Ndeto v Republic (Criminal Appeal E060 of 2021)
[2024] KEHC 34 (KLR) (11 January 2024) (Judgment)

Neutral citation: [2024] KEHC 34 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E060 OF 2021

GMA DULU, J

JANUARY 11, 2024

BETWEEN

JAMES MUNYAO NDETO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From conviction and sentence in Sexual Offence Case No. 24 of 2019 by Hon. J. D. Karani (RM) at Makindu Law Courts)

JUDGMENT

1. The appellant was charged with incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of offence were that on diverse dates between October 2018 and February 2019 at Athi Kamunyuni in Kibwezi Sub County within Makueni County intentionally and unlawfully caused his penis to penetrate the vagina of M.M a child aged 17 years who is 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 on the same diverse dates and at the same place intentionally and unlawfully touched the vagina of M.M a child aged 17 years with his penis who is her (should be his) daughter.

3. He denied both charges. After a full trial, he was convicted of the main charge of incest and sentenced to twenty five (25) years imprisonment.

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

    1) That the learned Magistrate erred both in law and in fact by convicting him on defective charge sheet contrary to Section 134 and 124 of the *Evidence Act* (Cap.80) and in holding that failure

to provide particulars of the place and dates the alleged offence occurred did not prejudice the appellant.

2) The learned trial Magistrate erred both in law and facts in basing a conviction on suspicion and assumptions DNA test and the same crucial witness was not called.

3) The learned trial Magistrate erred both in law and facts by failing to undertake through evaluation of the capacity of the minor in giving evidence under oath and warning themselves on reliance on the evidence of the minor.

4) The learned trial Magistrate erred in both law and facts in arriving at a conclusion without full evidence of DNA test as required by the law.

5) The learned trial Magistrate erred in law and in convicting the appellant in not taking into account the defence by the appellant as pertains to the minor's state of mind and character.

6) The learned trial Magistrate erred in both law and facts by sentencing and the sentence meted on the appellant is irregular, unlawful and excessive.

7) The learned trial Magistrate erred in taking into consideration irrelevant and extraneous facts and matters.

8) The learned trial Magistrate erred in both law and facts by dismissal my firm cogent or candid reasons contrary to Section 169(1) of the *CPC.*

5. The appeal was canvassed through 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 being a first appeal, this court is bound to evaluate all the evidence on record afresh and come to my own conclusions and inferences - see *Okeno v Republic* (1972) EA 32.

7. The appellant has raised both technical and substantive grounds of appeal. The first technical ground is on the charge, as he has complained that the charge is defective.

8. On this ground, the appellant has stated that because specific dates for the act or acts of incest were not given, then the charge is defective. In my view, the charge is not defective on that account as the period and months were clearly given, in this case where the complainant could not remember specific dates. Besides, the appellant was not prejudiced in any way. I dismiss that ground.

9. The appellant has also complained that crucial witness on DNA test was not called. Again, I find no crucial witness who was not called by the prosecution.

10. The appellant has also complained that the minor (complainant) was not taken through voire dire examination. This ground also has no substance, as the complainant PW1 was not a child of tender years, which courts have put at an age up to 14 years, as she was 17 years old. I dismiss that ground.

11. On the substantive grounds, the prosecution called seven (7) witnesses. The appellant on his part tendered unsworn defence testimony.

12. From the evidence on record, the biological relationship between the appellant and PW1 the complainant was proved beyond reasonable doubt to be that of father and daughter.

13. With regard to the age of PW1, a birth certificate was relied upon and produced as an exhibit. I find that the age of the complainant was proved beyond reasonable doubt.

14. As for sexual penetration, PW1 the complainant testified to sexual penetration. PW3 Sylvester Makau the Clinical Officer confirmed a broken hymen and a pregnancy of PW1. In my view, sexual penetration was proved beyond reasonable doubt.

15. As to the identity of the culprit, PW1 stated in evidence that the appellant was the person who had sexual intercourse with her. PW7 Irene Frida Maringa the Government Analyst confirmed that DNA comparison of blood samples showed that the child of PW1 was the biological child of the appellant. I note that his unsworn defence, the appellant admitted that blood sample was taken from him for DNA tests.

16. I thus find the defence of the appellant of an alleged grudge to be an afterthought. I find that the prosecution proved beyond reasonable doubt that the appellant was the culprit. The sentence is lawful.

17. For the above reasons, I dismiss the appeal and uphold both the conviction and sentence. Right of appeal explained.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JANUARY 2024 VIRTUALLY AT VOI.

GEORGE DULU

JUDGE

In the present of: -

Appellant

Ms. Omollo for State