with his wife, PW2.

On 31st July 2020, he had found PW1 watching porn on a mobile phone, belonging to a customer, who was with PW2. He disagreed with PW2 over that, and beat her, and poured the alcohol she was selling on her. He testified that the allegation that he had sexually violated PW1 arose from that dispute. He also stated that his marital disputes with PW2 arose after he married a second wife.

4. In its judgment, delivered on 10th March 2023, the trial court found the appellant guilty, as all the elements of the offence had been positively proved, and it sentenced him to life imprisonment, on the same date, which was translated to 50 years.

5. The appellant was aggrieved, and brought the instant appeal, which revolved around the charge being duplicitous; the evidence amounting to hearsay and being contradictory; expert evidence lacking probative value; defence evidence being disregarded; sentence being harsh and deterrent, and mitigating circumstances not being taken into account; and violations of Articles 49 and 50 of *the Constitution*.

6. Directions were given on 6th May 2024, for canvassing of the appeal by way of written submissions. The written submissions on record were filed by the appellant, which I have read through, and taken note of the arguments made.

7. The appellant concedes that PW1 was his daughter. He submits that the recorded evidence did not establish that he had had carnal knowledge of PW1, and, therefore, penetration had not been proved. He submits that none of the prosecution witnesses linked him to defilement of PW1. He cites Charles Koli Anyaso vs. Republic Kakamega HCCRA No. 190 of 1998 (Waweru, J) and Geoffrey Otieno Bor vs. Republic [2021] KEHC 6075 (KLR) (Kiarie, J) in support. He further submits that the age of PW1 was not established, and he cites Francis Anamu vs. Uganda CRA No. 2 of 2000, Stephen Ouma Opiyo vs. Republic Kisumu HCCRC No. 46 of 2009 (JR Karanja, J), Alfayo Gombe Okello vs. Republic [2010] eKLR (Gicheru, Bosire & Waki, JJA), Daniel Mwasi vs. Republic Nairobi HCCRA No. 458 of 1985 (Schofield, J) and Adedeji vs. State [1971] All NLR 75, to support his arguments. On sentence, he relies on Nilsson vs. Republic [1970] EA 599 (Harris, J) and Nashon Rume Ojwang vs. Republic Homa Bay HCCRA No. 12 of 2019 (Kiarie, J), to argue that the sentence for incest with a minor was not mandatory. Finally, he submits that the investigating officer did not testify on how he gathered "his investigations."

8. I will determine the appeal on the basis of the grounds that the appellant has submitted on, on the premise that the grounds that he has not submitted on have been dropped. He has submitted on the age of PW1, penetration, the investigations and sentence.

9. On the age, the charge indicated that PW1 was 13 years old, as at 31st July 2020, when the offence was allegedly committed. No document was produced to prove the age, and PW2 explained that the appellant had burned all the relevant documents, after he was arraigned. However, that of itself was fatal to the issue of proof of age. PW1 testified that she was 13, and so did her mother, PW2. PW2 gave birth to her, and so her testimony, on the matter of her age, should carry immense weight. No one can be expected to know the age of a child than the mother of the child herself. The appellant concedes that PW1 was his child too. He has not accused PW2 of lying about the age of PW1, and he did not present, at trial, alternative evidence to demonstrate that the information given by PW1 and PW2 was inaccurate.

10. On penetration, he submits that the evidence was inadequate. PW1 did not give a coherent account of what happened on 31st July 2020, for that was the date alleged in the charge, and she testified generally about what used to happen between 2016 and 2020. However, she did produce documents about the events of 31st July 2020. PW2 and PW3 gave accounts that corroborated her case. PW1 testified

that it happened to her. She was the victim. No evidence on penetration can trump that of the victim herself. PW2 took PW1 to hospital after 31st July 2020, and the medical evidence, as presented by PW3, confirmed and corroborated the allegation, that PW1 had been defiled. PW1 identified the appellant as her assailant. She could not have been mistaken, given that the appellant was her own father. I am not persuaded that penetration had not been established.

11. On investigations, the complaint is that PW4 did not give details of or narration on how he conducted his investigations. It is common practice for investigators to give a blow by blow account of the steps that they took in investigations, from the time they were allocated the case up to the time they take to the witness stand. It helps the court to have a clear picture of the background to the case, and in particular how all the evidence placed before the court was obtained. It is good practice. However, the role of the court is not to audit investigations, but rather to assess the guilt or otherwise of the accused person based on the evidence presented. Whether the investigations were effectively or shoddily done is usually neither here nor there. The court would only be interested in how the investigations were done, where an allegation is made that the evidence sought to be relied upon had been improperly obtained, hence it was inadmissible. Beyond or besides that, the absence of a narration on how the investigations were carried out would not be fatal.

12. On the sentence, the offence charged was not defilement, but incest, which is defined in section 20(1) of the *Sexual Offences Act*. However, defilement is also covered or subsumed in incest, where the victim of the offence is a minor. The penalty for defilement of a minor female, by a close relative, in the context of incest, is very stiff, a maximum of life imprisonment. Why would the law prescribe such a stiff penalty? To protect abuse of minors within the family setting. This is a zone where children should expect nurture and protection, within the warm and friendly environment or sanctuary, provided by their parents, and other close relatives. Unfortunately, and sadly, sexual abuse often happens within this zone. It is the worst form of abuse of trust. It is also a zone which enables the perpetrators to get away with it, as they often get succour and protection from other family members, in a code of silence, to protect family honour. Therefore, where defilement happens within the family setting, and it is brought out in proceedings, such as these, it must be dealt with without any form of sympathy to the perpetrators, by way of heavy penalties, for deterrence purposes.

13. In addition, it should also be pointed out that incest overlaps with defilement, where minors are involved. The perpetrator would essentially have committed 2 offences. He would have had sexual connection within forbidden relationships, and he would have defiled a minor. The penalty, where a minor is involved, would be stiffer, to punish the offender for the incest and the defilement.

14. The victim of the defilement, in this case, was 13 years old. The appellant preyed on her. Her life was pretty messed up. She has been described as traumatised from her experience, and had to flee her home. The appellant was her father, and what he did to her was a breach of trust. He deserved what he got, by way of sentence.

15. Mandatory and minimum sentences for sexual offences were declared unconstitutional, in Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others vs. Republic Mombasa HC Petition No. 97 of 2021 (Mativo, J). The Court of Appeal, in Julius Kitsao Manyeso vs. Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), declared the sentence of life imprisonment unconstitutional; and in Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), it was declared that life imprisonment translated to 30 years.

16. It would appear that the trial court was alive to Maingi & 5 others vs. Director of Public Prosecutions & another [2022] KEHC 13118 (KLR) (Odunga, J) and Edwin Wachira & 9 others vs. Republic

Mombasa HC Petition No. 97 of 2021 (Mativo, J), and more particularly to Julius Kitsao Manyeso vs. Republic Malindi CACRA No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJA), hence the translation of the mandatory life imprisonment to 50 years. Evans Nyamari Ayako vs. Republic Kisumu CACRA No. 22 of 2018 (Okwengu, Omondi & J. Ngugi, JJA), came after that.

17. These developments, in the jurisprudence in this area, appear to favour the appellant. However, the Supreme Court has put brakes on the same, in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), where it was declared that the minimum mandatory sentences, provided by certain laws, remain lawful and constitutional. That would mean that the decisions by the High Court and Court of Appeal, discussed above, are now no longer good law.

18. Overall, I do not find merit in the appeal, on conviction, and I do hereby dismiss the appeal, on conviction, and affirm the conviction. As a consequence of Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) (Koome, CJ, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), I now have no discretion to intervene, in the manner proposed by the appellant, on the sentence. The same is, therefore, upheld and confirmed. The appeal is dismissed in its entirety. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, ON THIS 28TH DAY OF NOVEMBER 2024.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr. JIE, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.