JM v Republic (Criminal Appeal E111 of 2021)
[2023] KEHC 1042 (KLR) (21 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1042 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E111 OF 2021

GMA DULU, J

FEBRUARY 21, 2023

BETWEEN

JM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original judgment of Hon. C. A Mayamba in Kilungu Principal Magistrate's Court PMCR (S.O) Case No.E022 of 2021 pronounced on 30th November 2021)

JUDGMENT

1. The appellant was charged in the magistrate's court with incest by a male person contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of offence were that on December 25, 2018 at 0800 hours at Kilome Sub-Location in Mukaa Sub-County within Makueni County being a male caused his genital organ to penetrate the genital organ of CM (name withheld) aged 16 years who was to his knowledge his daughter.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of offence were that on the same dates and at the same place, unlawfully and intentionally committed an indecent act with CM a child aged 16 years by touching her genital organs who to his knowledge was his daughter.

3. He denied both charges. After a full trial, he was convicted of the main charge of incest, and sentenced to 16 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal and relied on the following grounds –

1. That the trial magistrate erred in law and facts by failing to consider that there was no evidence to prove the offence of incest (defilement) to the required standards in law of beyond reasonable doubt.

2. The trial magistrate erred in relying on hearsay evidence adduced by the prosecution witness and failed to note that the charges against him were borne out of malice and ill will.

3. The trial magistrate erred in relying on suspicion and fictious evidence of Pw1 and without noting that Pw1 was subjected to duress thus incriminating the appellant.

4. The trial magistrate erred in convicting on mere allegations and presumptions and holding the testimonies of the prosecution witnesses as truthful and free from doubt without the benefit of properly conducted DNA required under section 2 of *SOA* to ascertain whether or not the accused was linked with the commissions of the offence.

5. The trial magistrate erred by not finding that the evidence of Pw1 as adduced in court and also the long period of delay in not reporting the incident in reasonable time raised sufficient doubt as to occurrence of the incident and the doubt should have been resolved in favour of the appellant.

6. The trial magistrate erred by not observing that there were no substantive investigations by the investigating officer, thereby basing the conviction on mere allegations and fabrications. He acted *mala fides* while handling the case.

7. The trial magistrate erred by shifting the burden of proof on the appellant in that it is trite law that an accused person should only be convicted on the strength of the evidence of the prosecution evidence, but not on the weakness of his defence.

8. The trial magistrate erred by failing to find that the prosecution had not proved its case beyond reasonable doubt as required for by the law and also failed to scrutinize and evaluate the prosecution's evidence and therefore arriving at an erroneous decision.

9. That the magistrate erred by failing to find that the trial contravened the appellant's constitutional rights to a fair trial in accordance with Article 50 *Constitution of Kenya*.

10. The sentence imposed upon the appellant was harsh, excessive and in the circumstances contravened the provisions of Article 47 *Constitution of Kenya*.

5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant, and those filed by the Director of Public Prosecutions.

6. This being a first appeal, I am required to re-evaluate all the evidence on record, and come to my own conclusions and inferences – see *Okeno –vs- Republic* (1972) EA 32.

7. I have evaluated the evidence on record. In proving their case, the prosecution called 4 witnesses. On his part, the appellant tendered sworn defence testimony and called no additional witnesses.

8. The appellant was convicted and sentenced for incest. The prosecution had the burden of proving each of the elements of the charge beyond any reasonable doubt. The appellant did not have a burden to prove his innocence. See the case of *Woolmington –vs- DPP* (1935) AC 462.

9. In our present case the complainant Pw1 CM was alleged to be a child of 16 years. The evidence on record is however, that at the time of the alleged offence, the complainant was 14 years old. I find that

though the prosecution proved that the complainant was below 18 years, they proved that she was 14 years old, not 16 years old. Thus it was proved beyond reasonable doubt that the complainant Pw1 was a minor or a child.

10. The second element in the offence of incest is the relationship of the complainant and the accused, the appellant. From the evidence of the prosecution witnesses Pw1 and Pw2 SM, the complainant was step daughter of the appellant. This position is also affirmed by the appellant. I find that the prosecution proved beyond any reasonable doubt that the complainant and the appellant were a father and daughter.

11. The third element of incest is penetration of a sexual nature. The evidence on this element is that of the complainant Pw1 alone. The medical evidence does not confirm Pw1's evidence, as the complainant went to the hospital more than 2 years after the alleged incident.

12. In addition, the person to whom Pw1 is said to have first reported to the incident, a maternal uncle, was not called by the prosecution to testify in court, and no explanation was given by the prosecution for that failure.

13. In my view, the evidence of the alleged victim Pw1 CM is not saved by the provisal to section 124 of the *Evidence Act*, (Cap 80), as the person to whom Pw1 is said to have first reported the incident, was not called to testify in court. Secondly, Pw1's mother Pw2 SM contradicts Pw1's evidence and denies the incident. Thirdly, Pw1 took more than 2 years to report the incident to the police.

14. I thus find that the prosecution did not prove beyond any reasonable doubt that sexual penetration of the complainant had occurred on the date alleged. The fact that Pw1 hymen was missing at her age of 14 is not proof of sexual intercourse, and in particular, is not proof that sexual intercourse occurred on the date alleged.

15. The other element of the offence is the identity of the culprit. As I have found above with respect to sexual penetration, I also find that the prosecution did not prove, beyond reasonable doubt, that the appellant was the culprit. In addition, the evidence on record clearly shows the existence of a family rift which could easily have driven the complainant Pw1 to falsely implicate the appellant who was her step-father, with the offence.

16. With regard to this element of the offence also, the magistrate erred in attempting to shift the burden of proof to the appellant contrary to established requirements of the law. Secondly, the magistrate erred in convicting on his own perceptions which were not on the evidence on record.

17. In my view therefore, the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.

18. Lastly, the appellant has raised technical grounds that the trial magistrate contravened the principles of fair trial under Article 50 of the *Constitution*. I find no such violation of the *Constitution*.

19. It follows from my above findings that the conviction herein has to be quashed and sentence set aside.

20. I thus allow the appeal, quash the conviction and set aside the sentence imposed. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 21ST DAY OF FEBRUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE