GRD v Republic (Criminal Appeal E020 of 2021) [2022] KEHC 12731 (KLR) (20 April 2022) (Judgment)

Neutral citation: [2022] KEHC 12731 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E020 OF 2021

SM GITHINJI, J

APRIL 20, 2022

BETWEEN

GRD .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from Original Conviction and Sentence in Criminal Case No. 18 of 2019 of the Principal Magistrate's Court at Kaloleni-Hon. L.N Wasige, RM dated 28th September 2020)

JUDGMENT

1. The Appellant was convicted and sentenced to serve twenty years imprisonment for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the offence are that on diverse dates between the month of October 2017 and 29th August 2019, in [Particulars withheld] village, Jibana location Kaloleni Sub-county within Kilifi County the appellant intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of KMG, a child aged 17 years, known to him as his daughter.

2. The appellant was also charged with an alternative charge of indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between the month of October 2017 and 29th August 2019, in [Particulars withheld] village, Jibana location Kaloleni Sub-county within Kilifi County the appellant intentionally and unlawfully caused his male genital organ namely penis to touch the female genital organ namely vagina of KMG, a child aged 17 years.

3. Aggrieved by the said sentence and the conviction of the trial court, the Appellant lodged an appeal on the following grounds:

1. That the learned trial magistrate erred in law and fact by not considering that there was no DNA conducted to ascertain the paternity of the child.

2. That the learned trial magistrate erred in law and fact by not considering that there was massive contradictions and invariances since some of the mentioned witnesses were not called to testify.

3. That the learned trial magistrate erred in law and fact by not considering that section 20(1) of the *S.O.A* No. 3 of 2006 fetters the discretion of the judicial officers that are magistrates and judges as regards to sentencing.

Evidence

4. The prosecution called a total of 4 witnesses in support of its case.

5. PW1 KMG, the complainant, told the court that she was aged 18 years, having been born on October 16, 2002. She produced her age assessment report dated 18/9/2019 where her age was assessed as 17 years. She narrated that sometime in October 2017, she was residing with the appellant and her step mother in Kwale County. The appellant and the step mother had a disagreement which prompted the step mother to leave. She (Pw1) was left with the appellant and the other siblings. On one of the nights, the appellant went to the sitting room where she slept and had sex with her. It was her testimony that the appellant had sex with her again after a week. On both occasions, the appellant threatened her not to tell anyone about the incidents.

6. PW1 added that in November 2017, she missed her periods. She later found out that she was pregnant. In December 2017, the appellant gave her some tablets which caused her to bleed from her vagina after 12 hours. She left for her home in [Particulars withheld], Kaloleni where she lived with her aunt M. The aunt noticed the bleeding and took her to Vishakani clinic where she was found pregnant. It was her testimony that she miscarried during that month.

7. In January 2018, the appellant chased her aunt from their [Particulars withheld] home and he thereafter visited every weekend. PW1 told the court that the appellant started to have sex with her again in August 2018 every time he visited. She got pregnant again in December 2018 and the appellant gave her some tablets that caused her a miscarriage.

8. Thereafter, the appellant stopped having sex with her until June 2019. On 29/8/2019, she visited her aunt F in Pangani, Kaloleni where she opened up about what the appellant had been doing to her. They reported the matter to the area chief and later at Kaloleni Police Station. PW1 discovered she was pregnant after being examined at Mariakani sub-county hospital in September 2019. She told the court that the pregnancy belonged to the appellant.

9. Upon being cross examined PW1 testified that she had a boyfriend named Harrison but had never had sex with him. Her relationship with Harrison was only 6 months old.

10. PW2 FMR, the appellant's sister and PW1's aunt testified that in August 2019, her sister named M informed her of her suspicions that the appellant was defiling his daughter-(PW1) since she had miscarried twice. When PW1 visited her, she told her that the appellant had been having sex with her. They reported the matter at Kaloleni Police Station.

11. PW3 Mwangolo Chigulu a clinician at Mariakani sub county hospital produced the p3 form as PExh 2. He examined PW1 on 17/9/2019 on allegations of having been sexually abused. He found that she had a normal outer genitalia with no bruises or lacerations. No hymen. She had a whitish vaginal discharge and pus cells. PW1 also tested positive for pregnancy.

12. PW4 Sgt. Hadija Kenga, the investigating officer testified that on 13/9/2019 PW1 and PW2 filed an incest report. PW1 narrated her ordeal with the appellant. She recorded PW1's statement and escorted her to Mariakani sub county hospital.

13. Her testimony marked the close of the prosecution case. The court ruled that the appellant had a case to answer and put him on his defence. The appellant opted to give a sworn statement but did not call any witness.

14. He told the court that PW1, his daughter was born on 12/10/2002. The appellant narrated that on 10/12/2017 he moved his family from Kwale to [Particulars withheld] village where he left his four children with his sister M as he went back to Likoni to work. That the same month, M informed him that PW1 was unwell. She took her to hospital where it was found that PW1 was having a miscarriage. When questioned about the pregnancy by M, PW1 told her that it was for the boyfriend and that he had given her some pills.

15. The appellant denied having sex with PW1. He added that the complainant had a habit of spending the nights away from their home. He added that a day before his arrest, he was informed that PW1 had visited her aunt F. He went to get her to return home but PW1 declined.

Analysis and Determination

16. It is trite that the first appellate court has a duty to revisit the evidence that was before the trial court, re-evaluate and re-analyse it and come to its own conclusion bearing in mind that unlike the trial court, it did not have the benefit of seeing the demeanor of the witnesses 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.

17. The ingredients of the offence of incest are the relationship between the parties and; an indecent act or penetration. Section 20[1] of the *Sexual Offences Act* No. 3 of 2006 which the appellant was charged with provides:

> 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:
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> 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 appellant 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.

18. 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 organs of another person."

19. Again, on the element of penetration, the courts mainly rely on the evidence of the complainant which may be corroborated by medical evidence on P3 and PRC forms. See *Dominic Kibet Mwareng v Republic* [2013] eKLR.

20. In the present appeal, I do find that the age, penetration and relationship between the appellant and complainant were sufficiently proved. On November 18, 2019 when the Complainant testified, she

told the court that she was 18 years old having been born on October 16, 2002. According to the appellant, she was born on 12/10/2002. It is evident therefore that the complainant had just turned 18. The offence had occurred on diverse dates between 2017 and 2019. This confirms that the complainant was a minor as at the time of the offence.

21. Similarly, it is evident that penetration had occurred. The complainant was pregnant as at the time of testifying, such could only have been occasioned out of a sexual intercourse where penetration had been attained. As for the relation between the appellant and the complainant, the appellant admitted that she (the complainant) is his daughter.

22. The only disputed issue is whether the appellant was indeed the perpetrator.

23. PW1 gave a clear narration of how the appellant started defiling her in October 2017 in Kwale after her step mother left the house. That the appellant gave her tablets that led to a miscarriage in December 2017 when she got pregnant. The complainant moved back to their Nyalani home where the appellant followed her and had sex with her in August 2018. Thereafter the appellant would have sex with her every weekend when he went home from Likoni. PW1 got pregnant again in December 2018. Again the appellant gave her pills which led to her miscarriage in February 2019. The appellant had sex again with her in June 2019 and she discovered that she was pregnant in September 2019.

24. The Appellant's defence is that he was framed by his family. He implied that the complainant had been having sex with her boyfriend. There is no reason given why his own family and especially sisters would frame him with such a serious offence. Besides, PW4 told the court that during her investigations, she concluded that there was no grudge between the accused and his family. If the complainant was impregnated by her boyfriend, nothing held her from saying so, and had no cause to fix the Appellant. Such claim is in want of facets of truth.

25. Further, it is evident that the said boyfriend, Harrison lived in Kaloleni and had been in a relationship with the complainant for only six months of which they have had no sex. The Appellant so confirmed.

26. The Appellant avers that a DNA test ought to have been conducted to determine the paternity of the fetus the complainant was carrying.

27. It is a well-established principle of law that a DNA test is not the only means of establishing paternity in an offence as the present one. The courts have numerously ruled that section 36 (1) of the *Sexual Offences Act* is not couched in mandatory but permissive terms.

28. In *Williamson Sowa Mbwanga v Republic* [2016] eKLR, the Court of Appeal pronounced itself thus:

> " ...it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it is not necessary that the hymen be ruptured. (See *Twehangane Alfred v Uganda*, CR. APP. NO. 139 OF 2001)."
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> It is partly for this reason that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for

purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."

29. It was not therefore necessary in this case for the court to order a DNA test which is complicated when carried out before the birth of a child, or to delay the hearing to await the birth of the child for the same, on an issue which had been otherwise well established. The trial court recorded its reasons for believing the testimony of the complainant as envisaged under section 124 of the *Evidence Act* which provides:

> "Provided 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."

30. In *Arthur Mshila Manga v Republic*, Criminal Appeal No. 24 of 2014 [2016] eKLR, the court of appeal held that: -

> "It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See *Mohamed v Republic* [2008] KLR (G&F), 1175 and Jacob *Odhiambo Omuombo v Republic* (*supra*). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

31. The complainant was vivid in her testimony as to what happened. She was also firm during cross-examination by the Appellant and her testimony was not shaken. I therefore concur with the trial court, that the complainant told the truth and that it's the Appellant who committed the offence.

32. Section 20(1) of the *SOA* provides that the minimum sentence for the offence of incest is 10 years imprisonment, while the maximum sentence is life imprisonment where the victim is aged below eighteen years. The Appellant was sentenced to 20 years imprisonment. I have perused the trial court's reasoning on sentencing. I do find that the section is couched in mandatory terms in regards to the sentence, where the victim is a child. The accused person in such a case is liable to imprisonment for life.

33. The Appellant herein committed the offence against a minor and not only once. He impregnated her twice and prompted her to abort. He even followed her to her aunt's place for similar illegal purposes where he impregnated her for a third time. Even if the Court was to have discretion in sentencing, the circumstances called for a stiff sentence. It has been well explained by the Supreme Court that the Muruatetu case does not apply to any other offence, save for murder cases. This being so, the Appellant herein deserved a life imprisonment under the law. I am obliged to correct the error and enhance the sentence of 20 years imprisonment in place, with that of life imprisonment, in total compliance with the law.

34. The bottom line is that the conviction is upheld, and sentence enhanced to life imprisonment.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF APRIL, 2022.

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S.M. GITHINJI

JUDGE

In the presence of; -

1. Mr Mwangi for the State

2.The Appellant in person

CORAM: Hon. Justice S.M.Githinji

Mr Mwangi for the state

Appellant in person