



REPUBLIC OF KENYA



KENYA LAW
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**NMK v Republic (Criminal Appeal E016 of 2021)
[2022] KEHC 274 (KLR) (7 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
CRIMINAL APPEAL E016 OF 2021**

JM MATIVO, J

APRIL 7, 2022

BETWEEN

NMK APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal against Judgment, conviction and sentence in SO Number 7 of
2020 - Republic v NMK delivered by E. M. Nyakundi RM on 27.1.2021)*

JUDGMENT

1. NMK (the appellant) was sentenced to serve 20 years imprisonment in SO number 7 of 2020 at Wundanyi, SRM's Court for the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*¹ (the Act). There was no finding on the alternative count of committing an indecent act with a child contrary to section 11 (1) of the Act.
2. The appellant seeks to quash the said conviction and sentence citing the following grounds, namely, whether trial Magistrate failed to comply with section 31 of the Act; whether the appellant was accorded the chance to cross-examine the prosecution witnesses and whether the trial court failed to consider the appellants mitigation.
3. In determining this appeal, this court has a legal duty to re-analyse, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify.²

¹ Act No. 3 of 2006.

² See *Okeno vs Republic* {1972} E.A. 32at page 36, *Pandya vs Republic* {1957} EA 336, *Shantilal M. Ruwala Vs Republic* {1957} EA 570 & *Peter vs Sunday Post* {1958} EA 424.



4. PW1 George Lawrence Oguda, an employee of the Government Chemist Department, Mombasa and a holder of degree in Chemistry from the University of Nairobi and a Post-graduate degree in Forensic Science, Master's Degree in Environmental Science presented report prepared in this case. He said he was given 5 samples from the Government Chemist in 2 different days brought on 3rd February 2020 and 5th February 2020. He said the first sample was blood drawn from the appellant while the second was from PM1. He testified that the third swab was swab from the appellant's inner mouth while the 4th was from PM2. The 5th was from PM1. He was required to determine if there was any relationship between the exhibits. He said that he generated the DNA profiles and tabulated at the end of the report and found 99.99 more chances that NMK was the biological father of PM1, which meant that the appellant was the biological father of PM1.
5. PW2 DBA testified that the appellant is her husband. She stated that on 14th July 2019 she reported as Sauti Ya Wanawake that her child had been impregnated by her own father. He said the child does not speak well but she told him her father slept with her and the baby then was 9 months old. She said she had been married to the accused for 34 years. She said the complainant is epileptic, that she used to faint a lot and that he took her to hospital and she was issued with a P3 form.
6. Dr. Rukia Mkamburi Mwawana, Medical Doctor at Wesu Sub-County Hospital testified that on 23rd August 2019, a 20 year old alleged to have been defiled by her father, that the complainant was not mentally stable, but she was aware of who had defiled her, that the incident had occurred 4 months ago and she had tested positive for pregnancy and negative for HIV. Age assessment showed she was over 18 years. She produced her treatment notes and P3 form. She also testified that mental assessment showed that she was unable to express herself due to lack of insight and she was incoherent in speech, but her memory was fair.
7. PW4 PC Elizabeth Mkamburu testified that the complainant's mother reported to her that she was bathing the complainant when she noticed that she appeared like she noticed changes in her stomach in that she looked like she was pregnant. She testified that her mother took her to Gazi Dispensary accompanied by Sauti ya Wanawake where she was tested and found to be pregnant
8. The appellant gave sworn evidence. He stated that at the charges are allegations instigated by his wife. He also said his wife went and slept with another man's wife. He said the DNA report was fake.

The verdict

10. The learned Magistrate analysed the evidence, the law and the ingredients of the offence and he was persuaded that the prosecution had proved its case beyond doubt. He convicted the appellant on the main count and sentenced him to serve 20 years imprisonment.
11. In his submissions, the appellant cited *AMIL V Republic*³ in support of the proposition that rape or defilement is proved by evidence and not by DNA. He argued that the prosecution failed to avail the complainant. Further, he faulted the court for failing to adhere to the provisions of section 3 of the Act. He also argued that the evidence ought to have been corroborated.
12. The Respondents' counsel submitted that the offence of incest was proved.
13. As the record shows, the complainant was mentally unstable, had difficulty in speech and epileptic. She was not able to express herself fully due to lack of insight. The manner in which the trial was conducted is worrying. Despite the clear vulnerable nature of the complainant, the trial court did not invoke the provisions of section 31 of the *Sexual Offences Act*. It is not clear why the court ignored

³ {2012} e KLR.



such a clear statutory dictate which lays down the procedure the trial court should follow and declare the complainant a vulnerable witness as the law demands and properly appoint an intermediary as contemplated under the said section 31 of the Act.

14. Parliament in its wisdom enacted Section 31 of the *Sexual Offences Act*.⁴ Subsection (1) thereof provides as follows: -
15. The issue at hand essentially requires construing the content and scope of the above provision. In exercising this duty, this court is enforcing the Rule of Law by requiring that criminal trials be conducted within the “four corners” of the statutory provisions. In doing so, this court will be acting as the guardian of Parliament’s will, seeking to ensure that the exercise of judicial power is in accordance with the scope and purpose of Parliament’s enactments.
16. Section 31 (3) of the act provides that the court may, if it is in doubt as to whether a witness should be declared a vulnerable witness in terms of subsection (2), summon an intermediary to appear before the court and advise the court on the vulnerability of such witness. Sub-section (4) provides that upon declaration of a witness as a vulnerable witness in terms of the section, the court shall, subject to the provisions of subsection (5), direct that such witness be protected by one of the following measures---
 - a. allowing such witness to give evidence under the protective cover of a witness protection box;
 - b. directing that the witness shall give evidence through an intermediary;
 - c. directing that the proceedings may not take place in open court;
 - d. prohibiting the publication of the identity of the complainant or of the complainant’s family, including the publication of information that may lead to the identification of the complainant or the complainant’s family; or
 - e. any other measure which the court deems just and appropriate.
17. Further, sub-section (5) provides that once a court declares any person a vulnerable witness, the court shall direct that an intermediary referred to in subsection (3), be appointed in respect of such witness unless the interests of justice justify the non-appointment of an intermediary, in which case the court shall record the reasons for not appointing an intermediary. Sub-section (6) provides that an intermediary referred to in subsection (3) shall be summoned to appear in court on a specified date, place and time to act as an intermediary and shall, upon failure to appear as directed, appear before the court to advance reasons for such failure, upon which the court may act as it deems fit.
18. Section 31(7) provides that if a court directs that a vulnerable witness be allowed to give evidence through an intermediary, such intermediary may—(a) convey the general purport of any question to the relevant witness; (b) inform the court at any time that the witness is fatigued or stressed; and (c) request the court for a recess.

⁴ Ibid.

- 1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence in those proceedings a vulnerable witness if such witness is—
 - a. the alleged victim in the proceedings pending before the court;
 - b. a child; or
 - c. a person with mental disabilities.



19. In determining which of the protective measures referred to in subsection (4) should be applied to a witness, the court shall have regard to all the circumstances of the case, including—(a) any views expressed by the witness, but the court shall accord such views the weight it considers appropriate in view of the witness’s age and maturity; (b) any views expressed by a knowledgeable person who is acquainted with or has dealt with the witness; (c) the need to protect the witness’s dignity and safety and protect the witness from trauma; and (d) the question whether the protective measures are likely to prevent the evidence given by the witness from being effectively tested by a party to the proceedings.⁵
20. The court may, on its own initiative or upon the request of the prosecution, at any time revoke or vary a direction given in terms of subsection (4), and the court shall, if such revocation or variation has been made on its own initiative, furnish reasons therefor at the time of the revocation or variation.⁶
21. More significant is section 31(10) which provides in peremptory terms that a court shall not convict an accused person charged with an offence under this Act solely on the uncorroborated evidence of an intermediary. Also relevant is section 31(13) which provides that an accused person in criminal proceedings involving the alleged commission of a sexual offence who has no legal representation shall put any questions to a vulnerable witness by stating the questions to the court and the court shall repeat the questions accurately to the witness.
22. The above provisions provide the manner in which criminal proceedings involving vulnerable witness are to be conducted. A reading of section 31 shows that it places a duty on the court to follow the steps specified in the act. This must be reflected in the proceedings. It requires the court to undertake an enquiry to properly conclude that the witness is vulnerable. In my view, the procedure should consist of two parts: - (1) questioning the witness by the trial Magistrate in order to form an opinion that the witness is vulnerable, and, (2) questioning a parent or a guardian. The learned Magistrate never followed these steps, so one wonders how he satisfied himself and concluded that the complainant was vulnerable if at all he did. The provisions contemplate an inquiry which will support the finding.
23. A correct construction of section 31 leaves no doubt that it was necessary for the trial court to conduct an inquiry and form an opinion that the victim is a vulnerable witness. Section 31 requires the court to declare the witness a vulnerable person. This can only be done after an inquiry. The record must reflect the steps taken by the trial Magistrate, the conclusion arrived at and the declaration that the witness is vulnerable.
24. Section 31 (4) provides the steps to be taken to protect the witness once declared vulnerable. The court can either allow the witness to give evidence under protective cover of a witness protection box or direct that the witness gives evidence through an intermediary, or direct that the proceedings may not take place in open court, or prohibit the publication of the identity of the witness or take any other measures the court deems just and appropriate. The learned Magistrate did not take any of the above steps. It is an established principle of our law that an accused person is entitled to a fair trial and this ‘necessarily presupposes that the judicial officer who tries him is fair and unbiased and conducts the trial in accordance with those rules and principles or the procedure which the law requires. The procedures prescribed in section 31 are geared to ensure a fair trial.
25. Every accused has the right to a fair trial in terms of Article 50 (2) (k) of the *Constitution*. What exactly that right encompasses has not been circumscribed. It would be imprudent, even if it were possible, in a particular case concerning the right to a fair trial, to attempt a comprehensive exposition thereof. At

⁵ See section 31 (8).

⁶ See Section 31 (9).



the heart of the right to a fair criminal trial and what infuses its purpose, is for justice to be done and also to be seen to be done. However, the concept of justice itself is a broad and protean concept. In considering what, for purposes of this case, lies at the heart of a fair trial in the field of criminal justice, one should bear in mind that dignity, freedom, equality and the right to a fair trial are the foundational values of our Constitution.

26. Any measure that aims to both reduce the trauma experienced by complainant and improve the accuracy of their evidence must not undermine the accused's fundamental right to a fair trial.⁷ While appreciating the difficulty presented by witnesses of tender age or those who are mentally challenged, it is my view that the drafters of the act were aware of such challenges hence the provisions of section 31.
27. By failing to comply with the well-intentioned provisions of section 31 of the act which require an inquiry for the court to satisfy itself that the witness is vulnerable, the learned Magistrate fell into error. The underlying goal is the same — that the guilty are convicted and the innocent acquitted.⁸ One of the great advantages of the common law system is that it is a flexible system, capable of steady adaptation to the needs of contemporary society.⁹ Having faulted the learned Magistrate, the question that follows is whether this is a proper case for retrial. The court must bear in mind that the complainant may have recovered from the trauma and subjecting her to recall the ordeal may not be in her interests. In addition, witnesses' recollection may have faded while others may have relocated; hence, a retrial is likely to encounter challenges, which may affect the quality of the trial. Closely tied to this is the fact that both sides are aware of the evidence tendered, and, the temptation of parties coming to court fully prepared in anticipation of familiar questions may compromise justice. However, there is the public interest dimension, that the guilty must be punished and the innocent must be freed.
28. The triangular of rights must be respected and balanced. These are the rights of the accused person, the rights of the complainant and the public interest of seeing to it that the vice of incest and defilement of minors and persons and physically hand capped or mentally challenged persons is eliminated. To me, a proper balancing these rights dictates that this case be remitted, as I hereby do, to the trial court for re-trial. I order that the appellant be presented before the trial court for a fresh plea within the next 7 days and thereafter the trial to be undertaken and completed within 120 days.

Right of appeal 14 days

SIGNED AND ATED AT VOI THIS 7TH DAY OF APRIL 2022

JOHN M. MATIVO

JUDGE

⁷ See generally *Dietrich v The Queen* (1992) 177 CLR 292; J J Spigelman, 'The Truth Can Cost Too Much: The Principle of a Fair Trial' (2004) 78 Australian Law Journal 29.

⁸ *Ireland Law Reform Commission, Report: Prosecution Appeals and Pre-Trial Hearings, Report No LRC 81-2006* (2006) 5 [1.03].

⁹ Lord Judge, 'Vulnerable Witnesses in the Administration of Criminal Justice' (Speech delivered at the 17th Australian Institute of Judicial Administration Oration in Judicial Administration, Sydney, 7 September 2011).

