PMN v Republic (Criminal Appeal E086 of 2023)
[2025] KEHC 10439 (KLR) (16 July 2025) (Judgment)

Neutral citation: [2025] KEHC 10439 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E086 OF 2023

RPV WENDOH, J

JULY 16, 2025

BETWEEN

PMN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. PMN [the appellant] was charged with the offence of Incest contrary to section 20[1] of the *Sexual Offences Act*. The particulars of the charge were that on 2/12/2022 in Trans Nzoia East sub-county, intentionally and unlawfully inserted his male genital organ i.e., penis into the female genital organ of DCT, a girl aged five [5] years, who to his knowledge was a granddaughter.

2. In the alternative, he faced a charge of committing an indecent Act with a child contrary to section 11[1] of the *Sexual Offences Act* in that he caused his penis to touch the vagina of the child DCT.

3. He faced a second count of Sexual assault contrary to section 5[1] [a] [1] of the *Sexual Offences Act*. The particulars of the charge were that on the same date as above, used his fingers to penetrate the vagina of DCT a child aged five [5] years, a person he knew to be his granddaughter. The appellant was convicted on the first count and acquitted of the alternative charge and count II.

4. The Appellant was sentenced to serve forty [40] years imprisonment. The appellant is aggrieved by both conviction and sentence and filed this appeal based on the following grounds:

    1. The court erred by shifting the burden of proof on the appellant;

    2. That the court failed to consider his defence;

    3. That the charge was not proved to the required standard;

    4. That crucial witnesses were not called;

5. That the sentence is harsh and excessive

5. The appellant therefore prays that the conviction be quashed, sentence set aside and he be set at liberty.

6. This being a first appeal, it behoves this court to re-examine afresh all the evidence tendered in the trial court, subject it to fresh analysis and evaluation and arrive at this court's own conclusions but leave allowance for the fact that this court did not see or hear the witnesses testify. This court relies on the decision of Okeno v Republic [1972] EA 32 for guidance where the court said;

> " An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination 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. It is not the function of the 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 conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses".

The Prosecution Case: -

7. The prosecution called a total of four witnesses in support of their case.

8. PW1 DC a child in Grade I underwent a voire dire examination and the court allowed her to give sworn testimony because the court found her competent to do so. She recalled that she used to live with her grandfather. She recalled that they were playing when the grandfather picked and took her to the house, placed her on his bed and removed her clothes and inserted his finger into her vagina and did bad manners; that he threatened her that he would throw her out; that he removed his trouser and put a finger-like thing in her vagina and wounded her; that she felt so much pain and screamed and he threw her out of the house; that when her grandmother arrived, she told her about it and she was taken to Hospital then police station.

9. PW2 Kennedy Okango is a Clinical Officer based at Cherangany sub-County hospital. He recalled that a child D.C was taken for examination by her grandmother in a case of defilement; that the minor had been seen at [Particulars Withheld] School before she was taken to him; that she complained of passing urine while in pain.

10. He found that the hymen was partially torn and concluded that there was some penetration.

11. PW3 MN is the grandmother of PW1. She testified that on 2/12/2022, she had left home for the farm and returned at 10.00p.m.; that her granddaughter informed her that she had been defiled by the grandfather. She examined the complainant who complained of pain and aching stomach and that her grandfather had threatened her. She took the complainant to Hospital next day but did not ask her husband because he is very harsh. PW2 said that the complainant is five [5] years old.

12. PW4 PC Joshua Maloi of Cherangany police station is the Investigating Officer in this case. He recalled that on 25/1/2023, he received a report of defilement from MN that DC had been defiled on 2/12/2022. She was taken to Hospital and P3 form filled. PW1 produced the mother/child Book as an exhibit and it includes the complainant's date of birth on 9/12/2017 [P.Exh.5].

Defence Case:-

13. Accused testified on oath in his defence. He denied both offences. He recalled having been at home on 17/2/2023 when he heard a knock on the door. The door was open, police entered and assaulted

him, asked him to lock up and follow him. He was arrested for reasons he did not know. Later, he was asked if he knew Doreen which he admitted that she was his granddaughter and he was then accused of sexual assault. He denied knowing when the incident occurred. In cross examination the appellant stated that the complainant is a good girl, doesn't lie and maybe she was coerced to lie and frame him by the children she plays with.

14. The appellant filed submissions. He submitted that the prosecution case was full of contradictions as regards when the offence occurred; that whereas the offence is alleged to have been committed on 2/12/2022, the medical report refers to the complainant's being attended to on 10/8/2021 and 6/12/2022 then 26/1/2023; that the contradictions are not minor.

15. He also submitted that the medical evidence was not sufficient to support a conviction; that complainant's genitalia were found to be normal and that the hymen was partially torn and that the tear was old; that this was not evidence of penetration because the hymen can be torn in any other manner other than sexual assault.

16. The appellant also submitted that the offence was not proved to the required standard. He questioned why the complainant was not taken to hospital on 2/12/2022.

17. The appellant also complained that the sentence is harsh and excessive as it is disproportionate and violates his Constitutional rights.

18. In opposing the appeal, the Respondent identified three issues for determination being: -

    1. Whether the defence was considered;

    2. Whether crucial witnesses were deliberately left out;

    3. Whether the offence was proved beyond reasonable doubt;

    Section 20[1] of the *Sexual Offences Act* provides

    > " [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.

19. From the above section, the ingredients for the offence of incest are:

    1. Proof that the offender is a relative of the victim within the prohibited degrees of consanguinity;

    2. Proof of penetration or indecent act;

    3. proof of identity of the perpetrator.

20. On proof of the relationship between the complainant [PW1] and the appellant; PW1 and 3 identified the appellant as the grandfather of PW1. In fact, the appellant admitted to being the complainant's grandfather. They lived together and he described her as a good girl.

21. On proof of indecent act or penetration Section 2 of the *Sexual Offences Act* defines an Indecent Act as: -

    [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;"

22. Under Section 2 of the *Sexual Offences Act*, "penetration, means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

23. The complainant [PW1] who was aged five [5] years testified on oath after a voire dire examination, that the grandfather, the appellant, took her to his room, inserted fingers in her genitalia, then inserted a 'fingerlike thing' in her vagina as a result of which she felt a lot of pain and cried; that the grandfather had threatened her not to cry and as a result he threw her outside. PW3, upon returning home, that night, found the complainant in the appellant's bed PW1 complained to her about what had happened. PW3 examined PW1 and according to the treatment notes, found PW1's vulva reddish. The treatment notes and PW2 who later examined PW1 on 26/1/2023, found that indeed PW1's hymen was partially torn.

24. The appellant argues that there was no penetration because of the findings that the hymen was partially torn.

25. In the case of Mark Oiruri Mose v Republic [2013] eKLR, the Court of Appeal said "So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated and penetration need not be deep inside the girl's organ".

26. In the instant case, PW1's testimony taken with the findings of PW2 and 3, there is no doubt penetration was proved.

27. Even if penetration was not proved, the mere fact that the complainant's genitalia was groped with a finger and the male genital organ came into contact with hers, an indecent act was committed.

28. The appellant complained that the prosecution evidence was contradictory because it was alleged that the offence took place on 2/12/2022 yet the Doctor saw the witness [PW1] on 26/1/2023. It is clear from the record that though the complainant was defiled on 2/12/2022, it seems PW1 did not report to the authorities immediately. However, a delay in reporting the offence does not necessarily mean that the offence was not committed. PW3 was not asked to explain the delay.

29. Although the appellant claims to have been framed. The allegation that he may have been framed by friends of the complainant who is only five [5] years does not even make any sense.

30. PW1's testimony was clear, cogent and credible. The appellant himself stated that PW1 is a good girl and never lies. PW1's vivid and graphic description of the ordeal leaves no doubt in the court's mind that the appellant turned against his own grandchild in the absence of PW3 and violated her innocence. I find that it is the appellant who committed a sexual act with the complainant [PW1] which amounts to incest.

Whether the defence was considered;

31. In the Record of Appeal page 4, line 23-29, the trial court considered the appellant's defence and did not believe the appellant's narration that young children, friends of PW1 framed him. There was no reason for the children to do so. This court is of the same view. The defence was duly considered and dismissed as untrue.

Whether some witnesses were not called;

32. The general principle of law, whether a witness should be called by the prosecution is a matter within the prosecution's discretion. In Bukenya & others v Uganda [1972] EA 549 the Eastern Africa Court of Appeal said;

33. The prosecution must make available all witnesses to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the first decision of the case. Where the evidence called is barely adequate, the court may infer that the evidence of uncalled witnesses would have tended to be averse to the prosecution".

34. The court added that the prosecution is not expected to call a superfluity of witnesses. In Keter v Republic [2007] 1 EA 135, the court held inter alia;

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

36. Section 143 of the *Evidence Act* Cap 80 Laws of Kenya also provides "no number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact".

37. In the instant case, PW1 was the only witness to the incident as is common in Sexual matters which are committed in the dark or in secrecy. The appellant did not point to any other witness that should have been called.

38. I find the conviction safe and I affirm it.

Whether the sentence is harsh and excessive.

39. Under the proviso to section 20[1] of the *Sexual Offences Act* it is provided that upon conviction, if the victim is under 18 years, the accused is liable to life imprisonment. In this case, the complainant was only five [5] years old. The act must have been very traumatic to the little girl, committed by the very person who was supposed to protect her. It called for a deterrent sentence. The appellant was said to be about seventy [70] years old. In my view forty [40] years is on the higher side and I hereby reduce the sentence to thirty years imprisonment to commence on 20/2/2023. The appeal succeeds to that extent.

DATED, SIGNED AND DELIVERED AT KAPENGURIA ON 16TH DAY OF JULY, 2025.

HON. R. WENDOH

JUDGE

Judgement delivered in open court at Kapenguria in presence of; -

Mr. Suter for State/ Prosecution Counsel.

Appellant – Present virtually.

Juma/Hellen- Court Assistants.