PK v Republic (Criminal Appeal 27 of 2019)
[2023] KEHC 26071 (KLR) (30 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26071 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 27 OF 2019

RB NGETICH, J

NOVEMBER 30, 2023

BETWEEN

PK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement by Hon. N.M Idagwa (SRM) delivered on the 4th day of April, 2019 in Kabarnet Magistrates Court S/O No. 13 of 2017)

JUDGMENT

Background

1. The appellant was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that the accused on the 27th day of April, 2017 at around 1300hours in Baringo Central Sub-County within Baringo County being a male person did intentionally and unlawfully caused his penis to penetrate the vagina of GJK a girl aged 13 years who to his knowledge is his daughter.

2. In the alternative the Appellant was charged the offence committing indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on the 27th day of April,2017, at around 1300hrs at [particulars withheld] village Salawa Division in Baringo Central Sub- County within Baringo Couty being a male person did intentionally and unlawfully commit an indecent Act which caused his penis to come to contact with the vagina of GJK a girl aged 13 years.

3. The Appellant pleaded not guilty to the charges in the main and alternative charge and the case was set down for hearing. At the close of the prosecution's case, the court ruled that the prosecution had established a prima facie case against the Appellant and he was put on his defence. The trial court found the Appellant guilty as charged, convicted and sentenced him to serve life imprisonment.

4. Being aggrieved by the decision of the trial court, the appellant has lodged the instant appeal citing 11 grounds of appeal as follows: -

   i. That the learned Trail magistrate erred in both law and fact by failing to thoroughly analyze the evidence on record thereby arriving at a manifestly unjust conclusion that the prosecution had proved their case beyond reasonable doubt.

   ii. That the Learned Trial Magistrate erred in law and fact by failing to find that the prosecution did not prove their case beyond reasonable doubt to warrant conviction of the Appellant.

   iii. That the Learned trial magistrate erred in both law and fact by disregarding the Appellants defence thereby arriving at a manifestly unjust conclusion that he was guilty.

   iv. That the learned trial magistrate erred in both law and fact by importing extraneous evidence which was not part of the evidence presented before court thereby arriving at a manifestly wrong conclusion that the Appellant was guilty as charged.

   v. That the learned trial magistrate erred in both law and fact in finding that there was penetration when there was evidence to the contrary that penetration was never proved beyond reasonable doubt.

   vi. That the learned trial magistrate erred in both law and fact in finding that the evidence of the complainant had been sufficiently corroborated by the evidence of Pw 3 and Pw 4 when there was evidence to the contrary that Pw 4 did not witness the act and Pw 3 evidence was not proof of defilement as the complainant had been defiled previously vide Kabarnet Criminal Case No. 566 of 2009.

   vii. That the learned trial magistrate erred in both law and fact by finding that the age of the complainant had been proved beyond reasonable doubt when there was evidence to the contrary that the exact age of the complainant was never proved.

   viii. That the learned trial magistrate erred in both law and fact by relying on the evidence of PW4 in arriving at the conclusion that the complainant had been defiled when there was evidence to the contrary that Pw 4 had been informed by a minor child called Judy that the complainant had been defiled.

   ix. That the learned trial magistrate erred in both law and fact by failing to find that the prosecution's failure to summon Judy the eye witness to the alleged act created doubt on the prosecution's case which doubt ought to have been credited to the Appellant.

   x. That the learned trial magistrate erred in both law and fact by descending into the scene of litigation by summoning PW4 during active trial and ordering her to record a statement in Police custody thereby disregarding the cardinal principle of a fair trial.

   xi. That the learned trial magistrate erred in both law and fact by failing to exercise impartiality during trial by presuming that the appellant committed the offence.

5. The Appellant prays that this appeal be allowed, conviction and sentence set aside. The Appeal proceeded by way of written submissions.

Appellant's Submission

6. The Appellant submit that prosecution evidence is contradictory as change indicate she was 13 years old whereas the P3 form and treatment notes places her age at 12 years, while her mother stated that

she was 14 years old. That the first age assessment report stated that she was below 18 years and above 14 years hence it was not specific. That the prosecution sought to undertake a second age assessment which the appellant contested.

7. The Appellant submit that the court allowed the second age assessment on the purported x-ray film against the appellant's objection that the respondent was trying to fix the age of the complainant as aforesaid. That the 2nd purported assessment estimated the age of the complainant as above 14 years and below 18 years and argue that the x-ray film used in the said assessment cannot be ascertained whether it belonged to the complainant or not hence the 2nd age assessment report is untenable.

8. Further that the complainant's mother stated that she was born on 12th September 2001 and had a clinic card at her father's house. However, the prosecution did not bother to request her to avail it and going by the evidence of the mother the complainant was therefore 16 and/or 17 years at the time of the alleged commission of the offence.

9. That PW1, PW2 and PW3 presented contradictory ages of the complainant; that age is one of the ingredients that must be proved beyond reasonable doubt since it is a determining factor at the sentencing stage and the prosecution did not prove the age of the complainant beyond reasonable doubt and cited the case of Malindi criminal appeal no. 504 of 2010, Kaingu Elias Kasomo vs. Republic, where the Court of Appeal stated that the age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component; that it forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement and prove is essential as the sentence to be imposed will be dependent on the age of the victim.

10. Further, importance of proving the age of the complainant in sexual offences was emphasized in Alfayo Gombe Okello v Republic [2010] eKLR where the Court stated as follows: -

> "In its wisdom, Parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8(1)...proof of age of a victim is a crucial factor in cases of defilement under *Sexual Offences Act*. It must be proved failing which the offence will not have been proved beyond reasonable doubt in material particulars."

11. The Appellant argue that the trial court erred in its judgement when it stated that the age of the complainant had been established at 14 years in the face of a myriad of ages presented before it.

12. On penetration, the Appellant argue that PW3 stated that he relied on the treatment notes written by his colleague in filling the P3 form as he could not have examined the complainant after four days since it could not yield any result. He formed opinion that the complainant was defiled and/or penetrated because of the swollen Labia Majora, whitish discharge, missing hymen and painful inner thighs.

13. He avers that the labs result as regards the defilement and/or penetration are negative yet he makes the grave conclusion that the complainant was defiled. That the laboratory result at page 93 of the record of appeal indicate that there is no spermatozoa and/or pus cells seen which is conclusive prove that the complainant was not penetrated and/or defiled; and submit that had the appellant defiled the complainant as alleged, pus cells and spermatozoa could have been seen as the complainant was alleged to have been defiled at 1 pm on 27th April 2017 and examined the same day at 5pm two hours after the event; that the absence of hymen cannot be attributed to the appellant as the complainant had been defiled in 2009 by the chief's brother now serving a life sentence vide Kabarnet criminal case no. 566 of

2009 Republic v Joseph Chesaro hence the absence of the hymen cannot form the basis of concluding that there was penetration .

14. That Further, the swollen labia majora and painful thighs cannot be equated with penetration. That the complainant in her evidence stated that the appellant inserted his thing on her crotch which cannot be equated to vaginal penetration hence the learned trial Magistrate erred in assuming that the complainant meant her private part and penetration was not therefore proved beyond reasonable doubt.

15. They submit that the third issue is that the Investigation Officer's evidence has left many questions than answers which in their view she did not conduct any investigation but simply relied on hearsay evidence from the other witnesses. That it is clear from the evidence of pw4 that she did not witness the alleged defilement but was told by one Judy that the appellant was defiling the complainant and she went to the site and allegedly found them parting ways.

16. It is their submission that Judy ought to have been called to shed light on whether she saw the appellant defiling the complainant and/or corroborate the evidence of PW4 even though they are of no probative value. That her evidence could have corroborated the evidence of PW1. The Appellant submit that it is a cardinal principle that the prosecution must summon all witnesses even if their evidence may be adverse to their case and failure to do so would imply that the evidence of such a witness would be adverse to their case and Judy was a crucial witness who ought to have been called to shed light on what transpired on the said date bearing in mind that PW4 was declared a hostile witness.

17. That the fourth issue is PW4's evidence who was uncooperative at first such that she had to be remanded. She stated that she was at home when a child by the named Judy told her that the accused was doing bad things to the complainant. She said that she found the accused and the complainant having finished and were parting ways. That in another statement she stated that she saw the accused having sex with the complainant. That PW1 testified that PW4 told her that she saw what happened. PW4 stated that she had been threatened a number of times but she could not remember the exact dates.

18. The Appellant submit that PW4's evidence is full of contradictions and the trial court failed to make a finding that the witness having been declared a hostile witness her evidence was of no probative value and no conviction could be founded on her evidence.

19. On ground that the trial court erred in allowing a none compellable witness in PW2 to testify against the appellant who was her husband, the Appellant submit that the trial court made a grave error in its judgment in using the evidence of PW2 to establish the relationship between the appellant and the complainant yet she was a none compellable witness in the first instance hence she ought not to have testified and/or her evidence used against the appellant.

20. The Appellant further submit that there were no independent witnesses save for PW1 as the rest of the witnesses testified based on hearsay; that the alleged eye witness was not called to testify nor was her statement recorded. That the Court seems to have relied majorly on PW4's evidence yet her testimony was full of contradictions and she was a hostile witness.

21. Further that the trial Court failed to consider the appellant's statement which was not controverted by the respondent and/or by submissions. That it is apparent from the pleadings that the appellant did not receive a fair trial as the court was fixated on convicting him even in the face of glaring contradictions and non-corroboration of PW1's evidence. That it is the duty of the prosecution to prove its case beyond reasonable doubt and it is not the duty of an accused person to assist the prosecution in proving their case and submit that the prosecution's case was not proved beyond reasonable doubt.

22. As to whether the sentence imposed by trial court was harsh and unconstitutional, the Appellant submit that he was sentenced to life imprisonment which is harsh and unconstitutional and cited the case of Pidmas Wafula Kilwake v R [20181 e KLR where the court of appeal said this about minimum sentence:-

> "In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme court in Francis Muruatetu & Another v Republic. SC Pet No.16 of 2015/ which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act* which do exactly the same thing. Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing should be able to impose any of the sentence prescribed, if the circumstances of the case demand. On the other hand, the court cannot be constrained by section 8 to impose any of the sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing. It therefore follows that the Muruatetu decision applies mutatis mutandis to the provisions of Section 8(2) of the *Sexual Offences Act* which imposes the mandatory life imprisonment for the offence of defilement".

23. The Appellant submit that each case should be determined based on its unique facts and circumstances and prosecution having failed to prove its case beyond reasonable doubt urge this Court to quash the conviction of the Appellant, set aside the sentence and set the Appellant free.

Respondents Submissions

24. On whether the evidence was properly analyzed and whether the offence was proved beyond reasonable doubt, the respondent argue that the evidence was properly analyzed as a whole compared and weighed against defence evidence; that the Appellant's defence amounted to mere denial; that all these essential elements of the offence were proved beyond reasonable doubt.

25. The Respondent submit that the Appellant's defence was duly considered contrary to his allegation and on argument that the trial court took into consideration extraneous facts, the respondent submit that no extraneous matters were introduced into the case by the trial court.

26. On proof of penetration, the Respondent argue that penetration was proved in view of the medical evidence on record as penetration may be partial or complete and the doctor's evidence was further corroborated by evidence of the complainant and other prosecution witnesses in regard to the issue of penetration; and the evidence was not challenged or rebutted hence penetration was proved beyond reasonable doubt.

27. On corroboration, the Respondent argue that whereas there may be a minor contradiction in evidence adduced by the prosecution witnesses, the court will more often than not ignore a minor contradiction which does not go to the root or core of the case and submit that contradictions if any were minor and incapable of watering down otherwise overwhelming evidence by the prosecution.

28. On whether age of the Complainant was conclusively proved, the Respondent submits that it is clearly stipulated by both the Criminal Procedure and *evidence Act* that the means by which the age of the Complainant can be determined by the Court are as follows:-

    i. By a certificate of birth

    ii. Evidence of the Complainant

    iii. Evidence of the parent or guardian of the Complainant

    iv. By observation and estimation of the court.

29. That the court definitely applied one of above stated criteria to determine the age of the Complainant and a certificate of birth is not the only document by which age can be proved.

30. The Respondent submits that in cases under the *Sexual Offences Act* the *evidence Act* provide that evidence of a single witness can be relied on by the court to convict provided the court gives itself requisite warning and is satisfied that such evidence is credible enough to secure a conviction.

31. On argument that the prosecution was duly bound to call particular number of witnesses, the Respondent submits that in ordinary circumstances, the prosecution is duty bound to call particular number of witnesses to prove its case against the accused firstly if circumstances and facts of the case should of necessity have demanded a specific number of witnesses or that the accused specifically requested for their summoning and attendance for some special purpose and lastly it must be shown and demonstrated that without their evidence the court would have arrived at a different conclusion different from the current one.

32. That the Criminal Procedure Act provide that the court can at any time but before the prosecution case is closed either on application or on its own motion summon any person whom in its view it considers the evidence of such witness would be necessary for a just and fair decision and the learned trail Magistrate was right in summoning a witness as the same, shielded and protected by the relevant provisions of the Criminal Procedure Act.

33. The Respondent submits that the case against the Appellant was proved beyond reasonable doubt as prosecution evidence was well corroborated, consistent, un contradictory in any material sense and was credible; that the evidence was not challenged and urged the court to make a finding that the appeal lacks merit and dismiss the same entirely.

Analysis And Determination

34. This being a first appeal, this court is guided by the principles set out in the case of David Njuguna Wairimu v Republic [2010] eKLR where the Court of Appeal stated as follows: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided that it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

35. Similarly in the case of Okeno v Republic [1972] EA 32 where the Court of Appeal set out the duties of the appellate court as follows:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic [1957] EA 336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v R [1957] EA 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 finding and 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 [1958]EA 424." This was also set out in the case of Kiilu & Another v Republic [2005] KLR 174.

36. In view of the above, I have perused and considered the record of appeal and submissions by parties and wish to consider the following issues: -

i. Whether ingredients of the offence of incest of a child were proved beyond reasonable doubt.

ii. Whether the sentence imposed was harsh and excessive.

37. The offence of incest is provided for under Section 20(1) of the *Sexual Offences Act* as follows: -

> " 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."

38. The key ingredients of the offence incest include:-

a) Knowledge that the person is a relative;

b) Penetration or indecent act.

39. Further, Section 22 of the *Sexual Offences Act* provides as follows:-

> " In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not."

40. The complainant testified that the appellant was her father and that they have always lived together. Pw2 the mother to the complainant testified that the complainant is her first-born daughter and the Appellant is her father though not her biological father since she was born outside the marriage. The accused in his defence admitted that the complainant was his step daughter. Thus, the relationship between the complainant and the Appellant is not denied by any of the parties and the first ingredient was therefore proved.

41. In respect to penetration, Section 2 of the *Sexual Offences Act* defines penetration as: -

.....the partial or complete insertion of the genital organs of a person into the genital organ of another person.

42. Indecent act is defined as Indecent act means an unlawful intentional act which causes:-

a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

b) Exposure or display of any pornographic material to any person against his or her will.

43. From evidence adduced, the victim PW1 GCK, testified that she was 13 years old. She said on 27th April, 2017 the accused went to the house asked to go with him to the bushes to graze goats. While there, he instructed her to lie down and remove her panty then he proceeded to do bad manners on her by inserting his penis on her crotch. After the act he told her to go home and threatened her with physical harm should she tell anyone about the act. She remained at the scene of the alleged crime grazing goats while the accused looked for leaves. She stated that PW4-Nancy Chepkong'a Sing'oei who is her neighbour was on the road. She went and told her that she had seen what had happened. Nancy informed people about it who arrested the accused.

44. The complainant was taken to Kabarnet Hospital where she underwent a medical examination and was put on medication for 3 months. She stated that she was injured on her chest, waist and had stomach pains as a result of defilement. She was given a treatment note at the hospital which she took to the police station and recorded her statements. On cross-examination she stated that the accused went to the house at mid-day.

45. Pw3-Benjamin Kendagor a clinical officer from Kaptimbor dispensary received the Complainant who was accompanied by her mother. He said the Complainant informed him that she was defiled by a person known to her on 27th April, 2017 and was treated at Kabarnet County Referral Hospital. He said the Complainant had pain in her abdomen and inner thighs; her hymen was missing and she had swollen labia majora and had white discharge from her private parts. He concluded that there was penetration. He said he to him on the 4th day after the incident. He stated that from the treatment notes the Complainant was defiled at around noon.

46. PW4-NC testified that on 27th April, 2017 she was at home when a neighbor's child called Judy went to inform her that she had seen accused and her daughter who is the complainant herein in the bush. She went there and on arriving, she found the accused finishing the act of defiling her daughter. She informed people who were drinking busaa and they arrested him. She recorded her statement on 9th October, 2017. She said she never recorded statement earlier because accused had threatened to kill her if she did. On cross examination she said the accused defiled the child at midday and he was apprehended by members of the public at 3:00pm; and accused who lives 100 meters from her home threatened her on 7th October, 2017.

47. From the evidence adduced, the complainant's evidence was corroborated by evidence of pw3 who examined her and pw4 also found the accused before he left the scene. The accused was arrested at around 3pm 3 hours after the incident. There is evidence beyond reasonable doubt that the complainant was defiled. There is no doubt in relationship as evidence on record confirm that the complainant was accused's stepdaughter.

48. Even if there was no evidence to corroborate the complainant's evidence, Section 124 of the *Evidence Act* provide that in a criminal case involving a sexual offence where 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. Record show that the complainant adduced consistent evidence and evidence by PW3 shows that there was forceful penetration caused by a male organ. I take note of the

fact that unlike the appellate court, the trial court had advantage of observing demeanor of witnesses before court. From evidence adduced, I am satisfied that the complainant was defiled.

49. In respect to age assessment which confirmed she was 14 years. On whether the trial court considered accused's defence, I note that the trial court made the following observations: -

> " The accused further stated that this charge was fabricated by the Chief to settle scores. When the accused cross examined the complainant, he did not bring out this issue. Pw 4 was cross examined on whether she knew who Joseph Chesaro was, she did not know him and also stated that she was not used by the chief to nail the accused."

50. From the foregoing, it is evident that the accused's defence was considered by the trial court contrary to his allegations in the appeal. I agree with the trial court that the alleged grudge was not substantiated; it was not demonstrated that the accused was framed up as a result of a grudge. There was no doubt in credibility of the complainant to cast doubt on her evidence.

51. On prosecution's failure to avail a witness, the Court of Appeal in Julius Kalewa Mutunga v Republic Criminal Appeal No. 31 of 2005 held:-

> " ...As a general principle of law, 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 example, it is shown that the prosecution was influenced by some oblique motive."

52. In the East African Court of Appeal in Bukenya & Others v Uganda [1972] E.A 549, the court held that: -

a) The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent;

b) The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case;

c) Where evidence called is barely adequate, the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

53. The foregoing notwithstanding, it is trite law that a conviction can be based on the testimony of a single witness, a position that was captured by the Court of Appeal of Uganda in Okwang Peter v Uganda Criminal Appeal No. 104 of 1999 where the court held:-

> " Subject to certain well-known exceptions, it is trite law that a fact may be proved by the testimony of a single witness but this rule does not lessen the need for testing with the greatest care the evidence of a single witness in respect to identification especially when it is known that the conditions favouring correct identification were difficult. In such circumstances what is needed is other evidence, whether it is circumstantial or direct, pointing to guilt, from which a Judge or jury can reasonably conclude that the evidence of identification, although based on the testimony of a single witness, can safely be accepted as free from possibility of error."

54. The Appellant's argument is that one Judy who informed pw4 of the incident was not availed in court to adduce evidence. In my view what the court ought to consider is whether there was other evidence to prove the charge which in this case existed; The defence did not demonstrate any ill motive by the

prosecution in failing to avail the said witness. In view of the above, no miscarriage of justice was occasioned on the part of the respondent by failing to call the said witnesses. Failure to avail her in my view is not fatal to the prosecution case.

55. From the forgoing I find that all the ingredients of the offence of incest were established; the prosecution proved its case beyond reasonable doubt. This appeal is not therefore merited.

(ii) Whether the sentence imposed was harsh and excessive

56. Sentence imposed against the appellant was the minimum sentence provided by statute. The court of appeal has however declared life sentence unconstitutional. The sentence having been declared unconstitutional am inclined to impose determinate sentence. I am inclined to impose 25 years imprisonment.

57. Final Orders: -

1. Appeal on conviction is hereby dismissed.
2. Appeal on sentence is hereby allowed and sentence imposed by trial court is hereby set aside.
3. Appellant to serve 25 years imprisonment.
4. Period served in remand to be reduced from sentence imposed.

JUDGMENT DELIVERED, DATED AND SIGNED IN OPEN COURT AT KABARNET

THIS 30TH DAY OF NOVEMBER, 2023.

.....

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Elvis/Mr. Momanyi – Court Assistants.

Mr. Chebii for Appellant.

Mr. Mong'are for State.