RM v Republic (Criminal Appeal E40 of 2021)
[2023] KEHC 2728 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2728 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAPSABET

CRIMINAL APPEAL E40 OF 2021

RN NYAKUNDI, J

MARCH 30, 2023

BETWEEN

RM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon J A Owiti in Kapsabet Magistrates Sexual Offences Criminal Case No E054 of 2020)

JUDGMENT

1. The appellant was charged with the offence of Incest Contrary to section 20(1) of the *Sexual offences act*. The particulars of the offence are that on September 12, 2020 at [particulars withheld] Village within Nandi South Sub County of Nandi County, being a male person, caused his penis to penetrate the vagina of AV, a female person who was to his knowledge his daughter.

2. The appellant pleaded not guilty and the matter proceeded to full trial. The prosecution called a total of six witnesses who testified in court. PW1, the grandmother to the complainant testified that she was awoken by PW3, her daughter, and proceeded to the sitting room where she found the complainant naked and her genitalia was wet. She also saw the accused naked, asleep on the sofa. She reported the matter to the police station and PW3 was treated. She testified that the complainant was 8 years old as at September 12, 2020. Pw3 testified that she went to the sitting room on the material date and saw DW1 and PW2 naked and DW1s pants were lowered down to his knees. She informed PW1 who went to the sitting room and took PW2 to her bedroom. PW2 testified that on the material date she woke up and noticed her pant had been removed. She was relocated to PW1s room. She stated that she neither felt her pant being removed or pains in her genitalia. She testified that the accused is her father.

3. PW4 testified that he received a report on September 13, 2020 that PW2 had been defiled. He booked her report and minor was taken to hospital for treatment. He issued a P3 form to the complainant(AV)

which was filled and produced as pe-2. He produced the child health and nutrition card as pe-1 to prove age of the complainant(NM). PW5, Dennis Odhiambo, a clinical officer at Serem Hospital produced the p3 form and treatment note of complainant(AV) as pe-2 and 3 respectively having examined the minor on September 15, 2020. He noted bruises on the labia majora and minora of the minor(AV).

4. The appellant was put on his defence and testified that he spent a night in the house of PW1, Zippy Vugutsa, on September 12, 2020 as it was late but denied defiling AV-his stepsister save that he has been framed up by PW1 and PW3 on account of being defiant to their request to assist them in securing a place to burry a stillborn of his relative who was pregnant but aborted.

5. The trial court, upon considering the testimony of the witnesses and the evidence presented in court, was satisfied that the prosecution had proved its case to the required standard and convicted him of the main charge. He was then sentenced to 30 years' imprisonment.

6. Being aggrieved with the sentence and conviction, the appellant instituted the present appeal vide a petition of appeal premised on the following grounds;

    1. That the trial magistrate erred in law and in facts by failing to consider the discrepancies on age assessment of the victims were an afterthought.

    2. That, I am aggrieved the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.

    3. That the trial court erred in law and facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.

    4. That (I) am aggrieved the trial court erred in law and facts as it failed to hold that the medical report were not reliable.

    5. That the trial magistrate erred in law and in facts by failing to accord a fair trial.

    6. That the trial magistrate erred in law and in facts by shifting the burden of proof from the prosecution backyard to the appellant when the evidence failed to link him to the offence.

    7. That, other grounds will be raised during hearing.

7. The appellant's case is that trial magistrate failed to consider the discrepancies of the age of the victims and that the witness evidence was inconsistent. Further, that the medical report was inconsistent and uncorroborated. He urged that he was not afforded a fair trial and sought to have the appeal allowed.

8. Learned counsel for the respondent opposed the appeal and submitted that the evidence of the witnesses consistent and corroborated by the doctor's evidence. He urged that the ingredients of the offence of defilement were proved and further, that the relationship between the appellant and the complainant was confirmed by the witnesses. On the immunization card, the name of the appellant was stated as that of the father. He stated that the sentence was lenient but conceded it was lawful and urged the court to dismiss the appeal.

Analysis & Determination

9. This being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyse it and come to its own conclusion, further, the court has to bear in mind that unlike the trial court, it did not have the benefit of seeing the demeanour of the witnesses and the Appellant during the trial and can therefore only rely on the evidence that is on record. See *Okeno v R* [1972] EA 32 *Eric Onyango Odeng' v R* [2014]eKLR.

10. When dealing with Appeals there are certain limits of discretion for the session Judge as illustrated in the case of *Mbogo v Sha* [1968] EA 93 at 96. Which observed as follows: "A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifested from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice"

11. For purposes of this appeal it has been shown that the prosecution before the trial court ought to have discharged the burden of proof of beyond reasonable doubt on the critical ingredients of the offence of defilement as he stated in the case of *Charles Wamukoya Karini v Republic* Criminal Appeal No 72 of 2013 where it was stated that: " The critical ingredients forming the offence of defilement are age of the complainant, proof of penetration and positive identification of the assailant."

12. Upon considering the record of appeal and attendant submissions, the following issues arise for determination;

    1 Whether the prosecution proved its case to the required standard.

    In *Woolmington v DPP* [1935] AC and *Miller v Minister of Pensions* [1947] 2 ALL ER 372 that Court held a page 373: " That degree is well settled. It need not reach certainty, but it must carry a high degree of possibility proof beyond reasonable doubt does not mean proof beyond the shadow a doubt. The Law would fail to produce the connectivity if it admitted fanciful possibilities to deflect the cause of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course, it is possible, but not in the lease probable, the case is proved beyond reasonable doubt, but nothing short of that will suffer."

    This is the threshold the Appellant's Appeal will be tested against to determine the merits and demerits of the Memorandum of Appeal.

Whether the prosecution proved its case to the required standard

Section 20(1) of the *Sexual Offences* states;

(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 the female person.

12. The ingredients for the said offence – Incest are;

    1) Proof that the offender is a relative of the victim

    2) Proof of penetration or indecent Act

    3) Identification of the perpetrator

    4) Proof of the age of the victim

Whether the Appellant knew that the victim was his daughter

13. The nature of direct evidence presented before the Law Court from PW1, PW2 and PW3 established that the Appellant and alleged victim shared the blood line of father and daughter relationship. What constitutes relations by affinity to the first degree the trial court agreed with the prosecution and therefore sustained the findings as defined in Section 20 (1) of the *Sexual Offences Act*. Although the legislature did not define the word affinity to the 1st degree it did provide a rule of construction in the said section that the degrees of consanguinity and affinity shall be computed according to the Civil Law. The meaning of affinity is well established. It is the relationship which one spouse has because of the marriage to the blood relatives of the other. By the marriage, one party thereto holds by affinity the same relation to the kindred of the other, that the latter holds by consanguinity. What Section 20(1) of the Act has done is to enable to court apply it without the mechanics of the computation. (See *Simcoke v Grand Lodge of A.O.U.W* 84 lowa 383, 388, 51 N.W 8, 9 [1892]. These relationships are not changed nearly by the fact that the blood relationship in a given case is by half blood. The primary source of insight into the intent of the legislature is the language of the *Sexual Offences Act*. My reading of it is that the language of the statute is plain and the courts must interpret in accordance to the usual and natural meaning of the words used for the elements, of the offence of insets. The Appellant in this case is a natural father to the victim of the offence. The totality of the evidence from PW1, PW2, and PW3 paints a picture of positive visual identification and prior knowledge of the Appellant which placed him directly at the scene of crime. In the case of *Wamunga V Republic* (1989) KLR 4242 at 426 it stated as follows: " Where the only evidence against a dependent is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction". The evidence alleged to implicate the Appellant is that of recognition. Some of the questions of recognition were affirmatively answered by PW1, PW2, PW3 in consonant with the guidelines in the case of *R- vs Turnbull & Others* (1976) 3 ALL ER 549. Which has a detailed discussion on the factors that ought to be considered when the evidence turns on identification by a single witness. The court there said " The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have with the Accused under observation? At what distance? In what light? Was the observation impeded in any way....? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? Recognition may be more reliable than identification of a stranger but even when the witness is purporting to reorganize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

14. In the case of *Bassita v Uganda* S C Criminal Appeal No 35 of 1995 where Supreme Court held: "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

"For evidence to be capable of being corroborated it must:

(a) Be relevant and admissible *Scafriot* [1978] QB 1016.

(b) Be credible *DPP v Kilbourne* [1973] AC 729

(c) Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99

(d) Implicate the accused

Whether there was penetration or indecent act upon the victim

15. Penetration means the partial or complete insertions of the genital organ of a person into a genital organ of another person

16. The medical evidence of the clinical officer who testified as DW5 corroborated the evidence of PW1 and PW3 that there had been an indecent act committed with the complainant. Further, the said witnesses found him with his trousers removed alongside the complainant, lending credence to the allegations of the appellant having committed an indecent act. In the premises, I find that the element of the appellant having committed an act of penetration was proved beyond reasonable doubt.

17. Therefore, it follows that the prosecution proved that the appellant had committed incest with the complainant.

18. In furtherance to the above, the prosecution must prove the age of the victim of the offence. The prosecution placed reliance to prove age of the victim on the immunization card produced as exhibit 1 normally issued to the mother at the time of birth of a child. There was also the testimony of the mother who testified as PW1. That evidence was never controverted by the Appellant. This is consistent with the decision in *Joseph Kieti Seet v Republic* [2014] eKLR. HC. At Machakos Criminal Appeal No 91 of 2021 the learned judge held as follows:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni v Uganda*, Court of Appeal Criminal Appeal No 2 of 2000. It was held thus:
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> In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense ..."

19. Therefore proof of age of the victim of incest is not in doubt.

Whether the sentence was harsh/excessive

20. In *M K v Republic* [2015] eKLR which clearly pronounced itself on this matter as follows:

> " "17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?

18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.

19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of *Opoya v Uganda* [1967] EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in *James v Young* 27 Ch D at p 655 where North J said:

"But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".

We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s 184 which are "shall be sentenced to death".

20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

21. Guided by the decision in *Opoya v Uganda* [1967] EA 752 and the persuasive dicta of North J in *James v Young* 27 Ch D at p 655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

21. The punishment of offenders, and in particular their imprisonment, is legitimately undertaken in pursuit of a variety of social goals including deterrence and rehabilitation.

22. The sentence prescribed for the offence of incest under the proviso of section 20 (1) for the victims under the age of 18 is life imprisonment. But in employing the judicial discretion in order to secure the punishment of the Appellant, the trial court took into account aggravating, mitigation, the abuse of trust, the age of the minor, surrounding circumstances in which the offence was committed. In striking a balance on the cardinal principles of sentencing including proportionality test she precisely gave effect to a custodial sentence of 30 years for the Appellant. On Appeal, the Appellant has not convinced this court that there are existing extenuating circumstances to review that sentence downwards. Therefore, it is my considered view that the sentence was commensurate with the offence committed and decline to disturb the same. I hereby dismiss the appeal and uphold the sentence and conviction of the trial court. it is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY

OF MARCH 2023

.....

R. NYAKUNDI

JUDGE

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