JMN v Republic (Criminal Appeal 12 of 2020) [2023] KEHC 497 (KLR) (Crim) (31 January 2023) (Judgment)

Neutral citation: [2023] KEHC 497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 12 OF 2020

DO OGEMBO, J

JANUARY 31, 2023

BETWEEN

JMN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the conviction and sentence in Criminal Case No. 47 of 2018 at Chief Magistrate's Court, Makadara, Hon. H. M. Nyaga, Chief Magistrate, Judgment dated 25.9.2019, and sentence dated 1.10.2019.)

JUDGMENT

1. The appellant,JMN, faced a charged of Incest Contrary to section 20(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that on diverse dates between January 5, 2016 and March 1, 2018 at [particulars withheld] slums in Embakasi Sub-County, within Nairobi County, being a male person, he caused his penis to penetrate the vagina of TWM, a female Juvenile who was at his knowledge, his daughter.

2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, No. 3 of 2006. That on diverse dates between January 5, 2016 and March 1, 2018 at [particulars withheld] slums in Embakasi Sub-County within Nairobi County, he intentionally touched the vagina of TMM, a child aged 11 years with his penis.

3. After full trial, the appellant was convicted on the main count. He was subsequently sentenced to serve 30 years imprisonment. He has appealed to this court both on the conviction and the sentence. In this memorandum of appeal filed on 29.1.2020, the appellant listed the following grounds of appeal;

1. That the learned trial magistrate erred when he convicted the appellant on his own plea without cautioning himself whether the appellant had properly understood the charge and the facts of the case.

2. That the learned trial magistrate erred when he convicted the appellant on his own plea without cautioning himself whether the appellant understood the language used when the charge was read to the appellant

3. That the learned trial magistrate failed to make sure that the appellant had been informed of the charge with sufficient detail to answer to it.

4. That the learned trial magistrate erred in law and fact when he failed to find that the appellant was delayed to be brought to court before the expiry of 24 hours as required by Article 49(1)(f)(i)(ii) of the *constitution*.

5. That the learned trial magistrate erred in law when he convicted the appellant and sentenced him to serve life imprisonment whereas no birth certificate was attached to the facts of the case to prove the age of the complainant.

4. The appellant has prayed that his appeal be allowed, his conviction quashed and the sentence be set aside. This appeal was canvassed by way of written submissions.

5. It was submitted by the appellant that the ingredients of defilement, based on the cases of *Fappyton Mutuku Ngui v Republic*, Criminal Appeal No. 296 of 2010, and *Charles Wamukoya v Republic*, Criminal Appeal No. 72/2013 are:

i) Whether there was penetration of the complainants' genitalia.

ii) Whether the complainant was a child.

iii) Whether the penetration was by the appellant, or identification of the assailant.

6. That the elements of defilement were not conclusively proved and that the medical evidence did not prove the offence. That the conviction was based on suspicion and that suspicion however strong cannot provide the basis of inferring guilt. He relied on *Sawe v Republic* [2003]KLR 364, where the court of Appeal held;

> " Suspicion however strong cannot provide the basis of interfering guilt which must be proved by evidence beyond reasonable doubt."

7. It was further submitted that the prosecution failed to call crucial witnesses. He relied on *Juma Ngodia v Republic* [1982-88]KAR 454, in which the Court of Appeal held;

> " The prosecutor has in general, discretion whether to call or not to call someone's as a witness. If he does not call a vital reliable witness without a satisfactory explanation, re runs the risk of the court presuming that his evidence which could be and is not produced would, if produced have been unfavourable to prosecution."

8. He gave the examples of the neighbor mentioned by PW2 and also the volunteers who took the child. The case of *Paul Kanja Gitari v Republic* [2016]eKLR, was also cited in this regard, as well as *Bukenya & others v Uganda* [1972], EA 549.

9. The appellant further relied on *Woolmington v DPP* [1935]AC 485, that the case against him was not proved beyond any reasonable doubt.

10. The respondent on the other hand, submitted that the treatment notes, the medical summary, the post rape care form and the P3 form all indicate that there was evidence of penetration. And that there is no dispute as to the fact that appellant was father of PW1. Further, that the age of the complainant was proved to be 10 years. counsel relied on the Court of Appeal case of *J. W. A v Republic* [2014] eKLR , where the court held that both the P3 form and the medical report proved the age of the minor.

11. It was further submitted that the medical evidence was also conclusive, and that the case of the prosecution was not based on suspicion since there was both circumstantial and medical evidence pointing at the appellant as the perpetrator.

12. And on the issue raised that certain vital witnesses were not summoned, the respondent relied on the same case of *J.W.A v Republic* [2014]eKLR, where it was decided;

> " Whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for examples, it is shown that the prosecution was influenced by some oblique motive."

13. The respondent pleaded that this appeal lacks merit and should be dismissed and the sentence upheld. The appellant filed another document headed "rebuttal submissions" which to a large extent is a recitation of the earlier submissions.

14. I have carefully considered the above submissions of the two sides. The jurisdiction of this court as a 1st appellate court is well settled. In *Okeno v Republic* [1972]EA 32, a decision widely acclaimed, it was held;

> " The 1st appellate court must itself weigh the conflicting evidence and draw its own conclusion."

15. It is therefore imperative that this court do reconsider the evidence as laid before the trial court and to come to its own conclusions.

16. PW1 TMM, gave evidence on June 20, 2018 that she initially lived with her mother BM and father JM at [particulars withheld] in a 1 roomed house. That she was born on November 4, 2008 and so was 11 years old at the time and the appellant is her father. This witness had to be stood down due to inability to testify. She however continued with her testimony on August 17, 2018. Her short testimony was that whenever her mother went to work at night, she would remain with her father in the house. That on being summoned by her class teacher Charles on March 2, 2018, she told the teacher that her father used to do *tabia mbaya* to her when her mother was away. She was cross examined on May 14, 2019. She now stated that her father did not do anything to her. On re-examination, she confirmed that she had told the court that he did to her tabia mbaya.

17. BM was PW2. Her testimony was that appellant is her husband. That PW1 is their daughter born on November 13, 2008. She goes to work both during the day and night. That on March 13, 2018, she had been away at work at night only to come back home and find that her husband had been arrested. This witness had no more evidence. PW3

18. Rosemary Katite Mutua, a Volunteer Children Officer recalled that she met PW1 on March 5, 2018 when her teacher called her. That on speaking to PW1, PW1 told her that he father had defiled her the day before while her mother was away on night duty. This had been happening from 2016. She took the child to Medical Missioners of Mercy where the child was examined before being taken to the

clinic. That it was confirmed the child had been defiled and a P3 form was duly filled. In court, she identified the medical notes, PRC form and the P3 form.

19. C A, a teacher of PW1, was PW4. His testimony was that the school director instructed him to talk to the child to determine the problem she had. That the child revealed to her that her father had been defiling her. He proceeded to contact the social worker and reported the matter to the police. And PW5, Nancy Nyandare, a registered nurse recalled that on March 5, 2018, PW1 was taken to her on allegations of being defiled. She examined the child and noted she had a whitish discharge. Laboratory tests showed the presence of pus and epithereal cells, a sign of infection. She produced her report (Exh. 1).

20. Dr. Joseph Maundu was PW6. He examined the minor and filled in a P3 form. On examination, her outer genitalia was normal. She had broken hymen with old scars. Yet another medical officer, Maria Mohamed, gave evidence as PW7. She examined the child on March 5, 2018. She noted that her vagina was pink and hymen had old tears. She filled in her summary sheet and PCR form which she produced as exhibits. And the last witness, PW8 was Sergeant Agnes Mwania, the investigating officer. She took the witness statements and also arrested the appellant.

21. The appellant gave a sworn evidence in defence. He testified that on March 13, 2018, he was from work when he found both PW1 and PW2 at home. That 2:00AM, the police arrested him. He denied defiling his daughter. And that on March 1, 2018 PW1 had watched a movie till late, making her wake up late as a result of which he called the school. He went on that teacher Charles had issues with him over rent owed.

22. This basically is the evidence that came out from the 2 sides before the trial court. This is a case of incest. Section 20 of the *Sexual Offences Act*, No. 3 of 2006 defines the offence in the following terms;

> Any male person who commits an indecent act or an act which causes penetration with a female person who to his knowledge is his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is laible to imprisonment for a term of not less than 10 years.
>
> Provided that, if it is alleged that the female person is under the age of 18 years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or indecent act was obtained with consent or not."

23. The definition as above discloses that the critical ingredients of the offence of incest are;

    i) Indecent act or penetration

    ii) Age of the victim

    iii) Relationship of the victim and the perpetrator.

24. From the evidence on record there is no doubt that the complainant herein, PW1 was a minor at the time of this incident. It is on record that she was born on 4.11.2008 and the relevant certificate of birth was produced in exhibit (Exh.5). She was therefore about 10-11 years old. There is also no doubt that the appellant is father of the complainant, a fact the appellant himself has admitted in his defence.

25. With these 2 undisputed ingredients of the offence proved, the issue for determination is whether the prosecution proved the element of penetration. Section 2 of the sexual Act defines penetration as;

> " Penetration means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

26. It is worth stating from the onset that direct evidence towards proof of how this incident occurred did not come out clearly from the prosecution witnesses. The complainant, PW1, at 11 years could not, for whatever reason, state clearly what exactly transpired. The trial court in fact had to stand her down in an attempt to make her comfortable to testify to little success. It was not until she was recalled, that she stated that her father had done "*tabia mbaya*" to her. PW2 her mother again offered no evidence, insisting that she had no knowledge of what had transpired.

27. However, PW3 and PW4 who interrogated the complainant, both testified that PW1 confirmed to them that her father had defiled her.

28. Apart from the evidence of PW1, 3 and 4, it is worth noting that when the complainant was examined by PW5, the findings were positive that there was evidence of penetration. The relevant treatment notes, post rape care form and P3 form were produced in court. In total therefore the oral evidence given by PW1 about her father doing "*tabia Mbaya*" to her, and the results of the medical examination of the complainant, leave no doubt in my mind that the element of penetration was proved by the prosecution.

29. The next issue for determination is whether the appellant was the perpetrator of this offence. As already stated above, PW1 testified as to the father doing *tabia mbaya* to her. She repeated the same statement to both PW3 and her teacher PW4 and even to the doctors who examined her. It is apparent that the complainant had to report to school late making the appellant call the school to give an explanation. This, to me, is indicative of the fact that the appellant knew well what he had done and was trying to preempt any suspicious that the school teacher and director could have about the condition of the child. It is also worth considering that this incident took place at night when the complainant was only with the appellant, removing any possibility of involvement of any third party. And had it been someone else, the appellant, being the father of the child would have been the one to report the incident. He did not.

30. These circumstances put together clearly point to the appellant as the one who defiled his own daughter and this is not a case of mere suspicion as submitted by the appellant.

31. The appellant, in his defence, denied the charge and claimed that he had been framed up by PW4 over a rent dispute between his mother and the mother of PW4. With respect, I do not believe or find merit in this defence. PW4 gave evidence in court and the appellant had the opportunity to and indeed cross examined the witness. He never raised this issue. I do not find any merit in this defence which I dismiss.

32. As to the issue raised by the appellant that certain crucial witnesses were never called to testify, it is clear from the filed submissions that the appellant is well conversant with the provisions of section 143 of the *Evidence Act*, that no number of witnesses are required to prove a fact. He has even reproduced the case of *Juma Ngodia v Republic* [1982-88]KAR on the said subject.

33. In our case, the appellant has not specifically stated who those vital witnesses left out are, these nature of the evidence they could have and even how their evidence could probably have turned out negative to the prosecution's case. This ground is therefore not valid. I dismiss it.

34. Lastly on sentence, I have considered the sentence proceedings conducted by the trial court on October 1, 2019. The appellant was accorded the opportunity to offer mitigation which he did and which mitigation the court took into account. He was then sentenced to serve 30 years imprisonment which is the maximum sentence for the offence charged. I find this sentence both legal and proper and proper and I have no reason to interfere with the same.

35. The upshot is that this appeal filed on January 29, 2020 of the appellant lacks any merit. I dismiss the same wholly. Orders accordingly.

HON. D. O. OGEMBO

JUDGE

31st JANUARY 2023.

Court:

Judgment read out in court (on-line) in presence of the appellant (Kamiti Maximum) and Ms. Akunja for the state.

D. O. OGEMBO

JUDGE

31st JANUARY 2023.