FMM v Republic (Criminal Appeal E021 of 2022)
[2024] KEHC 1973 (KLR) (1 March 2024) (Judgment)

Neutral citation: [2024] KEHC 1973 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL E021 OF 2022

HI ONG'UDI, J

MARCH 1, 2024

BETWEEN

FMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of Hon C. A. Ogweno (SRM) delivered on 9th November, 2022 in Kisii Chief Magistrate's Court Criminal (Sexual Offences Case) No. E005 of 2021)

JUDGMENT

1. Felix Mwangi Maiko the appellant herein was charged with the offence of Incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that the appellant on 8th day of April, 2021 at around 0700 hrs at Kitutu Central sub-county within Kisii county being a male person, caused his penis to penetrate the vagina of female person who was to his knowledge his daughter. He faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the 8th day of April, 2021 at 0700 same stated place he intentionally touched the vagina of E.K. a child aged 8 years with his penis.

2. The appellant denied the charges and the case proceeded to full hearing with the prosecution calling five (5) witnesses while the appellant gave a sworn statement of defence and called no witness. He was thereafter convicted of the main count and sentenced to 30 years imprisonment.

3. Being aggrieved by the Judgment he filed the Appeal dated 18th November, 2022 through the firm of Nyagaka, Mosoka & associate advocates citing the following grounds:

    i. That the learned trial Magistrate erred in law and fact in not considering that the case against the accused was not proved beyond reasonable doubt as required by the law.

ii. That the learned trial Magistrate erred in law and fact in improperly analyzing the evidence of the complainant and her witnesses.

iii. That the learned trial Magistrate erred in law and fact in not realizing that a case of incest was not proved in support of the charge.

iv. That the learned trial Magistrate erred in law and fact in not finding that the evidence adduced was not collaborative but was inconsistent with the charge.

v. That the learned trial Magistrate erred in law and fact by admitting and relying on defective evidence by PW5 senior clinical officer without authority from relevant office.

vi. That the learned trial Magistrate erred in law and fact in not establishing that the medical evidence was defective and unsafe and unsupported for it to be relied upon.

vii. That the learned trial Magistrate erred in law and fact in not finding that the evidence adduced in support of the charge was inconsequential and did not implicate the accused at all – being hearsay.

viii. That the learned trial Magistrate erred in law and fact in not finding that the whole evidence was a constructive frame-up against the accused due to the failed relationship between the complainant's parents.

ix. That the learned trial Magistrate erred in law and fact in considering issues of law in her judgment more than the actual facts presented.

x. That the learned trial Magistrate erred in law and fact in dismissing the accused's defence that couldn't be challenged by the prosecution.

4. A summary of the evidence on record is that the appellant is the husband of PW2 MNM who is the mother to PW1. On the other hand, the appellant is a step-father to PW1. PW1 was born on 6th June 2012 and a birth certificate was produced to that effect (EXB 1).

5. PW2 left home for work on 8th April, 2021 at 6.00am leaving behind her brother J, the appellant and PW1. Later as PW1 was playing outside she was called into the house by the appellant who then closed the door. The appellant placed seat cushions on the floor and asked her to lie on them. He then brought a blanket and covered her head and removed her trouser and panty. He then did "tabia mbaya" to her by inserting his penis inside her vagina. When through he sent her to the river after threatening her. He followed her to the river and returned home with her.

6. PW1 mentioned this to her friend Purine who informed her own mother who then told PW2. A member of the community policing (PW3) was informed and that's how the appellant was arrested. The minor was later taken to Kisii Teaching and Referral Hospital for treatment. Dr. Nyameino Daniel (PW5) from the said facility testified and confirmed having examined the minor on 12th April, 2021. He found her to have been treated on 9th April, 2021. She had the followingTorn hymenVaginal swab revealed epithelial and pus cellsNo spermatozoaAll other lab tests were negative

7. His conclusion was that there was no obvious medical evidence to support defilement. He produced the P3 form as EXB 3, and the PRC Form as EXB2. To him at age 8 years it was not possible for the hymen to be reached without causing injuries on the outside genitalia. He also stated that a female can be born with an absent hymen. In his opinion, it was unlikely that penetration occurred.

8. In his sworn statement of defence the appellant testified that on 7th April, 2021 his first wife W called him asking to be sent money. He asked her to collect it the next day. PW2 threatened to deal with him

if he did. By then he had injured his leg. The next day PW2 went to work and he remained behind with his in-law JO and PW1. He could not move freely because of the injury. He stated that their house had two bedrooms and he had never entered PW1's bedroom.

9. PW2 returned home at 8pm when some people came and arrested him. It was claimed by PW2 that he had defiled PW1. They went to the hospital together and the doctor confirmed that PW1 had not been defiled. He testified that he was not in a position to have sex even with his own wife and that J who was in the house never recorded a statement.

10. The Appeal was canvassed by way of written submissions.

The appellant's submissions

11. These submissions are dated 18th December, 2023 and were filed on 20th December, 2023 by the appellant's advocates. Counsel while relying on the case of Mohamed Boru Guyo v Republic Marsabit High Court Appeal No. E001 of 2020 submitted that the appellant had been involved in an accident and was incapable of having sexual intercourse even with PW2. That the trial court ignored the fact that the appellant was walking on crutches, and that he had been framed by the said PW2.

12. Relying further on the case of Republic v Rasta Mugina Malindi Criminal Appeal Case No. 20 of 2020 he submitted that the prosecution did not prove its case beyond reasonable doubt. Further that the trial magistrate did not take into account the defence by the appellant. Reference was made to the case of Voi High Court J.M.N v Republic HCRA No. E017 of 2021.

13. The respondent's submissions are dated 4th December 2023 and were filed by prosecution counsel. Akelo Job Cletus: He submitted that the prosecution proved all the ingredients of incest. Age was proved and the appellant identified as the father of the minor. On the medical evidence counsel argued that the prosecution had proved there was contact between the appellant's genitalia and that of PW1 hence incest was proved.

Analysis and Determination

14. Upon careful consideration of the evidence on record, submissions, authorities cited and the law I find the main issue for determination to be whether the offence of incest was proved against the appellant. In determining this issue, I will have to consider a few other issues.

15. Section 20(1) of the *Sexual Offences Act* defines incest as follows:

Incest by male persons

1. Any male person who commits an indent act or an act which cause 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 not less than 10 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.

Section 22 of the same Act provides as follows:

Test of relationship

1. In case of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.

16. There is no dispute about the relationship between PW1, PW2 and the appellant. The minor PW1 is indeed a step daughter to the appellant and any sexual encounter between them would amount to incest. The charge sheet indicates PW1's age as 8 years. A birth certificate S/No XXXX – Entry No. XXXX in PW1's name with no father's name was produced as EXB1. It shows the date of birth as 6th June, 2012 meaning at the time of the alleged offence PW1 was aged 8 years plus 10 months. This confirms that she was below 18 years hence a minor.

17. The next critical issue is whether there was penetration of the minor's genital organ by a male organ as stated in the charge sheet. Section 2 of the *Sexual Offences Act* define "penetration" as meaning the partial or complete insertion of the genital organs of a person into the genital organs of another person".

18. PW1 testified that besides the 8th April, 2021 the appellant had had sex with her one other time. This is at Pg 19 line 4 where she states: "This was the 2nd time he had done tabia mbaya to me". On the other hand, PW2 told the court something different at Pg 20 line 26-28

> " The child also said you had defiled her previously on several occasions. I did not know. The child had not opened up to me before"
>
> Additionally, the arresting officer stated this at Pg 25 line 8
>
> " The child said you had defiled her on several occasions".
>
> The doctor in his introduction stated at Pg 26 lines 1-3.
>
> " On 12/4/2021 I examined a child aged 8 years old under reference No. XXXX/21 Kisii Teaching and Referral Hospital. She had a history of defilement by the father on several days including 8/4/2021".

19. From the above excerpts it is clear that what PW2, PW4 and PW5 told the court about the times PW1 had been defiled is different from what PW1 herself told the court. PW5 must have gotten that information from the hospital treatment notes which were in any event not availed to the court. If indeed PW1 had been defiled severally as claimed by PW2 and PW4 then this court expects that to be revealed by the evidence of PW5 the doctor who filled the P3 Form.

20. A critical examination of the evidence of PW5 reveals that the doctor did not find any obvious support of defilement of the minor. Yes, the doctor upon reading the treatment notes indicated that the hymen was torn. There is nothing showing that as at 9th April, 2021 PW1's hymen was freshly torn to confirm penetration. I pull out two sentences in evidence by the doctor (PW5) who was a prosecution witness. He stated thus: Pg 27 lines 4-5

> " I came to a conclusion that there was no obvious medical evidence to support defilement".
>
> Lines 13-14
>
> " In my opinion, it is unlikely that penetration occurred".

PW2 in her own evidence at Pg 20 lines 2-5

> " When I went home I found F, J and E. I called E aside to the bedroom. Upon inquiries she said she had been defiled by the father at 6.30am. She did not appear in any visible pain".

21. This is an 8-year-old child alleged to have been defiled by an adult fit to be father and she did not appear to be in any visible pain according to the mother. It is not disputed that the appellant had been injured while at a construction site in January, 2020 and was using crutches up to the time he was appearing in court for the hearing of the case. He claimed not to be functioning sexually at the time. In view of his condition, the allegations and denial of the charge was it difficult for the trial court to order for a medical examination of him to rule out any elements of pretence?

22. Further more in view of the medical evidence by PW5, the court ought to have examined PW1's unsupported evidence with a keener eye. She never gave any evidence on exactly what the appellant did to her after removing her trouser and panty. What did she go to do at the river? Was the appellant walking on crutches when he allegedly went for her at the river?

23. John the brother of PW2 was at the house when she left for work. At what point did he leave the house since PW1 says she was defiled at 6.30am after being called back to the house by the appellant. Was John in the house then? Was PW1 indeed playing outside at 6.30am? John ought to have recorded a statement and come to testify. The court was never told why that was never done.

24. The appellant denied having committed the offence complained of. He explained his inability to engage in sex even with his wife. (PW2). The doctor's evidence does not support the claims by PW1 and PW2. All these pieces of evidence have made this court ask the many above questions as PW1's evidence is left in limbo. These are issues which are key and had the learned trial Magistrate addressed them the court would not have arrived at the decision it did.

25. Since this court is not satisfied with the evidence of PW1 it will not use it to convict the appellant on the alternative count. The upshot is that the prosecution did not prove its case to the required standard.

26. For my part I find merit in the Appeal which I hereby allow. The conviction is quashed and the sentence set aside. The appellant shall be released unless otherwise lawfully held under a separate warrant.

Orders accordingly

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 1ST DAY OF MARCH, 2024 AT NAKURU.

H. I. ONG'UDI

JUDGE