DKW v Republic (Criminal Revision E002 of 2021) [2022] KEHC 12680 (KLR) (27 July 2022) (Judgment)

Neutral citation: [2022] KEHC 12680 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL REVISION E002 OF 2021

GMA DULU, J

JULY 27, 2022

BETWEEN

DKW .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the original sentence and conviction of Hon. J. Mwaniki in Makueni Chief Magistrate's Court CMCR (S.O) Case No.35 of 2019 pronounced on 12th November 2020)

JUDGMENT

1. The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006.
2. The particulars of offence were that on unknown date between the months of May 2019 and June 2019 in Makueni Sub-county within Makueni County, intentionally and unlawfully caused his penis to penetrate the vagina of JM (name withheld) a child aged 12 years who was to his knowledge his daughter.
3. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same unknown date in 2019 and at the same place intentionally touched the vagina of JM a child aged 12 years with his penis.
4. He denied both charges. After a full trial, he was convicted on the main count of incest and sentenced to 20 years imprisonment.
5. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds –
    1. That the magistrate erred by convicting and sentencing him without considering that the charge sheet was defective.

2. That the trial magistrate erred in convicting him without considering that the evidence of the prosecution lacked to justify a condition and sentencing in defilement cases. (sic).

3. That the magistrate erred in convicting him in a stage managed case with no proof of defilement and P3 form, PCR form and age assessment produced had never been proved.

4. The learned magistrate erred in basing the conviction on evidence that was full of inconsistencies, contradictions and loopholes as no eye witness or evidence was brought forward, thus shifting the burden to the appellant.

5. That the trial magistrate erred in shifting the burden of proof to the appellant by requiring the appellant to prove his innocence and as such the prosecution case was not proved beyond reasonable doubt and the benefit of the doubt ought to have been resolved in favour of the appellant.

6. The learned magistrate erred in convicting him using evidence adduced selectively.

7. The learned magistrate erred by not considering that the Government Analyst's report on DNA was inconsistent and incomplete.

6. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by both the appellant and the Director of Public Prosecutions.

7. This being a first appeal, I will start by reminding myself that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences see *Okeno –vs- Republic* [1972] E.A 32.

8. At the trial, the prosecution called six witnesses. The appellant tendered unsworn defence testimony and did not call any additional evidence.

9. In summary Pw1 was Stella Nthambi Muasya a Clinical Officer at Makueni Referral Hospital who produced a P3 form, a PRC report on the victim, and also an ultra sound report on pregnancy of the victim herein.

10. Pw2 was the victim JM, whose evidence was that she was 12 years old, that the appellant who was her father penetrated her sexually but that another relative school boy at [particulars Withheld] School had earlier penetrated her sexually. It was her evidence that when her mother Pw3 noticed that she was pregnant she enquired, and she disclosed the culprit to a friend IM (Pw4).

11. Pw3 was ENK the wife of the appellant, who stated in evidence that she had earlier parted with the appellant, but who later joined her in Wote in April 2018. She also stated that the victim told her that she had sex with M a boy aged 18 years in class 8.

12. Pw4 was IM, a friend of the victim, who stated that the victim disclosed to her that the appellant had sexual intercourse with her in June 2019.

13. Pw5 was Dr. Kisia Dalmus Mumo who produced an Age Assessment Report on the victim prepared by Dr. Nyambane a Dentist at Makueni Referral Hospital wherein the age of the victim was assessed to be 12 years. Pw6 on the other hand, was Emily Okworo a Government Analyst whose evidence was that she examined labeled blood samples at the Government Laboratory in Nairobi, from which it was established that the child of the victim named Muuo was 99.0% established to be a biological child of the appellant.

14. In his defence, the appellant denied committing the offence and said that he did not know how the blood samples taken to the Government Chemist were obtained.

15. The first element of the offence herein is the age of the victim who was said to be 12 years old. An age assessment report was produced in court. It was not challenged. The evidence of Pw1 and Pw2 also confirm that the victim was aged 12 years. I find and hold that the prosecution proved beyond reasonable doubt that the victim was aged 12 years.

16. The second element of the offence is the relationship of the victim and the appellant as father and daughter. This biological relationship has not been disputed at all. I find that the prosecution proved beyond any reasonable doubt that the appellant and the victim were a father and daughter.

17. The third element of the offence was penetration. In this regard, the victim said that she was sexually penetrated. The medical evidence is to the effect that the hymen of the victim was missing and that she was pregnant. Infact, before conclusion of the case, she bore a child. In my view therefore penetration of a sexual nature was proved beyond reasonable doubt.

18. The fourth and last element of the offence is the identity of the culprit. In my view, the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. The first reason is that the victim (Pw2) stated that she had sexual intercourse with somebody else on a date she did not disclose, and no additional evidence was brought to clarify the matter further. Secondly, and more importantly, the Investigating Officer did not testify, and there is no evidence on record as to who obtained the blood samples forwarded to the Government Chemist, how the samples were stored, who took them to the Government Chemist.

19. Thus it cannot be said that the blood samples forwarded to the Government Analyst, were genuine blood samples from the victim, the child and the appellant.

20. The above evidence on record thus creates a big doubt, regarding the source of samples, whose benefit has to be given to the appellant. Indeed, the appellant raised this issue in his defence, but the trial magistrate did not put it into proper perspective.

21. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. On that account alone the appeal on conviction will be allowed.

22. Though the appellant has complained that the charge was defective, I find no defect on the charge sheet that would make it fatal. However, since I have already found that the prosecution did not prove that the appellant was the culprit, I will allow the appeal, quash the conviction and set aside the sentence.

23. Consequently, and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 27TH DAY OF JULY 2022, IN OPEN COURT AT MAKUENI.

....

GEORGE DULU

JUDGE