SWK v Republic (Criminal Appeal 025 of 2018)
[2023] KEHC 20061 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20061 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 025 OF 2018

SC CHIRCHIR, J

JUNE 29, 2023

BETWEEN

SWK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. V Ochanda,(SRM) at Murang'a chief Magistrate's court in S.O case No 28 of 2015)

JUDGMENT

1. The Appellant was charged with two counts in the lower court. On the first count he was charged with incest contrary to section 20(1) of the *sexual offences Act* No 3 of 2006 (The Act).
2. The particulars were that on the 8th day of September 2015 at kaweru sub- location within muranga county intentionally caused his penis to penetrate the vagina of LMM who was to his knowledge, his granddaughter, aged 5 years.
3. On the 2nd count he was charged with defilement contrary to section 8(1) & (2) of the Act.
4. The particulars were that on 8th September 2015- at kaweru area within muranga county intentionally and unlawfully caused his penis to penetrate the vagina of LMM a child aged 5 years.
5. In respect of each charge, he faced an alternative charge of having an indecent act with a child contrary to section 11(1) of the Act.
6. He was acquitted on count 1 but found guilty on count 2 and sentenced to life imprisonment. He was aggrieved by the outcome and consequently filed this Appeal.

Petition of Appeal.

7. The Appellant has set out the following grounds of Appeal, which are paraphrased as follows:

> "1. That he pleaded not guilty to the charge
>
> 2. That the trial magistrate erred in both law and facts by failing to give him a chance to defend himself.
>
> 3. That the trial magistrate erred in both law and facts when she failed to allow the complainant to appear before the court to narrate her side of the story
>
> 4. That the trial magistrate erred in both law and facts by convicting him while relying on the evidence given by one witness, who is his neighbour.
>
> 5. That the Honourable court treated his case with urgency since his health was worsening due to his old age.
>
> 6. That the trial court failed to realize that the charges were motivated by his brother's wish to have him die in prison so that they can take his land.."

Appellant's Submission

8. In his submission, the Appellant seem to depart from his grounds and has presented only 3 issues for determination, namely: whether the ingredients of incest was proved to the required standard; secondly whether the sentence was harsh and lawful and finally whether his rights to legal representation were violated , particularly taking into account his advanced age.

9. On whether the offence of incest was committed, the Appellant submits that the relationship between the complainant and the accused was not proved so as to establish the offence of incest within the context of section 20(1) of the Act.

10. On the element of penetration, it is his submission that the clinical officer did not find any evidence of defilement. He further submits that the complainant description of what transpired did not constitute penetration. He has relied on the case of *Langat Dinyo Domokonyang vs Republic* (2017) e KLR in this regard.

11. It is further submitted that the medical report was incompetent to collaborate the evidence of the complainant. The Appellant further contends that a broken hymen is not a proof of penetration.

12. He further argues that he was convicted on circumstantial evidence but the said evidence did not pass the test, so as to form a basis of conviction.

13. He tells the court that he does not contest the issue of identity, and the age of the child.

14. On the issue of sentencing, it is the Appellant's submission that the trial magistrate erred in sentencing him to life imprisonment yet the sentence provided for the offence is not mandatory.

15. It is his final submission that following the High court decisions in the cases of *Philiph Maing & 5 others vs Republic* – Machakos High court constitutional petition No. E017 of 2021 and *Edwin Wachira & others vs Republic*- Mombasa High Court petition No. 97 of 2021, this court has the discretion to give him a lesser sentence than that prescribed by the Act.

The Respondent's Submissions

16. On penetration, it is the Respondent's submission that the description given by the complainant on what transpired constituted defilement.

17. On whether the relationship between the Appellant and the complainant was proved, the prosecution's submission is silent.

18. The prosecution has not also responded to the issue raised regarding the question of whether the sentence for the offence of incest is mandatory or not.

Summary of the Evidence

19. PW1, was the complainant. Following a voire dire examination, she gave an unsworn testimony. she testified that on 8/9/15, while she was going home, alone, from school, she met her grandfather sitting next to the forest. The time was about 4pm. She testified that the grandfather took her hand and led her into the forest; He removed her dress and her panty. He removed his trouser and that he put his thing of "kususu" inside her. She said she felt bad but there was no pain. She resisted but he continued. She said that the Appellant was her grandfather.

20. PW2, was the mother to the complainant. She testified that on 9/9/2015 as she was preparing the complainant to go to school, she complained of pain in her private parts, but she refused to say what the problem was. Later a neighbour (PW3) told her that she had found the complainant the previous day on the road. That day she questioned the child and the child narrated to her what had happened the previous day. She took the child to the police station and then to the hospital. She identified the accused on the dock and stated that he is a grandfather.

21. PW3 was a clinician from muranga District hospital. He seemed not to have been having the correct documentation, and he was stood down.

22. PW4, was the complainant's father. He narrated to the court what the complainant reported to him about the defilement. He identified the Appellant as Sk. Questioned by the court on the nature of the relationship between him and the Appellant, he stated that the Appellant was his paternal uncle.

23. PW5, told the court that on 9/9/15, she met the complainant walking alone while coming from school, around 3.30 pm. She was standing on the road. She stated that she went about her other business but came back shortly to the place where she had left the complainant, but she did not see the child. She called out her name but there was no response. The following day she went to inquire from PW2 about the time the child arrived home and the two decided to instead wait for the child to arrive and explain where she had been. On arrival the complainant offered to take them to where she had been. The complainant led her and PW2 to a maize plantation and narrated to them what had happened to her there.

24. PW6 was the clinical officer. This is the same witness who had taken the stand as PW3 but was stood down. He was again stood down and came back as PW7. He told the court that the complainant was brought to the hospital on 10/9/15, and her mother reported that she had been defiled on 9/9/15 at around 4pm. He testified that on examination, he found the hymen was torn, there was no active bleeding. The sample taken had blood stains; there was whitish discharge on the vaginal opening, no spermatozoa was seen. He made a conclusion that the complainant had been having sexual intercourse. As regards the particular day, there was proof of penetration. He filled and signed the P3 on 21/9/15, which he produced as an exhibit.

25. PW8, was the investigating officer. She arrested the Appellant upon carrying out investigation.

26. On being put in his defence, the Appellant opted to give unsworn statement and did not call any witness. In his rather very brief defence, he denied defiling his daughter. He stated that he was not taken to the doctor to confirm that he was the perpetrator.

Determination

27. The duty of this court as the first appellate court is to review and re-evaluate the evidence on record and come to its own conclusions while not ignoring the conclusions made by the lower court. This was the finding in the case of *Okeno v. Republic* 1972 EA 32) where the Court of Appeal for Eastern Africa stated that:

> " An appellant on a first appeal is entitled to expect the evidence as whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424.".

28. The following issues arise for determination:

    a). Whether the charge of defilement was proved

    b). Whether the sentence passed was excessive.

29. First let me address myself to the charge of incest which was the first count. The record shows that the Appellant was acquitted of the charge of incest. Thus, making it a ground of Appeal and extensively submitting on it is misconceived. Thus, since incest is not an issue in this Appeal, I will not address myself to it.

Whether the charge of defilement was proved

30. For the charge of defilement to be sustained, the prosecution must prove the age of the victim, the identity of the perpetrator and the act of penetration. The age of the victim and the identity of the Appellant was readily admitted by the Appellant in his submissions and therefore it is not an issue for determination.

31. The appellant disputed the element of penetration. Penetration is defined in section 2 of the Act as:"' the partial or complete insertion of the genital organ of a person in the genital organ of another person".

32. It is the Appellant's submission that the statement of the complainant where she stated," he removed his trouser and kept his thing for kasusu inside me" did not necessarily mean defilement. He also argued that the term " tabia mbaya" does not connote sexual intercourse. In this regard he has relied on the high court decision in the case of *Langat Dinyo Domokonyang vs Republic* – Kapenguria High court CRA No. 6/2017 (2017) e KLR where the court held: : "Bad manners" is an English phrase which refers to discourteous manner that ignores acceptable social usage. Rudeness, disrespect, insolence, impertinence, bluntness, impudence, coarseness, discourtesy, abruptness, boorishness,

incivility, brusqueness, churlishness, curtness, indelicacy, and impoliteness can all fit in definition of bad manners. "bad manners" is a phrase of which is not carried anywhere in the *Sexual Offences Act*. Whenever used by a child or anyone else in evidence, it is the duty of the prosecution to ensure that the user makes it explicit to the court as to its meaning and fits it to the ingredients of the offence as disclosed in the Act. It should not be left to the court to assume or guess as to the meaning of the phrase. Offences in *Sexual Offences Act* are very technical in nature and whichever one is looked at can fit in the phrase "bad manners"

33. Further, the Appellant submits, according to PW7, the clinical officer, everything was normal and that there were no spermatozoa found in the child's vagina.

34. In Bassita Hussein v Uganda, Supreme Court criminal appeal No 35 of 1995, the court stated: "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victim's own evidence and corroborated by medical evidence or other evidence."

35. Section 124 of the *Evidence Act* Provides that "where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth"

36. It is necessary to cite in verbatim the relevant portions of the complainant's testimony in this regard. She stated: "on 8/9/2015 I was going home from school at 4 pm. I was alone. I met my grandfather sitting next to the forest. He took me to the forest. He held my hand. He removed my clothes.... He removed my panty. He removed his trouser and kept his thing for " kasusu" inside me... I felt bad. I got bored...he stayed for 9 minutes... I wore my clothes".

37. What was the child saying? The role of the court is to look at the words used by the child and try to decipher the meaning especially where the child is of such tender age as in this case. It is my understanding that when the child said " he kept his thing for kasusu inside me "it was the child's plain language of saying that the Appellant inserted his penis inside her. I have taken note of the views expressed by the high court in Lagat Donyo case (supra), which I respectfully disagree with. Demanding for explicit description of penetrative sex may be demanding of what is obviously beyond a 6- year old's capability. The child may not know that the "thing for "kasusu" is called a penis but at least she knows that the particular organ is for passing urine. That was the best description she could manage.

38. Further in the case of *Muganga Chilejo Salha v Republic* [2017] eKLR the Court of Appeal while acknowledging the use of euphemisms by children when describing acts of sexual intercourse stated: -

> " Naturally children who are victims of sexual abuse are likely to be devastated by the experience and given their innocence, they may feel shy, embarrassed and ashamed to relate that experience before people and more so in a courtroom. If the trend in the decided cases is anything to go by, courts in this country have generated/accepted the use of euphemisms like, "alinifanyia tabia mbaya", (IE v Republic, Kapenguria High Court Criminal Case No. 11 of 2016) "he pricked me with a thorn from the front part of this (sic) body." (Samuel Mwangi Kinyati v Republic, Nanyuki HC Criminal Appeal No. 48 of 2015), "he used his thing for peeing", (David Otieno Alex v Republic, Homa Bay HC Criminal Appeal No. 44 of 2015), "he inserted his "dudu" into my "mapaja" (Joses Kaburu v Republic, Meru HC Criminal Case No. 196 of 2016), "he used his munyunyu" (Thomas Alugha Ndegwa, Nairobi HC Criminal Appeal No. 116 of 2011) as apt description of acts defilement. We,

> however, need to remind trial courts that the use of certain words and phrases like "he defiled me" which are sometimes attributed to child victims, are inappropriate, technical and unlikely to be used by them in their testimony. See AM v Republic Voi HC Criminal Appeal No. 35 of 2014, EMM v Republic Mombasa HC Criminal Case No. 110 of 2015, among others. Trial courts should record as nearly as possible what the child says happened to him or her."

39. The description by the complainant "he kept his thing for kasusu inside me" is in the same genre as the above descriptions referred to in Muganga's case(supra) Am bound by the above decision of the court of Appeal in any event.

40. The evidence of the complainant was corroborated by the evidence of the clinical officer. He told the court that the sample collected from the complainant was blood- stained; there had been penetration and she had some discharge. The child was far from reaching puberty to give room for any possibility of menstruation so as to explain the blood stain in her private parts. The Appellant argues that penetration would have caused more damage than the one being described and there is no way the child would not have felt pain or cry.

41. However, penetration need not be complete to constitute defilement. partial insertion of one's genitals into the genitals of another suffices (see section 2 of the Act)

42. In view of the foregoing, am satisfied that penetration was proved. Further considering that the other two ingredients of defilement were readily admitted to, it is my finding that the charge of defilement was proved beyond reasonable doubt.

Whether the sentence was excessive in the circumstances

43. The Appellant has argued that the offence of incest does not attract a mandatory minimum sentence and that the trial court misconstrued the provisions of section 20 of the Act. However as pointed out earlier, the Appellant was convicted of the charge of defilement under section 8(1) and 8(2) of the Act and not incest. The sentence for defilement under section 8(2) is a mandatory minimum sentence of life imprisonment. The sentence is founded in law, and being mandatory, neither the trial court nor this court can mete out any lesser sentence.

44. The Appellant has relied on the supreme court decision on *Francis Karioko Muruatetu & Another -vs- Republic* (2015) e KLR to argue for a reduction of his sentence. However, the supreme court did clarify that their finding had no bearing on the mandatory sentences set out in, interalia, the *sexual offences Act*.

45. In conclusion, the trial court's finding in both the conviction and sentence is upheld and the Appeal herein is dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 29TH DAY OF JUNE, 2023.

S. CHIRCHIR

In the presence of:

The Appellant.