ANW v Republic (Criminal Appeal E115 of 2024)
[2025] KEHC 4489 (KLR) (8 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4489 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL E115 OF 2024

DR KAVEDZA, J

APRIL 8, 2025

BETWEEN

ANW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. M. Maroro (SPM) delivered in Chief Magistrates' Court (Kibera) S.O. Case No. 39 of 2022 on the 4th day of March 2024)

JUDGMENT

1. The Appellant was charged and after full trial convicted by the Subordinate Court of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars were that on diverse dates between 2018 and April 2022 at Kangemi Location Dagoretti within Nairobi County, the appellant, being a male person, caused his penis to penetrate the vagina of JWN, a girl aged 15 years who was, to his knowledge, his daughter. The appellant was sentenced to serve 20 years imprisonment on the main count and 10 years imprisonment on the alternative count. The sentences are to run concurrently.

2. Aggrieved, he filed an appeal challenging his conviction and sentence. The appellant raised seven grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted and contended that he was not accorded a fair hearing as he was not supplied with witness statements during trial. He urged the court to quash his conviction and set aside the sentence.

3. The appeal was canvassed by way of written submissions, which I have considered.

4. This is the first appellate court and in Okeno v. R [1972] EA 32, the Court of Appeal for East Africa laid down what the duty of the first appellate court is. It is to analyse and re-evaluate the evidence that

was before the trial court and come to its own conclusions on that evidence without overlooking the conclusions of the trial court but bearing in mind that it never saw the witnesses testify.

5. With the above, I now proceed to determine the substance of the appeal. In his grounds and submissions, the appellant complains that the trial magistrate failed to appreciate the ingredients of the offence of incest.

6. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt.

   Section 20 of the *Sexual Offences Act* provides for:

   Incest by male persons

   (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 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.

7. The critical ingredients for the offense of incest as defined in section 20 (1) of the Act are that; the victim and the accused fall within the prohibited degrees of consanguinity, the age of the complainant, proof of penetration, and positive identification of the perpetrator.

8. PW1, JWN, born 4 July 2007. She lived with her mother in Gishagi, separated from her father since early that year. She testified that from 2014, her father, the appellant, made her bring bathwater to the bathroom and wash his underwear, beating her and her siblings if they refused. He also forced her to sleep in his bed, where he would rape her, warning her to stay silent. She never told her family. Later, Gichagi Dispensary staff noted signs of sexual activity, leading her to Kangemi Police Station and Nairobi Women's Hospital. She said he defiled her five times in one week, stopping only when she reached class eight.

9. In cross-examination, she confirmed the abuse began in class four, with beatings even without cause. He also made her make his bed. On re-examination, she reiterated that he isolated her starting in 2014, defiling her when alone together.

10. PW 1's testimony did not require corroboration in accordance with the proviso to section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) if the trial magistrate recorded reasons why she believed the child was telling the truth. In this case, the trial magistrate noted that PW1's testimony was not shaken on cross-examination and that it was consistent.

11. On additional corroborating evidence, in March 2022, MM (PW2) noticed PW1, a minor, complaining of an itchy vagina. She took her to the hospital multiple times in March and April, where a doctor revealed someone had been sexually active with her. John Njuguna (PW3), a clinician at Nairobi Women's Hospital, confirmed this on 13th April 2022 via a GVRC form. The minor, born on 4th July 2007, reported stomachaches and admitted her father had defiled her repeatedly since class four. Examination showed an old torn hymen, though no STIs were detected; he produced the GVRC and P3 forms as evidence.

12. Betty Njeri (PW4), a GBV ambassador, learned of the abuse on 12th April 2022. After verifying with the landlady, she intervened, noting the minor's fear of her father. She alerted the children's officer, leading to the appellant's arrest. Rosemary Muthoni (PW5) had also observed the minor's prolonged illness—

rashes on her armpits and private parts. A hospital visit revealed an STD and the minor confessed to her father's long-term abuse. Rosemary reported it to Kangema Police Station. She later clarified the minor sought her help, and a nurse recommended Nairobi Women's Hospital after providing cream.

13. Patrick Simiyu (PW6), the investigating officer, acted on a rescue call, confirming the appellant as the minor's father. He took them to the station, recorded statements, and presented her birth certificate. The minor mentioned washing her father's underwear, though the appellant wasn't medically examined.

14. In his defence, the appellant claimed he'd lived with his children since 23rd December 2014 due to his wife's mental health issues. In December 2021, after his hospitalisation, his wife briefly returned but left with one child in February 2022, leaving four behind. That month, he noticed his eldest scratching her armpit and planned a hospital visit, but Mary Muthoni stepped in. Days later, three men arrested him, questioning him about his daughter before taking him to Kabete Police Station. He insisted he had a good relationship with her, denying any abuse or threats, and alleged she'd been coached to accuse him.

15. The primary issue is the relationship between the victim and the appellant, and his identification. PW1 testified that the appellant is her biological father, a fact corroborated by her birth certificate, tendered in evidence, listing him as such.

16. On identification, PW1 provided vivid testimony of the appellant's repeated sexual assaults, including threats. Given her familiarity with him as her father, I hold that the appellant was both correctly identified and perpetrated the acts.

17. Regarding penetration, PW3, a clinician, observed an old torn hymen, consistent with PW1's account of the appellant's actions, thus supporting the prosecution's case.

18. As to the minor's age, PW6 produced her birth certificate, confirming she was born on 4th July 2007, rendering her a minor under the law at the time of the offences.

19. The appellant's identity as PW1's father, coupled with evidence of penetration, satisfies me that the prosecution proved its case beyond reasonable doubt. The conviction of the trial court was proper and is upheld on the main count.

20. However, the trial court convicted the appellant on both the main charge and the alternative charge. In doing so, the trial court fell into error. It is trite law that a conviction cannot be made on both the main charge and the alternative charge. This position was stated by the Court of Appeal in David Ndumba vs Republic [2013] eKLR thus: -

> " On the issue of the alternative charge, we find that nothing turns on the fact that the trial court did not make a pronouncement on the same. In M.B.O. –VS- Republic, Criminal Appeal No. 342 of 2008, this Court held,
>
> > " The practice of charging offences in the alternative is one of abundant caution and that is why no finding is made on such charge once there is ample evidence to support the main charge.'"

21. The charge is an alternative to and not an addition to the main charge and therefore once the trial court found that the prosecution had proved the main charge of attempted defilement, the trial magistrate had no business in proceeding to convict the Appellant on the alternative. For that reason, I partially allow the appeal on conviction by setting aside the conviction on the alternative charge.

22. That notwithstanding, sentences are intended, inter alia, to punish an offender for his wrongdoing, they also aim to rehabilitate offenders to renounce their criminal tendencies and become law-abiding citizens. I have no doubt that the sentence imposed by the trial court on the main charge, in this case, was lawful.

23. For the above reasons, I hereby affirm the sentence of twenty (20) years imprisonment imposed on the main charge. The sentence on the alternative charge is set aside.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 8TH DAY OF APRIL 2025

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Mutuma for the Respondent

Tonny Court Assistant