JMM v Republic (Criminal Appeal E057 of 2024)
[2025] KEHC 4326 (KLR) (20 March 2025) (Judgment)

Neutral citation: [2025] KEHC 4326 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL E057 OF 2024

LN MUTENDE, J

MARCH 20, 2025

BETWEEN

JMM ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. JMM, the Appellant, was charged with Incest contrary to Section 20(1) of the *Sexual Offences Act*. Particulars were that on the 19th day of February, 2021 in Nyandarua West Sub-County within Nyandarua County, the accused person intentionally and unlawfully caused his penis to penetrate the vagina of MFW a female aged 11 years who was to his knowledge his niece.

2. In the alternative, he faced the charge of Committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars being that on the 19th day of February, 2021 in Nyandarua West Sub-County within Nyandarua County intentionally touched the vagina of MFW a child aged 11 years who was to his knowledge his niece.

3. He was taken through full trial convicted for the offence of incest and sentenced to suffer life imprisonment.

4. Aggrieved he appeals on the grounds that;

    a. The learned trial Magistrate erred in law and in fact in convicting and sentencing the Appellant based on uncorroborated testimony of the complainant.

    b. That the learned trial Magistrate erred in law and in fact in convicting, sentencing the Appellant based on glaringly contradictory and inconsistent evidence tendered by the prosecution.

c. That the learned trial Magistrate erred in law and in fact in failing to find that the failure by the prosecution to avail material witnesses prejudiced the prosecution's case greatly.

d. That the learned trial Magistrate erred in law and in fact in convicting and sentencing the Appellant based on contradicting evidence between the P3 and PRC form.

e. That the learned trial Magistrate erred in law and in fact in finding that the complainant's inner pant and shorts were removed by the Appellant even when such inner pants and shorts were neither identified nor produced in court.

f. That the learned trial Magistrate erred in law and in fact in failing to find that the only reason why the complainant said she had been defiled by the Appellant was because she feared punishment from PW5 from a wrong committed earlier.

g. That the learned trial Magistrate erred in law and in fact in failing to find that the prosecution did not prove their case beyond reasonable doubt.

h. The sentence is excessive and illegal.

5. Briefly, facts of the case were that on 19th February, 2021, FMW the complainant went to collect leaves for goats which she put in a sack when a person pulled her from behind. It turned out to be her paternal uncle. He took her to his house and molested her. She divulged the information to PW5, PN her other uncle who advised her to tell her mother upon returning home from the funeral she had attended with her husband.

6. The complainant was taken to hospital for examination and the matter was reported to the police who recorded statements and caused the Appellant to be arrested.

7. Upon being placed on his defence, the Appellant failed to tender evidence in defence.

8. The trial court considered evidence on record and reached the finding to convict and sentence the Appellant.

9. The appeal was canvassed through written submissions following directions by the court. It is urged by the Appellant that although there is no need for corroboration where the court believes the minor told the truth reasons have to be recorded which was not the case in the instant case.

10. That there are apparent contradictions and in particular the P3 produced indicate the probable weapon used as 'NONE' which is not a weapon. Hence the argument that the aspect of penetration being not corroborated by medical evidence. That the P3 form indicates that there was no discharge; blood or infection noted on the complainant. The anus, labia majora and minora were normal; and, had the Appellant forced himself on the complainant, then the labia minora and majora should have been bruised or lacerated. That she also had no injuries on any other part of her body and she was not pregnant. That the PRC form on the other hand indicated that the hymen was broken. That contradiction noted on the two (2) documents made them unreliable. Failure to identify or produce the inner pants and shorts the complainant stated to have worn was questionable.

11. It was further urged that existence of doubts indicated that the prosecution case was not proved to the required standard. Reliance was placed on the case of Robin Koech v Republic [2022] where it was stated thus;

> " Where there is doubt, it is deemed that the prosecution has not discharged its burden of proof and the benefit of such an event goes to an accused person. In the present case and as already discussed, it is difficult to establish beyond the shadow of doubt that the Appellant

was the person who defiled the victim. It behooved the prosecution to adduce adequate and cogent evidence to nail down the Appellant and point only to him as the person who committed the crime. Unfortunately, the evidence on Record was neither watertight nor sufficient. I find that the last ingredient of identification was not proved to the required legal standard. The Appellant shall benefit from the doubt lingering over his identification as the person who defiled the victim."

12. That as held in Woolmington v DPP [1935] 4KHL 1, it is the duty of the prosecution to prove the case beyond reasonable doubt and the accused bears no duty to prove his innocence. Also cited in this regard was the case of Patrick Ong'au Okhoma [2021] eKLR where the High Court stated thus;

> " Throughout a criminal trial, an accused person bears no duty to prove his innocence. The burden is on the Prosecution to prove their case beyond reasonable doubt."

13. The contradiction between the evidence of the victim and her uncle PW5 was singled out.

14. It was further argued that there was no proof of there having been penetration considering the narration of the victim.

15. Further, that crucial witnesses, the complainant's siblings alleged to have been with her were not called as witnesses.

16. On sentence, it is argued that the life imprisonment sentence imposed upon the Appellant is provided in law but is harsh and excessive. That the Appellant in mitigation sought forgiveness stating that he is HIV positive and was a first offender.

17. The Respondent did not file submissions despite being given an opportunity since July, 2024.

18. I have considered evidence adduced at trial, grounds of appeal and submissions by the Appellant. This being a first appellate court, it is duty bound to subject evidence adduced before the trial court to a fresh evaluation and analysis bearing in mind the fact of not having had the opportunity of hearing the witnesses and observing their demeanour. This was stated in Okeno v Republic [1972] EA 32 as follows;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424."

19. The Appellant was indicted and convicted for incest an offence that is created by Section 20(1) of the *Sexual Offences Act* which enacts that;

> " 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."

20. The prosecution was therefore duty bound to prove that; an indecent act or act of penetration was committed; the offender had knowledge that the victim was a relative; and for purposes of sentencing age of the victim is relevant.

21. The charge sheet indicates the age of the victim as eleven (11) years. A copy of the victim's birth certificate was adduced in evidence establishing that she was born on 9th January, 2009. In Francis Omuroni v Uganda, Criminal Appeal No. 2 of 2000; the Court of Appeal stated that;

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense...."

22. The question of age not being in dispute the prosecution proved beyond reasonable doubt that the victim was of an apparent age of 11 years.

23. On the question of the degree of consanguinitas that did exist between the complainant and the Appellant, evidence tendered was that the victim was the Appellant's paternal niece which he does not dispute.

24. Penetration is defined by Section 2 of the *Sexual Offences Act* as;

> " .....the partial or complete insertion of the genital organs of a person into the genital organs of another."

25. Evidence regarding the act was of a single witness, the victim. She testified that the Appellant found her as she fetched leaves to feed goats. He pulled her from behind, the leaves that were on the sack fell down. That the Appellant held her sweater and pulled her inside the house and threw her on the seat inside the house he occupies alone, as he sent away his wife and children. That he covered her mouth, removed her panty and shorts. He lifted the dress, lifted her, placed her on the bed and made her lie facing up. He went unto her, removed his trouser and the thing he uses to urinate in the middle of the road and inserted it inside her vagina. She felt pain and screamed.

26. It is urged that penetration did not occur. According to the PRC form there was no evidence of trauma on the vagina but the hymen was broken. PW3 Teresia Ndumia who filled the P3 form stated that the hymen was freshly broken. Although her evidence is contradicted by what she wrote on the P3 form that at the time of seeing the victim a day after the incident, there was no evidence of physical harm.

27. The victim was a child. Section 124 of the *Evidence Act* provides that;

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material 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 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."

28. In Kassim Ali v Republic, Criminal Appeal No. 84 of 2005 (Mombasa) the court stated that;

> " ... The absence of medical examination to support the fact of rape is not decisive as the fact of rape can be proved by the oral evidence of a victim of rape or by circumstantial evidence."

29. In AML v Republic [2012] eKLR the court stated that;

> " The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

30. The trial court considered evidence adduced by the victim. In believing her, it opined that "the clear narration by the victim herein described a male – female sexual intercourse. There is therefore sufficient evidence on record to prove that the victim's vagina was penetrated by Penis". It is hence not right to allege that the learned trial Magistrate did not give the reason for believing the victim.

31. On the question of crucial witnesses having not been availed to testify. Section 143 of the *Evidence Act* provides thus;

> No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact.

32. In Keter v Republic [2007] EA 135 the court of Appeal stated that;

> " The prosecution is not obliged to call a superfluity of witnesses but only such witnesses are sufficient to establish the charge beyond any reasonable doubt."

33. The stated crucial witnesses were the victim's siblings that were with her pursuant to her testimony she stated that she was behind her siblings when the Appellant pulled her and carried her into his house. Of importance is that there was no eye – witness to the act, evidence that was not challenged as the Appellant opted to give no explanation to what transpired.

34. On the question of contradictions that were discernible; In Twehangane Alfred v Uganda (Criminal Appeal No. 139 of 2001) [2003] UGCA 6 it was held that;

> " With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

35. With that principle as a guide, the contradiction pointed out in respect of the victim's testimony is that she said that PW5 pushed the door after the act and the Appellant threw her out with her clothes. On his part PW5 stated that he had sent the complainant to get a rope and she took too long and when she ultimately returned she said that she had been at the Appellant's place who had defiled her.

36. PW5 denied having pushed the door, he was the Appellant's brother who said in re-examination that he did not confront the Appellant because they would have fought. He also advised the victim to inform her mother of what had befallen her. Which she did and the matter was reported to the police. This

was a contradiction that was satisfactorily explained which cannot lead to the victim's evidence being rejected. Evidence of the complainant proved that penetration occurred and the Appellant was the perpetrator of the act.

37. On the question of sentence, the contention is that the sentence imposed of life imprisonment is harsh and excessive. The proviso to Section 20(1) of the *Sexual Offences Act* enact that;

> 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.

38. The word liable in the sentence clause permits the court to exercise discretion. In MK v Republic [2015] the Court of Appeal stated that;

> " 17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?
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> 18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
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> 19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment."

39. In the MK case (Supra) the court set aside life imprisonment and sentenced the Appellant to 20 years imprisonment.

40. This being an appellate court it has limited power to interfere with the trial court's sentences. It must be demonstrated that the sentence was harsh and excessive in that the court acted on wrong principles.

41. In mitigation the Appellant stated that he was a first offender and HIV positive. A maximum penalty being imposed on a first offender may be deemed harsh. (See Arrisol v Republic [1957] EA 447).

42. The aggravating circumstances were that; as stated the Appellant was HIV positive, yet he carried out the heinous act against his niece.

43. The upshot of the above is that the appeal against the conviction lacks merit and is accordingly dismissed. But, the sentence is set aside and substituted with a sentence of 25 years imprisonment which will be effective from the date of arrest, 21st February, 2021.

44. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MARCH, 2025.

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L.N. MUTENDE

JUDGE