GOO v Republic (Criminal Appeal E095 of 2023)
[2024] KEHC 7411 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7411 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIBERA

CRIMINAL APPEAL E095 OF 2023

DR KAVEDZA, J

JUNE 21, 2024

BETWEEN

GOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the original conviction and sentence delivered by Hon. D. Kuto (SPM) on 1st March 2023 delivered in Chief Magistrates' Court (Kibera) S.O. Case No. 84 of 2014 Republic vs GOO)

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 2009 and 18th August 2014 in Kajiado County the appellant being a male person, caused his penis to penetrate the vagina of MGO, a girl aged 14 years who was, to his knowledge, his daughter.

2. The appellant was sentenced to serve 20 years imprisonment. He appeals against conviction and sentence in line with his petition of appeal dated 14th April 2023. The appellant raised eleven (11) grounds, which have been coalized as follows: He challenged the totality of the prosecution's evidence against which he was convicted and contended that some key prosecution witnesses were not called, while some were unreliable. He also argued that the trial court failed to consider his defence. 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. The thrust of the grounds of appeal is that the prosecution failed to prove its case beyond reasonable doubt. 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.

6. The prosecution case was as follows. The Complainant (PW1) gave sworn testimony after a voire dire. She stated that she was 15 years old, a high school student, and that the appellant was her biological father. She recounted that in 2008, her father returned from the United States of America. That at the time she was in class four. The appellant called her into his bedroomed, locked the door, and asked her to undress. The complainant obliged. That the appellant also undressed and he inserted his penis into her vagina.

7. She testified that this continued whenever her mother was away. She explained that she requested to be transferred to a boarding school, and her mother agreed. During a mid-term break, while she was in seventh grade, the appellant forcibly took her to his bed and defiled her. During this incident, she struggled against him but refrained from screaming because her younger siblings were in the adjacent room. By this time, she had been taught about sex in school and was aware of what was happening.

8. The complainant told the court that on 18th August 2014, the appellant came to her room and defiled her despite her protests. After the incident, he threatened her, warning that no one would believe her. She made the courageous decision to confide in her mother. Earlier, she had already confided in a school friend about the ongoing situation at home and had sought counseling as advised. Her mother took immediate action by taking her to the hospital for medical care and then reported the incident to the police. As a result, the appellant was arrested.

9. The first issue for consideration is the relationship between the victim and the perpetrator, and whether he was positively identified. In her testimony, PW1 stated that the appellant was her biological father. This was confirmed by PW1's birth certificate produced during the trial, showing the appellant registered as the father. On identification, PW1 gave clear and graphic testimony of how the appellant defiled her on various occasions over six years. The appellant was someone well-known to her. I therefore hold that the Appellant is not only PW1's father but also the one who committed the act of sexual assault.

10. PW1'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, as she told the others notably her mother PW3, her teacher, and the medical examiners the same story.

11. Regarding additional corroborating evidence, the prosecution called PW3 the complainant's mother who testified that she received a distress call from the complainant on 18th August 2014. The complainant told her that the appellant had been defiling her and had also defiled her on the material day. She told the court that she had already been informed about the said incident by the school. She took the complainant to the hospital and reported the matter at Ngong Police Station.

12. PW2, PM, the principal at the Complainant's school testified that she received a report from one of the teachers that one of her students was being defiled by her father. She informed the complainant's mother and referred the child to counseling.

13. PW5, LO, a friend of the complainant's mother took the complainant to hospital upon her mother's request. She testified that she did not talk to the complainant about the incident.

14. Two Clinical Officers, PW4 and PW6, provided crucial medical evidence. PW4, Dr. Maundu, testified on behalf of Dr. Shako, who examined the complainant on August 19, 2014. The examination revealed a normal external genital area with tenderness, lacerations on the lower part of the genitalia, a broken hymen with multiple old tears, and a whitish discharge, all consistent with penetration. PW6, Dr. Kinuthia Edward, testified on behalf of Mr. Wamae, who examined the complainant on August 18, 2014. He observed an absent hymen and a normal genital area, also consistent with penetration. Both produced the Post Rape Care (PRC) Form and P3 medical report to support their findings. I hold that this opinion is consistent with the evidence of penetration, and corroborates PW1's testimony that the Appellant penetrated her.

15. The appellant complained the trial court failed to consider his defence. In his defence, he maintained his innocence and argued that the complainant and her mother PW3 were framing him. The trial court considered this defence and found it to be baseless. Weighed against the watertight prosecution's evidence, I have reached the same conclusion.

16. The Appellant complains that essential witnesses were not called. However, no arguments were made on which witness was not called and was a crucial witness. Section 143 of the *Evidence Act* provides that in the absence of any requirement by the provision of law, no particular number of witnesses shall be required to prove a fact. However, it has been held that where the prosecution fails to call a particular witness who may appear essential, then the court may make an adverse inference as a result of failure to call that witness (see Bukenya and Others v Uganda [1972] EA 549 and Erick Onyango Odeng' v Republic [2014] eKLR).

17. It is my finding that given the totality of the evidence, the medical evidence presented was sufficient to convict the appellant. Therefore, it was not necessary and would neither add nor subtract anything from the prosecution case in line with the provision of section 124 of the *Evidence Act*.

18. Having found that the appellant was positively identified, coupled with the finding that he penetrated PW1 who is his daughter as registered in the birth certificate, I hold that the prosecution proved its case against the appellant beyond reasonable doubt. I accordingly affirm the trial court's conviction.

19. While age is a crucial factor in sentencing as provided for in section 20(1) of the Act, it is only required to prove that the victim was under 18 years old. In this case, the birth certificate revealed that PW1 was born on 3rd December 1999, and had just turned 10 years when the first incident occurred. She was 14 years old when the last incident occurred in 2014. Section 20(1) provides that a person who commits incest with a person below the age of 18 years shall upon conviction be sentenced to life imprisonment.

20. The prosecution proved that the child was 14 years old, hence the trial court ought to have imposed the sentence of life imprisonment. However, the court, while exercising discretion, considered the circumstances of the case and that the appellant was a first offender, the pre-sentence report, and sentenced the appellant to 20 years' imprisonment. In this respect, the trial court did not err in imposing the sentence of 20 years imprisonment after considering the facts of the case. I therefore do not find any reason to interfere with the sentence. It is affirmed. The appeal is dismissed for lack of merit.

Orders accordingly.

JUDGEMENT DATED AND DELIVERED VIRTUALLY THIS 21ST DAY OF JUNE 2024

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D. KAVEDZA

JUDGE

In the presence of:

Appellant Present

Joy Court Assistant