DOO v Republic (Criminal Appeal E217 of 2022)
[2025] KEHC 2602 (KLR) (Crim) (3 March 2025) (Judgment)

Neutral citation: [2025] KEHC 2602 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL E217 OF 2022

CJ KENDAGOR, J

MARCH 3, 2025

BETWEEN

DOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against conviction and sentence in Makadara Magistrates Courts S.O No. 229 of 2018 delivered on 14th October, 2022 by Hon. M. Kivuti (SRM.)

JUDGMENT

1. The Appellant was charged with the offence of incest contrary to Section 201 (1) of the *Sexual Offences Act* No. 3 of 2006 and faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 6 of 2006.

2. The particulars of the offences are that, under the main charge: on the diverse dates between 1st January, 2016 up to 6th October, 2018, in Makadara District within Nairobi County, being a male person caused his penis to penetrate the vagina of NM female a child who was to his knowledge his niece.

3. The Appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*. The particulars being that on diverse dates between 1st January, 2016 and 6th October, 2018 within Nairobi area County, the Appellant intentionally and unlawfully touched the genital organ (vagina) of NM, a child aged 15 years with his penis.

4. The Appellant was after trial found guilty on the alternative count and was thereby sentenced to eight (8) years imprisonment. Being, aggrieved by the conviction and sentence, and he preferred the present appeal.

5. The Petition of Appeal dated 11th November, 2022 raised 19 grounds of appeal. The gist of the grounds is that he contended that the trial Court misstated the evidence and relied on discredited evidence on record, thereby wrongly convicting him. Further, that the prosecution failed to establish the ingredients necessary to suffice the conviction on the charges against him. He faulted the learned magistrate for his failure to note the doubts, inconsistencies and discrepancies in the prosecution evidence, consequence of which he ought to have been acquitted. In addition, he argued that no proper reasons were given for the rejection of his defence, and that the learned magistrate erred by holding that penetration amounted to an indecent act contrary to Section 11(1) of the *Sexual Offences Act*.

Written submissions

6. The Appellant submitted that the learned trial magistrate erred in matters of both law and fact by failing to find that the prosecution case was not proved beyond reasonable doubt on the alternative charge leading to the Appellant to be improperly convicted. He submitted that the trial Court did not caution itself against relying on the evidence of a single identifying witness, as the evidence of PW1 and PW2 differs. Further, that the sentence imposed on the Appellant is harsh given that the probation officer's report favored the Appellant in all aspects.

7. The Respondent, at the time of making this determination, had not yet filed its submissions.

Determination

8. I have considered and analyzed the evidence that was tendered in the trial Court by both the Appellant and the prosecution, the grounds of appeal, and the written submissions. The issues for determination are two pronged;

    i. Whether the prosecution proved their case to the required threshold, and;

    ii. Whether the sentence was appropriate.

9. It is the duty of the first Appellate Court to carefully examine and analyze afresh the evidence presented from the trial Court and draw its own conclusion. An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination. (See Pandya vs. Republic (1957) EA 336).

Whether the prosecution established its case against the appellant beyond reasonable doubt?

10. First, it is noteworthy that for the offense of incest to suffice, there must be proof beyond reasonable doubt of either 'the commission of an indecent act or penetration'. Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006 which is titled "incest by male persons", provides as follows;

> 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 and proved 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." (emphasis is mine)

11. On the other hand, under Section 11 (1) of the Act, the offence of indecent act with a minor which was the minor alternative offence provides as doth:

> " Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years".

12. Section 2 (1) of the Act defines indecent act as an intentional act which causes;

    (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.

    (b) exposure or display of any phonographic material to any person against his or her will, but does not include an act which causes penetration."

13. In this instance, having considered the prosecutorial evidence during the trial Court's proceedings, I agree with the learned trial magistrate that the crucial element of the Complainant's relationship to the Appellant was not established in evidence, beyond reasonable doubt to suffice the main charge. In as much as the Complainant consistently referred to the Appellant as 'uncle', both PW4: PC Elizabeth Mwikali and DW2: Pheny Bosibori, the Appellant's wife, conceded that the Complainant's deceased mother was the sister to DW2. Simply put, DW2 is the complainant's maternal aunt.

14. Section 22 (2) of the *Sexual Offences Act* sets the test for consanguinity;

    (a) an "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;

    (b) "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;

15. Based on the definition of an uncle vis a vis a niece within the auspices of the Act, the relationship between the Appellant and the Complainant herein, does not fit the criterion. It would follow that the main charge of incest contrary to Section 20 (1) of the Act falters.

16. That said, I shall proceed to the merits of this appeal as preferred by the Appellant herein. He primarily faults the trial Court for finding him guilty of the alternative charge; the offence of committing an indecent act with a child, erroneously, on the context that penetration was established.

17. The record before me, shows clearly that complainant was properly subjected to voire dire examination at the end of which, the learned Magistrate concluded that she was intelligent and understood the duty of speaking the truth and the nature of an oath and directed her to give sworn evidence.

18. The provisions of Section 124 of the *Evidence Act*, are informative to the end that a conviction can rest squarely on the sole testimony of the victim/complainant. See Daniel Maina Wambugu v Republic [2018] KEHC 5656 (KLR).

    Section 124 of the *Evidence Act*, Cap 80 provides as follows:

> " Notwithstanding the provisions of Section 19 of the Oaths and Statutory Declaration Act, where the evidence of the victim admitted in accordance with that section on behalf of the Prosecution in the proceedings against any person for an offence, the accused shall not be liable to be convicted in proceedings against him unless it is corroborated by other evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, the only evidence is that of the alleged victim of the offense, 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."

19. The triune ingredients are the age of the victim (must be a minor), contact of one's body part to either the genitalia, breast or buttocks of another, and that contact was done intentionally.

20. The first element is age. The Court of Appeal in Edwin Nyambogo Onsongo vs. Republic (2016) eKLR stated as follows in respect of proving the age of a victim in cases of defilement:

> "... the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. We think that what ought to be stressed is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable." (emphasis added).

21. The minor's age was established by the sworn testimony of the Complainant. At the time of her oral testimony, she testified that she was 16 years, and confirmed that at the time of the incident on 5th October, 2018, she was 15 years. I note that the medical examination report estimated her age to be 13 years. The medical summary sheet, based on her statement, documented her year of birth as 2002 but did not particularize the exact month or day. Based on the medical exam report and the complainant's testimony, I find the minor's age to be 15 years at the time of the incident. In his submissions, the Appellant did not contest the minor's age, and conceded that she was a minor.

22. The second issue is whether the prosecution established intentional contact of the appellants body with the minor's genitalia, breasts or buttocks, beyond reasonable doubt. As I have held hereinabove the provisions of Section 124 of the *Evidence Act*, are informative to the end that a conviction can rest squarely on the sole testimony of the victim.

23. Lord Denning in Miller v Ministry of Pensions, [1947] 2 ALL ER 372 had this to say about standard of proof-

> "That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

24. The Appellant argued that there exists undeniable contradictions and inconsistencies in the Complainant's testimony, in that she could not reliably outline the specific days that the alleged incidences occurred. In addition, that a witness by the name Valentine was not called.

25. With regards to discrepancies and contradictions, in John Mutua Munyoki v Republic [2017] KECA 376 (KLR) the Court of Appeal noted as follows;

> "How about inconsistencies and contradictions? There were quite a number though the respondent dismissed them as inconsequential. In cases where the court has to prefer the evidence of one person against the other, for instance between the accused and the complainant and that is the only evidence, the court must approach such evidence with a

degree of circumspection, particularly in sexual offences that are normally committed in secrecy with hardly any eye witness. Contradictions and inconsistencies therefore matter in deciding who to believe. The contradictions have to be considered and weighed carefully."

26. Further, in Philip Nzaka Watu v. Republic [2016] eKLR where the Court of Appeal stated as follows:

> "However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses. Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

27. The Complainant was residing with the appellant and his family. PW2's testimony shows the genesis of how a disagreement back then resulted in the referral of the matter to the police. PW3 testified on the findings of medical examination on 8th October, 2018 for a sexual assault. The history provided during the medical examination indicated that the Complainant was a victim of a sexual assault said to have occurred on 5th October, 2018. The findings reported that the Complainant had old tears and fresh lacerations in the vagina.

28. The Complainant used the term rape and defile when recounting the sexual encounters which she said were all by the Appellant but she could not tell how many times it had occurred. She stated that the first incident occurred in 2016, which she described as when she had come from her rural home and stated that the Appellant would defile her after 1- or 2-weeks intervals. During cross-examination, the Complainant recounted that the Appellant defiled her when he returned home from work and she had come from school.

29. The Appellant in his defence accused the Complainant of running away from home on the 5th October, 2018. He stated that between 2016 and 2018, the Complainant would threaten to commit suicide whenever she was confronted about making a mistake. He stated that the Complainant framed him in the current case after he confronted her about a complaint that had been made by a lady, whom the Complainant visited often, who asked the Appellant's wife to caution the Complainant from going to her house.

30. In assessing the Complainant's testimony, I find her recollection of the sexual encounters to consist of detailed and vivid accounts; the trial Court in the judgment noted that it believed the Complainant and had no reason to doubt her truthfulness. She provided thorough descriptions of when these encounters occurred and stated that she had lost count of how many times they took place.

31. The sexual encounters described by the minor lacked clarity regarding her definitions of rape and defilement. Nonetheless, her account unequivocally indicates that an inappropriate act took place.

32. Section 2(1) of the *Sexual Offences Act* defines an indecent Act to mean: "indecent act" means an unlawful intentional act which causes—

    (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

    (b) exposure or display of any pornographic material to any person against his or her will;

33. The medical reports indicated lacerations on her vagina four days after what the Complainant described as the last ordeal; this was related to the last incident and amounted to defilement for which the Appellant was not charged. The offence of incest was not upheld because the incestuous relationship was not proven.

34. As much as the Appellant challenges the inconsistencies regarding when the Complainant disclosed the ordeal, I find this inconsequential. It has not, in any way, undermined the Complainant's testimony or cast doubt on its veracity. The complainant had been living with the appellant and his family following her mother's death. She informed the court that she feared confronting the abuse because the appellant would threaten her. Furthermore, they were the only family she knew and were supporting her education and accommodation.

35. On the same breath, the mere fact that the prosecution did not call some witnesses, herein the alleged Valentine, the same did not vitiate the prosecution case against the Appellant, this being a sexual offence where under Section 24 of the *Evidence Act*, the Court can convict based on the sole evidence of the Complainant.

36. The incidents occurred over nearly two years. While the evidence does not fully prove penetration in some of the sexual encounters, it indicates that an indecent act was committed against a child. The circumstantial evidence provided by witnesses PW2 and PW4 supports the victim's account. When considered together, the evidence demonstrates beyond a reasonable doubt that indecent acts took place by the contact from the appellant by his penis on the Complainant's vagina.

37. It follows that the Appellant's defence, asserting that the allegations were fabricated and that the Complainant became ill-mannered following her mother's death, remains unsubstantiated. The Court evaluated the evidence and concluded that the victim was truthful. The Appellant's claim that the charges were fabrications by the Complainant was found to lack basis. The trial Court considered the issue and deemed it an afterthought. Consequently, I see no reason to diverge from the trial magistrate's findings, having had the opportunity to hear and observe the Complainant during her testimony and to weigh it against the Appellant's defence while assessing their demeanor. For these reasons, I have reached the same conclusion as the learned trial magistrate, albeit with different findings regarding the issue of penetration.

38. In this case, the prosecution has proven its case against the Appellant beyond reasonable doubt on the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.

39. As to the 8-year custodial sentence imposed on the Appellant, I am of the view that the trial Court duly exercised it discretion. Nonetheless, the minimum sentence pursuant to Section 11 (1) of the *Sexual Offences Act*, stipulates that any person who is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

40. The recent position, on the strict principles guiding interference on sexual offences sentences by appellate courts were recently considered by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) which noted that minimum sentences unlike mandatory sentences set the floor rather than the ceiling when it comes to sentences.

41. The sentence was meted out long before the Supreme Court pronouncement set the bar on minimum sentences. I have perused the trial Court's pre-sentencing hearing and the it is noteworthy that the learned magistrate considered "the nature of the offence, mitigation and the decision in Machakos High Court Constitutional Petition No. E017/2021 eklr". The said decision by G.V Odunga faulted

the *Sexual Offences Act* for undermining the discretion of the Court by prescribing minimum mandatory sentences. This Court cannot fault the trial court for relying on the Machakos decision at that time. Moreover, I find the sentence was inherently sound under the circumstances. Any interference would be prejudicial to the Appellant, especially considering that the state did not apply to enhance the sentence in this case.

42. Accordingly, I uphold the conviction and sentence of the trial Court. Consequently, the appeal is hereby dismissed in its entirety.

43. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 3RD DAY OF FEBRUARY, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

C.A- Beryl

Applicant present

Ms. Njoki ODPP Present