TMN v Republic (Criminal Appeal E020 of 2022)
[2022] KEHC 15700 (KLR) (28 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15700 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E020 OF 2022

GMA DULU, J

NOVEMBER 28, 2022

BETWEEN

TMN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original judgment of Hon. E.M Muiru in Kilungu Principal Magistrate's Court CMCR (S.O) Case No.E027 of 2021 pronounced on 12th January 2022)

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. The particulars of offence were that on diverse dated between January 2021 and July 2021 at unknown time in Kee Location within Makueni County being a male person caused his penis to penetrate the vagina of CNT (name withheld) a female child aged 14 years who to his knowledge was his daughter.

2. 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 between the same dates and at the same place intentionally touched the vagina of CNT a child aged 14 years with his penis.

3. He denied both charges. After a full trial he was convicted of the main count of incest and sentenced to life imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, and relied on the following grounds –

    1. The trial magistrate erred by failing to observe that the trial was conducted in contravention of section 19 of the *Oaths and Statutory Declarations Act* concerning the reception and

admissibility of a child of tender years, Article 4 of the *Constitution*, and section 2 of the *Sexual Offences Act* as well as presiding over an unfair trial against his constitutional rights.

2. The trial magistrate erred in law and in facts when he convicted and sentenced him without observing that the charges before the court were defective for both being at gross variance with the evidence on record.

3. The learned magistrate erred in law and fact by convicting him without considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of incest to the required standard in law beyond reasonable doubt.

4. The learned magistrate erred both in law and fact by failing to apply section 124 of *Evidence Act* and to observe that the prosecution case was full of contradictions and inconsistencies which rendered the prosecution case unbelievable.

5. The learned trial magistrate erred both in law and fact when he dismissed his defence which alleged possibility of being framed up due to an existing grudge without giving cogent reasons under section 169 of the *Penal Code*.

5. The appeal was canvassed through filing of written submissions. In this regard, I have considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

6. This is a first appeal. I am thus bound to apply the legal principle 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 v Republic* (1972) E.A 32.

7. In proving their case, the prosecution called 5 witnesses. The appellant on his part tendered sworn defence testimony and did not call any additional witnesses.

8. The appellant has raised technical as well as substantive grounds of appeal. The first technical ground is that the charge is defective, as it is at variance with the evidence on record.

9. In my view, there was no defect on the charge sheet. What is stated in a charge or information is an allegation which has to be proved. If the prosecution evidence contradicts the allegation in the charge, then it means the charge or allegation is not proved. It does not mean that the charge is defective.

10. The appellant has complained that the trial was conducted in contravention of section 19 of the *Oaths and Statutory Declarations Act*, Article 4 of the *Constitution* and section 2 of the *Sexual Offences Act*, and as a result of which it was unfair trial. What I understand from this complaint is that the complainant Pw1 was not subjected to voire dire examination before testifying in court.

11. Indeed, under section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), a child of tender years is required to be examined on whether he or she understands the nature of an oath and knows the importance of saying the truth, before testifying either on oath or without taking the oath.

12. Pw1 was not subjected to voire dire examination. She was indeed a minor, below 18 years. However, all the evidence on record was that she was above 14 years of age. I am aware that courts have sometimes subjected children below 18 years to voire-dire examination. However, that is the practice. The rule of law as repeatedly stated by the courts is that children below 14 years are of tender years, and it is only for such children that the law requires to be put through voir-dire examination. I thus dismiss that complaint as Pw1 was above 14 years.

13. I now come to the proof of the offence. From the evidence on record tendered by the alleged victim Pw1 CNT, Pw2 EK her grandmother, and Pw4 Erick Kasiamani the Clinical Officer at Kilungu Sub-County hospital, I find that the age of the victim was 17 years, not 14 years as alleged. The victim was thus a minor, but aged 17 years.

14. Legally speaking however, incest can be committed even between people who are above 18 years, as the victim does not have to be a minor.

15. With regard to penetration, Pw1 the victim stated that she was sexually penetrated. The Clinical Officer Pw4 testified that the medical evidence was that the victim's hymen was broken and that she was 20 weeks pregnant. This was about 5 months pregnancy.

16. In my view, from the evidence on record, the prosecution proved beyond any reasonable doubt that the victim was sexually penetrated.

17. With regard to the element of the relationship of the victim and the appellant, there is no dispute, and there is no denying from the appellant, that the victim was a daughter of the appellant. The prosecution thus proved this element beyond any reasonable doubt.

18. I now turn to the identity of the culprit. The victim Pw1 said that the appellant was the culprit. It is evidence of a single victim witness of a sexual offence. Under the provisal to section 124 of the *Evidence Act*, such evidence does not require corroboration to sustain a conviction, provided it is believable and so believed by a trial court on reasons to be recorded in the proceedings.

19. In the present case, and with the evidence on record, in my view there was no sufficient basis for the magistrate to believe the evidence of the victim. First, the victim did not inform anybody about the acts of the appellant. Secondly, the teacher who is said to have broken the news of the pregnancy was not called to testify. Thirdly, there was also the vehement denial on oath of the appellant, which was not shaken in cross-examination.

20. Thus, in the circumstances of this case where advanced pregnancy of Pw1 was detected, in my view in rebutting the defence of the appellant, the prosecution should have waited for the three (3) months for the child to be born, and then a DNA test conducted. In my view also, with the existing delicate family relations, and especially wherein Pw2 does not appear to have been happy that the appellant took custody of the children after Pw2's daughter separated from the appellant, the possibility of existence of a grudge and fabrication of a case against the appellant is quite high.

21. I thus give the benefit of the doubt to the appellant and find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. The conviction will thus be quashed and sentence set aside.

22. 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 28TH DAY OF NOVEMBER 2022, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE