MG v Republic (Criminal Appeal E051 of 2021)
[2022] KEHC 14454 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14454 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E051 OF 2021

JM MATIVO, J

OCTOBER 27, 2022

BETWEEN

MG .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal against Judgement, conviction and sentence in SO Case Number 2 of 2017- Voi, Republic v MG, delivered by F.M.Nyakundi, SRM, on 7.10.2019)

JUDGMENT

1. MG (the appellant) was sentenced to serve 30 in prison in SO No 22 of 2018 at Voi SRM's Court for the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*[1](the Act). The appellant now seeks to quash both the conviction and sentence citing 4 grounds in his Amended Memorandum appeal which can be condensed into 3 grounds, namely; (a) was the charge defective, (b) did the prosecution prove its case to the required standard, and (c) was the appellant alibi defence considered.

2. 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]

3. On the May 11, 2018, PW1 the complainant testified that she was 20 years and in class 8. She recalled that on August 28, 2016 at around 9pm, when her mother had gone to a funeral in Samburu, the appellant came to the house she shared with her 16 year old brother demanding for food. After being informed that his food was in his house, the appellant suddenly grabbed the complainant by her

[1] Act No 3 of 2006.

[2] See Okeno v Republic {1972) EA, 32at page 36, Pandya v Republic {1957} EA 336, Shantilal M. Ruwala v Republic {1957} EA 570 & Peter v Sunday Post {1958} EA 424.

neck, tripped her to the ground. Since the complainant had only covered herself with a leso and had nothing beneath, he pulled aside her leso, removed his trouser using his one hand while warning her not to scream. Thereafter, the appellant caused his penile shaft to penetrate the complainant's genitalia, and that was the first time she ever had sexual intercourse. The complainant testified that she got pregnant and gave birth on May 13, 2017 at Moi County Referral Hospital subsequently, the child died. However, samples of DNA were taken from the body and it was released for burial.

4. On cross-examination, PW1 confirmed that it was the appellant who is her biological father that forced her to have sex with him and that she did not scream or struggle with the appellant because he had choked her and as a result her brother sleeping in the other room in the house heard nothing. She further confirmed that she did not inform her mother of the incident because of the Appellant's threats and it is her head master who discovered that she was pregnant.

5. PW2 John Thuku the Head Master of Buguta Primary School testified and stated that on February 14, 2017 he was informed PW 1 appeared disturbed. Upon interrogating her she was evasive. However, upon further interrogation on February 17, 2017 the complainant opened up and confirmed that she was six months pregnant and that the appellant was responsible for the pregnancy. PW2 thereafter forwarded the matter to the police.

6. On cross-examination PW2 admitted that he first knew the appellant during his arrest and that it was the complainant who informed him the date of the incident and implicated the Appellant as the person responsible for the pregnancy.

7. PW3 CPL Douglas Mwakarabo testified and stated that on February 17, 2017, while at the police station, he met the complainant accompanied by PW2 and a clinical officer from Buguta dispensary. PW2 demanded the arrest of the appellant a person known to him and who it was alleged had impregnated the complainant. He subsequently arrested the appellant on February 18, 2017 at the market.

8. PW4 Kwekwe Govi Chirundi testified and stated that the complainant is her daughter and currently a student at Buguta Primary school, and that presently she lives at her uncle's place as she is uncomfortable with going home. It is her testimony that in March, 2017, she confronted the complainant on her five months pregnancy but she was evasive on who was responsible. She further stated that the appellant was arrested during the time she had taken the complainant for examination at Buguta dispensary. Later on, on May 13, 2017 the complainant gave birth to a still birth.

9. PW5 Lucy Nyambura a Nurse by occupation at Buguta Health Centre testified and stated that the complainant was brought to her on February 18, 2017 by her mother and a police officer. She conducted a pregnancy test as requested and it turned out positive, she was around 6-7 months.

10. PW6 Dr Sumeita Seif a doctor at the Moi Referral Hospital in Voi produced treatment notes on behalf of Dr Hamida. It was his testimony that the complainant delivered a live baby weighing 2.4 kilo grams and that the baby died 35 minutes.

11. PW7 Sgt Lucy attached to the gender office at Voi Police station testified that she was the investigation officer in the case and that at the time of the incident the complainant was 17years old having been born on November 2, 1998 according to her immunization card. She further stated that after the complainant gave birth and the child succumbed. However, DNA samples were obtained and taken for sampling. However, the result were that the tissues obtained were not enough for any result to come out. PW7 in cross-examination denied being present at the time the appellant was being interrogated.

12. PW8 George Lawrence Oguda a principal chemist at the government chemist in Mombasa testified and stated that on May 25, 2017, he was presented with five exhibits under instructions from the court

to examine and determine paternity of a deceased infant. However, all the samples did not generate any DNA profile. Therefore, he was unable to compare the DNA profile generated from buccal swabs of the Appellant with those of the dead infant. However, there are 99% chances that the Appellant is the biological father to the complainant. He also stated that samples can fail if poorly preserved.

13. At the close of the prosecution case, the trial Magistrate found that the prosecution had established a prima facie case and placed the appellant on his defence. The learned Magistrate complied with the provisions of section 211 of the *Criminal Procedure Code*.[3]The appellant elected to give sworn evidence. He call DW2 Kwekwe Soji Kiluki as his witnesses. His defence was that on August 28, 2016 the day of the offence, he was at a burial with his wife and that they stayed at the burial for three days and came back and that he has never admitted to committing the alleged offence.

14. On cross-examination, the Appellant confirmed that the complainant was his 10th Child and that she was 17 years at the time of the alleged offence. He further confirmed that on August 28, 2016, he left his home at 4pm and it is not far from that place and that he can take few minutes, and it was a ceremony of his uncle called Benja Kemande that was to take place for 1 ½ hours and that they were at that place for three days as a family and all the time he was with his wife and that he would also call Kassim Benja as his witness. The appellant confirmed that they arrived at that place by 7:30pm after leaving his children at home. The appellant also confirmed that he the complainant never stated who the father of the deceased child was.

15. DW2 who initially testified as PW4 testified and stated that she and the Appellant went to the burial on September 28, 2016 and stayed there for 3 days, and she was not aware why he was arrested. On cross-examination, DW2 confirmed that they were at the burial after leaving home at 5:00pm and they stayed there for the next three day but some of their children went to the funeral and went back home.

16. After analyzing the prosecution evidence, the defence and the law, the prosecution was persuaded that the elements of the offence had been established. He convicted him to serve 30 years imprisonment.

17. The appellant submitted that the charge sheet omitted the word unlawfully after the word intentionally and as a result the said charge was defective and contrary to section 134 of the Criminal Procedure Code on a charge containing sufficient particulars as may be necessary.

18. On penetration, the appellant submitted that there was no medical evidence done on the complainant's genital organs to prove penetration and that the complainant kept quiet for five months until it was discovered she was pregnant. Furthermore, the DNA test conducted did not provide any sufficient nexus that the appellant was the one who impregnated the complainant.

19. On the evidence of identification, the appellant submitted that the offence was committed on August 28, 2016 at 9,00pm inside their house. However, there is no evidence that there was a source of light in the house. Further the applicant submitted that the only conversation between the complaint and himself was on food. Therefore, there might have been mistaken identity as the thug could have imitates the appellant's voice to gain entrance. The appellant also submitted that the complainant never informed her brother, mother or even her step mother of the incident after they all came back from the funeral. The appellant cited the finding in *Nzaro v Republic*[4] where the court held that it is possible for a witness to believe genuinely that he had been attacked by someone he knows so the possibility of error or mistake is always there.

[3] Cap 75, Laws of Kenya.

[4] **(1982)2 KAR 212.**

20. The appellant in his defence submitted that his alibi defence was corroborated by DW2 who confirmed that they went to the funeral and they stayed there for 3 days.

21. Mr. Sirima, learned prosecutor submitted that there was penetration which can be gleaned from the complainant's testimony that the Appellant inserted his penis into her vagina and that PW6 Dr Sumeita Seif confirmed that the complainant was taken to Moi Referral Hospital and dragonized with spontaneous vaginal delivery. Consequently, penetration was proved beyond reasonable doubt.

22. On the relationship between the Appellant and the complainant and the age of the appellant, the learned prosecutor submitted that it is a fact that the appellant is the complainant's father and that at the time of the incident, the complainant was 16 years old. To prove the complainant's age an immunization card was produced and the appellant never controverted the same. Consequently, it follows that all the elements for the offence of incent were proved beyond reasonable doubt.

23. On the Appellant alibi defence, it was submitted that the offence happened on August 28, 2016, yet DW2 testified that she was with the Appellant at the funeral on September 28, 2016, thus, the date DW2 referred to was irrelevant to the proceedings and no witness was brought to court to corroborate the appellant's defence that was a sham and an afterthought.

24. The learned prosecutor also submitted that the appellant escaped from lawful custody when he had been taken for DNA examination together with the complainant. Consequently, it is not far-fetched to hold that his actions of escaping was an overt admission of guilt.

25. On the issue of the charge sheet being defective, it was submitted that the omission in the particulars of the charge sheet did not in any way vitiate the trial or deter the appellant from understanding the charges against him or making his defence. Furthermore, it cannot be said to be lawful for a father to have carnal knowledge of his daughter. In any event, the omission of the said word is curable under section 382 of the *Criminal Procedure Code*. The prosecutor cited the finding in *WKK v R*[5] where the court held that the omission of the word "unlawfully" cannot render the charge defective.

26. The appellant has faulted the trial magistrate for convicting him on a defective charge. The Court of Appeal in *Peter Ngure Mwangi v Republic*[6] addressed the issue of a defective charge sheet when it held that there are two factors to be considered. One, whether or not the charge sheet is indeed defective and two, whether or not even with such defect justice could still be met. The substantive law on a defective charge sheet is section 134 of the *Criminal Procedure Code*.[7]The said section provides:-

> " Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged."

5 **(2014)eKLR.**

6 [2014] eKLR

7 Supra note 3

27. The Court of Appeal in *Benard Ombuna v Republic*[8] addressed the issue of a defective charge sheet in the following terms:-

> " In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

28. Section 382 gives guidance on whether even with such defect justice could still be met or whether the defect is curable. Section 382 of the *Criminal Procedure Code* provides:

> " Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice. Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings. It follows therefore that the court in determining whether a defect caused injustice has to have regard whether the objection should have been raised at an earlier stage in the proceedings." (Emphasis mine).

29. Dealing with the issue of the omission of the term unlawful in the charge sheet in *Daniel Oduya Oloo v Republic*[9] the court held that:-

> " On the same issue the Appellant submitted that the particulars of the offence were fatally defective as they failed to disclose that the act of defilement was unlawful. It is true that the word unlawful was not included in the particulars of the offence. The offence of defilement represents a situation in which the key elements requiring proof are age of the victim, identification of the perpetrator and penetration. It is an offence perpetrated to children. Given the fact that children cannot consent to the acts that form the basis of the offence implies that as long as the elements of the offence are proved, the offence itself is deemed unlawful. Therefore, the mere omission of the word "unlawful" does not, in the circumstances, render the charge sheet defective."

30. Applying the test above, the appellant participated in his trial in a manner to suggest he understood the charge. He cross examined the witnesses well and was able to put an appropriate defence. This is an indication that the appellant understood the particulars of the charge he faced. Further, the appellant did not at the first instance raise an objection or rather contend that the charge sheet was defective. He in the circumstances cannot be said to have been prejudiced. It is noteworthy that an unlawful act cannot cease to be so through the omission of the word 'unlawfully' in the charge sheet. This ground therefore fails.

[8] [2019] eKLR

[9] [2018] eKLR

31. In the second ground of appeal, the appellant contends that the trial magistrate convicted him based on evidence of an inconclusive DNA medical report. The position in law is that where the only evidence against an accused is that of a single identifying witness, the court should exercise great caution and carefully scrutinize that evidence before making it the basis of a conviction due to the likelihood of a miscarriage of justice. It is trite however that the court can convict on the sole evidence of the victim of sexual offence under Section 124 of the *Evidence Act*[10] but the court must believe that the complainant is telling the truth and records its reasons for such belief.[11]

32. I have looked at the record and the evidence of PW1 (victim). The offence of incest is defined in Section 20(1) of the *Sexual Offences Act* as:

> "(1) 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, provided that if it is alleged in the information or charge that the female person is under the age of eighteen years, the accused 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."

33. Thus the ingredients for the offence of incest are:

(i) Proof that the offender is a relative of the victim.

(ii) Proof of penetration or indecent Act.

(iii) Identification of the perpetrator.

(iv) Proof of the age of the victim.

34. It is not disputed that the Appellant and the Complainant are relatives that is father and daughter. It is not also in dispute that at the time of the alleged offence the complainant was 17 years old. What is in dispute is the issue of proof of penetration and the identification of the perpetrator. On the issue of penetration, in *E E v Republic* [12]the court expressed itself on the question of penetration as follows:-

> " Penetration is defined in section 2 of the *Sexual Offences Act* as
>
> "'Penetration' means the partial or complete insertion of the genital organ of a person in the genital organ of another person.
>
> The penetration or act of sexual intercourse has therefore to be proved to sustain a charge of defilement. In *Bassita Hussein v Uganda*, Supreme Court criminal appeal No 35 of 1995, the court stated,
>
> "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

[10] Cap 80, Laws of Kenya.

[11] See Arthur Mshila Manga v Republic Criminal Appeal No 24 of 2014 [2016] eKLR.

[12] [2015] eKLR

35. The appellant contends that penetration was never proved since DNA test results were inconclusive. It is trite that a DNA test is not mandatory and failure to adduce such evidence does not weaken the prosecution case. [13] In *Williamson Sowa Mbwanga v R*[14], the Court of Appeal pronounced itself as follows:-

> "As regards the first ground of appeal, 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)."

36. It is noteworthy that Section 36 of the Act empowers the court order DNA tests. Regarding this provision, the Court of Appeal in *Robert Mutungi Muumbi v Republic*[15], explained that:

> "Section 36(1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms. Decisions of this Court abound which affirm the principle that medical or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

37. Section 124 of the *Evidence Act*[16] reads:-

> "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" (emphasis added).

38. The proviso stipulates that a court can convict an accused person in a sexual assault cases where the minor is the victim solely on the victim's evidence as long as the court believes that the minor is speaking the truth. In this case, there is no medical evidence to prove penetration. The court is then left with the option of relying on other methods of evidence including the testimony of the complainant or any other witness.

39. It was PW1's testimony that the appellant she had only wrapped a leso on her body after removing her clothes. It was the complainant's evidence that the appellant caused his penis shaft to penetrate into her genitalia and had sexual intercourse with her. On cross-examination, PW1 confirmed that

13 See George Kioji v R CR App No 270 of 2012 (UR).]

14 [2016] eKLR

15 MLD CA CRA No 52 of 2014

16 Supra note 12

the Appellant forced her into having sex with him and that she did not enjoy the act as it was painful and that it was as a result of the defilement that she missed her period and became pregnant. It is noteworthy that on cross-examination, of PW1, the appellant never raised the issue of him having an alibi. Consequently, I find no reason to doubt the findings by the learned trial Magistrate which I accept that there is no intervening factor that anyone else apart from the appellant committed this offence.

40. On the evidence of identification, what this court has to grapple with is whether the appellant was positively identified. The appellant is the complainant's father. He first asked her for food. It's highly improbable that she could have mistaken him. I find and hold that there is nothing to suggest that the appellant was not properly identified.

41. The question is whether the defence of alibi adduced by the appellant can stand. As pointed out by the defence counsel, the dates the appellant claims to have been away differ from the date of the alleged offence. On this ground, his alibi falls. The law today is that it is up to the prosecution to displace any defence of an alibi and show that the accused was present at the place, and at the time the offence was committed by the accused or his accomplices. I am satisfied that the learned Magistrate properly applied her mind to the law and the evidence and arrived at the correct finding. Arising from the above discussion, I find and hold that this appeal against conviction and sentence fails.

DATED AND SIGNED AT VOI THIS 19TH DAY OF OCTOBER 2022

John M Mativo

Judge

Dated and Signed and delivered virtually at Mombasa this 27th day of October 2022

OLGA SEWE

JUDGE