PMK v Republic (Criminal Appeal E019 of 2021)
[2023] KEHC 20844 (KLR) (26 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20844 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL E019 OF 2021

CW GITHUA, J

JULY 26, 2023

BETWEEN

PMK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original conviction by Hon. I. Gichobi (PM) dated 27th August 2021 and sentence by Hon. P.M Kiama (SPM) dated 2nd September, 2021 in Kangema Sexual Offence Case no. 35 of 2020)

JUDGMENT

1. In the amended charge sheet dated 2nd June 2021, the appellant, PMK, was charged in the main count with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* no. 3 of 2006 (hereinafter the SOA). The particulars were that on diverse dates in the month of May 2020 at Mathioya sub-county within Murang'a county, he intentionally and unlawfully penetrated the vagina of J. N.W with his penis, who was to his knowledge, his daughter aged 12 years.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child, contrary to Section 11 (1) of the SOA in that at the same time and place, he intentionally and unlawfully touched with his penis the vagina of J.N.W, a child aged 12 years.

3. After a full trial, the appellant was convicted in the main count with the offence of incest and was sentenced to life imprisonment. He was aggrieved by his conviction and sentence hence this appeal.

4. In the grounds encapsulated in his petition of appeal filed on 16th September 2021, the appellant in a nutshell complained that the learned trial magistrate erred by convicting and sentencing him on the basis of inconsistent and contradictory evidence which was insufficient to prove the charges against him beyond any reasonable doubt; that as the prosecution failed to discharge its burden of proof, his conviction was unsafe and it ought to be quashed and his sentence set aside.

5. The appellant, who was acting in person, chose to prosecute his appeal by way of written submissions. He presented his written submissions dated 6th January 2023 which I must say were quite comprehensive and the respondent filed its submissions in response on 18th January 2023 through learned prosecution counsel Ms. Penny Gakumu.

6. In his written submissions, the appellant admitted the age of the victim as stated in the particulars supporting the charge and the fact that he was her stepfather having been married to her mother for over seven years before they separated. He however denied having sexually assaulted the complainant as alleged and claimed that the charge was a fabrication by the victim's mother given their sour relationship.

7. In addition, the appellant submitted that the learned trial magistrate erred in law in finding that penetration had been proved to the required legal standard when the only evidence availed by the prosecution to the court was that upon medical examination by PW5, PW1's hymen was found to be broken; that evidence of a lost or broken hymen was not by itself proof of penetration as it can be broken or lost through other means including engagement in physical activities and some people are even born without it.

8. It was the appellant's further contention that the trial court erred by basing his conviction on circumstantial evidence which did not prove his guilt as charged beyond reasonable doubt; that had the learned trial magistrate properly evaluated his defence, he may have reached a different conclusion.

9. The appeal was contested by the respondent. Learned Prosecution Counsel, Ms. Gakumu, in her submissions supported the appellant's conviction and sentence. She contended that the prosecution had adduced cogent, strong and credible evidence which proved all the ingredients of the offence of incest beyond any reasonable doubt; that the discrepancies or contradictions in the prosecution case, if any, were not material and were therefore not fatal to the prosecution's case. She urged me to find that the appellant was properly convicted and sentenced and dismiss the appeal for lack of merit.

10. The prosecution case as presented to the lower court was that the appellant and the victim's mother (PW3) were married and lived as a couple for about 7 ½ years before they separated and went their different ways. At the time the offence was allegedly committed, PW3 was living with her three children including the victim in her parent's home while the appellant was living alone in a different village. After a brief voire dire examination, the victim who testified as PW1 narrated how on 9th May 2020 her father, the appellant, picked her and her two siblings from their mother's home at [Particulars Withheld] village and took them to his house. On arrival, he instructed her younger sister (PW2) and brother to go to the farm to pick sugarcane and she was left behind preparing a meal.

11. PW1 recalled that she peeled some bananas and was preparing to cook them when she asked the appellant to show her where to get a matchbox. He directed her to a jacket under his bed and as she was looking for the matchbox, the appellant cupped her mouth, threatened to cut her and her mother to pieces with a sharpened panga after which he undressed her by removing her trousers and underwear. He also removed his trousers and penetrated her vagina with his penis. After her sister and brother came back, they were given a ride back to their mother's home by a motor bike rider who had been sent to pick them by their mother.

12. On the following day, together with her siblings, she went back to the appellants house. The appellant sent PW2 and their brother to the river and then gave her a drug which she ingested after which they went back home. On the next day, she visited the appellant's house with some friends and as the appellant was unhappy with her taking friends to his house, they left.

13. It was PW1's further testimony that sometimes in July 2020, she confided to her auntie one N that her father had defiled her which allegation she repeated in the presence of her mother. She explained that she could not have told PW3 about her ordeal earlier as she feared that the appellant would actualize his threat of cutting her up and PW3 to pieces.

14. On her part, PW2 supported PW1's testimony regarding the days that together with their brother they had visited the appellant's house. She recalled that on each visit, the appellant would send her and their brother on errands and upon their return, they would find PW1 crying holding her cheek. And although PW1 did not tell them why she was crying, on returning home after the first visit, she noted that she was going to the toilet often. She however contradicted herself on this claim when she stated during cross-examination that after the appellant picked them from their maternal grandparents home, they did not go back home and remained in his house for a week after which their mother went for them.

15. According to PW3, she only got to learn that PW1 had been sexually assaulted by the appellant when she was informed about it on 29th September 2020 by her sister, one N N to who PW1 had reported the matter in July 2020. She testified that upon questioning PW1, she informed her that the appellan had not only defiled her on 9th, 14th and 21st May 2020 but he had done so many times previously, more than ten times on days she could not even remember. The matter was reported to PW4, P.C. Salome Akinyi at Nyakianga police station.

    On 13th October, 2020, PW4 issued PW1 with a P3 form which was completed by PW5 Donah Maithima after examining PW1 at Nyakianga Health Centre on 12th October, 2020.

16. In his evidence, PW5 recalled that upon examining PW1, he did not find bruises or lacerations on her external genitalia. He however noted that her hymen was "broken but old". He produced the P3 form in evidence as P Exhibit 2 and treatment notes as P Exhibit 3.

17. When placed on his defence, the appellant elected to give an unsworn statement and called two witnesses, a village elder (DW2) and his area Assistant Chief (DW3). In his unsworn statement, the appellant claimed that he received a text message from his brother's wife W informing him that J.N (PW1) had been defiled. As he could not get more information from PW3, he was accompanied by W to see DW2 who after hearing their story referred them to the Ass-chief (DW3).

18. In his evidence, DW2 recalled that when the appellant went to see him, he asked him to warn PW3 against damaging his reputation and visiting him at his place of work as the visits might cost him his job.

19. DW3 recalled having had a meeting with PW3, the appellant and their parents which was also attended by DW2; that during the meeting, it transpired that PW3 and the appellant were not in good terms as there were allegations that the appellant was going to PW3's home to hurl insults at her. It also emerged that the two were not taking proper care of their children as there were reports that boda boda riders were making advances on their daughter J. N, the victim in this case.

20. This being a first appeal to the High Court, it is an appeal on both facts and the law. I am conscious of my duty as the 1st appellate court which is to re-evaluate and consider afresh the evidence adduced before the trial court to arrive at my own independent conclusions on whether or not the appellant was properly convicted and sentenced. In doing so, I should be careful to remember that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses: See: Okeno V Republic (1972) EA 32; David Njuguna Wairimu V Republic (2010) eKLR; Jamin Wafula Wabululu V Republic (2004) eKLR.

21. I have carefully considered the grounds of appeal, the evidence on record as well as the written submissions filed by both parties and the authorities cited. I have also read and evaluated the judgement of the trial Court. Having done so, I find that only two key issues emerge for my determination in this appeal which are;-

    i) Whether the offence of incest was proved against the appellant beyond any reasonable doubt.

    ii) Whether the sentence meted out against the appellant was unlawful or manifestly harsh and excessive.

22. Starting with the first issue, the offence of incest by a male person is created by Section 20 (1) of the *Sexual Offences Act* which makes it clear that to establish the offence, the prosecution must prove that the accused person committed either an indecent act or an act which caused penetration to a female person who was to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother. The age of the victim must also be proved because punishment for the offence differs depending on whether the victim was an adult or a minor.

23. Section 22 of the SOA proceeds to lay down the test for determining the prohibited relationships specified in Section 20 (1) and provides that a brother and sister includes a half-brother, half-sister, adoptive brother and adoptive sister while a father includes a half father and an uncle of the first degree.

24. In this case, as stated earlier, the age of the victim and her relationship with the appellant was not contested. The appellant admitted that the victim was 12 years old at the time the offence was allegedly committed and that he was her step-father. He was therefore within the degree of consaquinity set out in Section 20(1) as read with Section 22 of the SOA in relation to the complainant. What was strongly disputed was the prosecution's claim that the appellant sexually assaulted the victim on diverse dates in the month of May 2020 as alleged in the particulars supporting the charge.

25. A reading of the trial courts judgement reveals that when convicting the appellant, the learned trial magistrate addressed his mind to the ingredients of the offence of incest and made a finding that the prosecution had proved the charge against the appellant to the required standard because PW1's claim that the appellant, who was her stepfather had sexually assaulted her was collaborated by the medical evidence adduced by PW5's to the effect that, when he examined the victim, he found her hymen missing.

26. It is noteworthy that the appellant was facing a sexual offence involving a minor and it was not therefore necessary for the trial court to look for and find corroboration of the victim's evidence in order to convict the appellant. Under the proviso to Section 124 of the *Evidence Act*, the learned trial magistrate was entitled to convict the appellant on the sole evidence of the minor victim if for reasons to be recorded, he believed that she was a truthful witness. Unfortunately, in this case, the learned trial magistrate did not apparently have in mind the provisions of Section 124 of the *Evidence Act* and did not make any finding on the victim's credibility.

27. Although there was nothing wrong with the learned trial magistrate looking for evidence to corroborate PW1's testimony, after my own independent analysis of the evidence on record, am unable to agree with his finding that PW5's evidence materially corroborated PW1's testimony. I say so because it is trite that evidence of a missing or broken hymen is not by itself proof that the victim had been involved in sexual intercourse. This position was well articulated by the Court of Appeal in PKW V Republic [2012] eKLR which was also cited by the appellant in which the court expressed itself thus;

> " In their analysis of the evidence on record, the two courts below do not seem to have directed their minds to these details. They appear to have placed a high premium on the finding that

the child's hymen had been broken. Was this justified? Is hymen only raptured by sexual intercourse?

Hymen also known as vaginal membrane, is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most case of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is, however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen. Those who are, there are times when hymen is broken by factors other than sexual intercourse. These include insertion into the vagina of any object capable of tearing it like the use of tampons, masturbation, injury and medical examinations can also rapture the hymen. When a girl engages in vigorous physical activity like horseback riding, bicycle riding and gymnastics, there can also be natural tearing of the hymen. .....”

28. In addition, it is pertinent to note that PW5 examined PW1 on 12th October 2020 about five months after the alleged defilement. The long delay in having PW1 medically examined made it difficult if not impossible to tell whether she lost her hymen as a result of her alleged sexual assault by the appellant or subsequently through other means. It is therefore my finding that PW5's evidence did not have much probative value and the learned trial magistrate should not have placed much reliance on it.

29. That said, the question that this court must now address is whether without the evidence of PW5, the rest of the evidence was sufficient to prove the guilt of the appellant as charged in the main count to the required legal standard of proof beyond any reasonable doubt. After my own independent evaluation of the other evidence on record, I agree with the appellant's submissions that the evidence adduced by the other prosecution witnesses was riddled with material contradictions and yawning gaps which remained unexplained throughout the prosecution case.

30. For instance, PW1 and PW2 who claim to have visited the appellant's house together gave different accounts regarding the duration of their visits. Whereas PW1 testified that they returned home after every visit, PW2 in her evidence in chief supported this claim but contradicted herself and PW1 by asserting during her cross examination that after the first visit, they remained in the appellants house for a whole week until their mother went to pick them up. These two different accounts given by people who made the alleged visits together are hard to reconcile.

31. Secondly, and most importantly, although PW1 testified that the appellant defiled her only on 9th May 2020, PW3 claimed that when she eventually opened up about her ordeal, PW1 told her that the appellant had defiled her more than ten times on many different days which she could not remember but they included the 9th , 14th and 21st May, 2020.

32. From the above evidence, the question that arises is this: If in fact PW1 was defiled as alleged by PW3 which is what is alleged in the particulars supporting the charge, why did she tell the lower court that she was defiled only on 9th May 2020? The only conclusion I can draw from this evidence is that either one or both of them lied in their evidence and in my view, the contradictions in their evidence casted a serious doubt on their credibility.

33. In addition to the foregoing, it is not clear why PW3 claimed that she learnt of the alleged defilement in September 2020 about two months after PW1 had allegedly reported the matter to her Auntie N, PW3's sister in July 2020. The said Auntie N was not called as a witness to tell the court the exact information she received from PW1, if any, and why it took her two months to notify PW3 about the terrible ordeal her daughter had suffered in the hands of the appellant.

34. Although under Section 143 of the *Evidence Act* the prosecution was not bound to call any number of witnesses to prove its case, it is my considered view that failure to call the said Auntie N to fill in the gaps created by PW1 and PW3's evidence further weakened the prosecution's case.

35. Given my foregoing analysis, I find that the learned trial magistrate failed to thoroughly interrogate the evidence in its entirety and thereby failed to appreciate that there were major contradictions in the evidence adduced by crucial prosecution witnesses which made the prosecution case unreliable and insufficient to prove the guilt of the appellant as charged in the main count beyond reasonable doubt. In my view, the evidence tendered by the prosecution had more questions than answers and raised doubt whether the appellant had indeed committed the offence as alleged.

36. After comparing the prosecution case against the appellant's defence, I am persuaded to find that the appellant's claim that the charge was a fabrication by PW3 cannot be said to be farfetched.

37. For the above reasons, I am satisfied that the appellant's conviction was unsafe and cannot be sustained. I therefore find merit in this appeal and it is accordingly allowed. The appellant's conviction is hereby quashed and sentence set aside.

    I direct that the appellant shall be released from prison forthwith unless otherwise lawfully held.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 26TH DAY OF JULY 2023.

C. W. GITHUA

JUDGE

In the Presence of:

The appellant

Ms. Muriu for the respondent

Mr. Quinteen: Court Assistant