JMW v Republic (Criminal Appeal E122 of 2017)
[2024] KEHC 9720 (KLR) (22 July 2024) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E122 OF 2017

BM MUSYOKI, J

JULY 22, 2024

BETWEEN

JMW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in Kiambu Chief Magistrate's Court (S. Atambo SPM) criminal case number 1675 of 2014 dated 8h September 2017)

JUDGMENT

1. This is an appeal against conviction and sentence in Kiambu Chief Magistrate's Court criminal case number 1675 of 2014. In the said case, the appellant was charged with incest contrary to Section 20(1) of the *Sexual Offences Act* number 3 of 2006. He was accused of having committed incest with EW, his daughter aged five. There was an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the same Act. The appellant was tried and convicted of the main charge and sentenced to life imprisonment. He has now preferred this appeal seeking to quash the conviction and set aside the sentence.

2. The appeal was canvassed by way of written submissions. The appellant's submissions are dated 11th June 2024 whereas the respondent's are dated 5th June 2024. In his submissions, the appellant has sought to amend his grounds of appeal in what he called his memorandum of appeal filed on 24-10-2017 which raised five grounds of appeal which I reproduce in verbatim as follows;

    1. The learned magistrate erred in law and fact in failing to note that my constitutional right to fair and impartial trial under articles 50(2), (c), (j), of *the constitution* of Kenya 2010 for non disclosure of adverse prosecution evidence were grossly violated.

    2. The learned trial magistrate erred in law and in facts by failing to find that the prosecution did not prove penile penetration of the complainant's genitalia vis a vis the appellants allegedly

complicity in light of failure to be medically examined to prove the same due to the alleged infection hence unproved.

3. The learned trial magistrate erred in matters of law and facts again in not appreciating the fact that the essential witnesses necessary to prove basic facts were not availed in court.

4. By failing to find that the complainant was incredible witness whose testimony cannot be trusted as she was of doubtful integrity.

5. The learned trial magistrate erred in matters of law and facts by failing to resolve the explicit evidence of grudge between the prosecution witnesses and the appellant in favour of the defence considering the strained relationship between complainants mother and family and appellant.

3. The amendments the appellant seeks to replace the original grounds are;

a. The Hon. Magistrate failed in matters of law and fact by failing to find that the appellant's trial was not fair as prescribed in *the Constitution* of Kenya 2010 i.e. his rights to fair trial under Article 50(2)(b) and (e).

b. The Hon. Magistrate erred in matters of law and fact in convicting me using evidence that did not prove penetration of the Complainant's genital organ.

c. The Hon. Magistrate failed in matters of law and fact by failing to observe that I was not properly identified as the perpetrator of the offence charged.

4. I have not seen any difference in the two versions of the set of grounds. The appellant had not given the requisite notice to amend his petition of appeal as required under Section 350(2) of the Criminal Procedure Code. For these two reasons I will not allow the proposed amendments. I will proceed to consider the appeal on the basis of the original grounds.

5. This being a first appeal, I will proceed to re-evaluate and re-examine the evidence produced before the trial magistrate while putting into consideration that I did not have the benefit of first hand recording of the proceedings and seeing the demeanour of the witnesses. I find it important to reproduce an abridged version of the evidence produced in the lower court.

6. PW1 was the complainant, a child aged 5 years for which reason the trial magistrate then conducted and *voire dire* after which it held that the child did not understand the nature of an oath and proceeded to take her unsworn evidence. The magistrate formed an opinion that the child had sufficient intelligence to appreciate the value of telling the truth.

7. The child testified that on a date she did not mention, her father who she called JM did bad things to her. She was categorical that the father removed her trousers and hurt her in the stomach. At this point, the magistrate made a note that the child was touching her private parts. In repetition, she stated that the father did bad manners to her on her private parts and told her not to tell anyone otherwise he will throw her into a dam. As she narrated her story, she pointed to her private parts three times. The child added that she was taken to hospital by her teacher where she was injected in her fingers. She did not know where her mother was.

8. In cross examination by the appellant, she restated that her father was JM and she had another dad whose name she could not remember. The court noted that due to fear and that the child did not want to face her father, he devised a sitting arrangement whereby the appellant could hear the complainant's voice and the complainant could hear the appellant's voice but not facing each other.

9. The second witness was one Maureen Wangari Karanja who described herself as a social worker in Cianda location within Kiambu. Her work involved checking on the welfare of people with disabilities and children particularly those who were not enrolled in school as well as old people in the location. She told the court that on 22-05-2014 at about 7 am, she met the complainant who she knew as she had initially met her when she was following up on her enrollment to school. On this date, she noticed that the complainant was walking abnormally and with her legs apart. When she enquired, the complainant told her that she was in pain in the stomach as she pointed at her private parts. The witness touched the complainant on the thighs and she whizzed in pain. She again touched her around the waist and child shoved her hands. The witness took the child to her house and on the way, they met her teacher.

10. PW2 added that the child told her and the teacher that her father had removed her clothes and placed her on his bed then inserted the black thing in her private parts. The child went to school with her teacher and PW2 went to the office of the assistant chief of the area who advised her to take the child to Karuri Health Center the following day. When she took the minor to hospital, the examination revealed that the child had been defiled. She identified the treatment notes from the health centre.

11. PW2 added that she knew the appellant who used to live with the complainant and her younger brother and she was aware that his wife ran away. On advice of the assistant chief, the witness secured a place for the complainant and her brother at Mogra children home in Kiambu. She also accompanied the child to report at the police post and helped in having P3 form filled. She also sought help of the appellant's brother and sister in law to get the clothes for the children after the appellant was arrested. She concluded by saying that she had no personal differences with the appellant who she pointed out in court.

12. On cross examination, PW2 confirmed that she had visited the appellant's house before when he used to live with his wife when she was doing a follow up of the children's enrollment in school.

13. PW3 was one Antony Kamau Mbugua. He told the court that he was the acting Chief of Cianda location in Kiambu. On 22-05-2014 while in his office, he received information from PW2 that a certain girl who was a pupil at Kawaida care had a problem walking as she met her along the road. The witness advised PW2 to take the child to Karuri sub district hospital. She came to the office with the girl and he noticed that the child was walking with her legs apart and very slowly. Upon interrogation, the child told him that her father had sexual intercourse with her and that her mother had abandoned them and that her father used to bath her and touch her private parts then force her to have sex with her. He was later to be informed by PW2 that the child had been diagnosed with sexually transmitted disease and she had been defiled. He knew the appellant who he identified as always wearing a red turban. He and the assistant chief arrested him and escorted him to Kawaida police post for further action.

14. The witness added that he sought a vacancy and placed the child at a children's home. He concluded his evidence in chief by stating that he was not the appellant's relative and that he had no personal differences with him. His cross examination was short. He stated that he did not establish which specific STD the child had been infected with. He also said that he had not heard of any other wrongdoing by the appellant prior to the incident.

15. PW4, Samuel Ndungu Muthiga told the court that he was the assistant chief for milimani sub location Cianda division in Kiambu. He stated that on 22-05-2014 he visited the area Chief John Kariuki Wambai and while there, two women came to the office and told him that a certain child was being sexually abused within [particulars withheld] village. He told them to report to PW3. The next day, he visited the office again where he found the Chief who informed him that he had received information from the area social worker that a girl had been defiled by her father. He and the Chief, made enquiries and managed to arrest the appellant. He narrated that the child said in his presence that the appellant

would bath her after her brothere was asleep. The appellant would remove her pants and defile her on their bed. According to him, the child was very frightened when she saw the father and they had to interrogate her in a separate room. He identified the appellant in court.

16. The investigation officer was the fifth witness. In addition to summing up the evidence of the other witnesses, she stated that the child was issued with a P3 form which he identified in court together with the treatment notes. The appellant was arrested on 24-05-2014 and was charged in court. The appellant did not cross examine her much. She is recorded as saying that she took over investigations from a previous investigations officer and that the subject was treated in hospital.

17. The last witness for the prosecution was Carolyne Ndemi who was a clinical officer working at Karuri sub county hospital. She produced treatment notes and the P3 form which showed that the child was defiled since at age 5, she ought to have had her hymen intact. She added that the infection was as a result of sexual activity. While being cross examined, she confirmed that she was the one who filled the P3 form and reiterated that the hymen was missing. She was not aware whether the appellant had been examined.

18. I have read the proceedings, the exhibits produced in the lower court, the memorandum of appeal filed by the appellant which should be a petition of appeal and the submissions by both the appellant and the respondent. I will handle the grounds as set out in the memorandum of appeal in succession.

19. Section 11(1) of the *Sexual Offences Act* provides that;

> 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."

20. 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'.

21. From the reading of the above provisions, the ingredients for the said offence are;

    a. Act of penetration;

    b. Relationship between the accused and the complainant;

    c. Identification of the perpetrator; and

    d. And in the proviso, the age of the victim.

22. The first ground of appeal blames the magistrate for failing to find that the appellant's constitutional rights under Article 50(2)(c) and (j) of *the Constitution* were violated. These Articles grant the accused person the right to be given in advance evidence that would be used against him and adequate time to prepare for his defence. The appellant claims that he was not given witnesses statements and being tired of asking for the same, he decided to proceeded without them. I have gone through the proceedings and find that the appellant was granted adequate time and facilities to prepare his defence. The record shows that the appellant cross examined all the prosecution witnesses. He has not complained that he was denied opportunity to do so. He was found to have a case to answer on 9-03-2017 and defence hearing was not conducted until 28-06-2017. In the intervening period, he asked for typed proceedings and the court postponed defence hearing until the appellant got the proceedings. The proceedings were eventually supplied to the appellant on 31-05-2017.

23. His claim that he was not given statements is also not true. Whereas it is true that he is recorded in some instances at the beginning of the trial complaining that he had not been supplied with whiteness statements, I notice there is no such complaint after the trial took off. He could not keep silent on such an issue then raise it on appeal. Indeed on 24-06-2015, he is captured asking questions in reference to statement where in cross examination, the PW3 responds that, 'it is true that my statement says she was found to have been infected with HIV'. On 28-02-2017, the investigation officer in response to the appellant's question stated 'the P3 you have and the one I have are the same'.Obviously, to ask a question along this line, the appellant must have been holding a copy of a P3 form. In any event, the appellant has not shown what prejudice he suffered in denial if any of these rights. In my view, not every violation of a right should result to an acquittal. I proceed to dismiss this ground of appeal.

24. The appellant has also challenged the magistrate's finding on whether there was penetration. This is according to his 2nd ground of appeal. As much as I can discern from this ground, the appellant is not challenging the fact that the child was penetrated. His argument seems to me to be that, there was no proof that he is the one who penetrated the child. His reasoning for this is that he was not examined to prove that he had committed the act because there having been allegations that the child had been infected with a sexually transmitted disease, he should have been examined to prove this. One would want to ask whether that was the only way to prove that the appellant was the one who did the heinous act. It is admitted by the respondent that the appellant was not examined. The appellant takes the position that the said failure was fatal to the prosecution's case. I hold the view that examination of a perpetrator of a sexual offence is important to corroborate evidence produced but it is not the only way to prove such an act. In AML v Republic [2012] eKLR the Court of Appeal held that;

> It was submitted that there was no medical evidence to connect the appellant with the offence no DNA test was conducted. The position of the law is that the offences of rape and defilement are proved by way of oral evidence and circumstantial evidence and not necessarily by medical evidence.'

25. Can an act of a culprit of offences of this nature be proved through circumstantial evidence? I think so. If the evidence is sufficient such that the court justifiably believes that no one else except the accused person had the time and opportunity to commit the act, the court would be justified to infer a guilty verdict.

26. The appellant was arrested two days after the discovery of the child's problems by PW2. It is not disputed that the complainant and his brother were left in the custody of the appellant. He was the one who was bathing them and taking them to school. After PW2 rescued the child, she was taken to a children's home together with her brother. That means that they did not go home on that day. It is very interesting and suspicious that the appellant did not take efforts to look for his children until he was arrested. While giving unsworn statement in his defence, the appellant told the court that he parted with his wife on a Monday and went to work and while at work he received summons through a telephone call from the Chief and went home the same day and found no one.

27. According to the appellant, he asked neighbours and he was informed that his wife had shifted. If indeed he went home the same day he got the summoned by the Chief and found no one, why did he not go back to the Chief's office or even the children's school to find out the fate of the children? This conduct is not consisted with the appellant's innocence. I find that the appellant's evidence in his defence was nothing but blatant lies.

28. There is no dispute that the child had been defiled. Going by her narration and the events that followed, the act must have been perpetrated a few days if not the same day she met PW2. The child was clear on

who did the heinous act on her. She was consisted before PW2, PW3, PW4 and the court. Her story is not shaken in anyway. The appellant having been the care giver of the young soul, he must have had the opportunity to notice anything wrong with the child in the event she had been defiled by someone else. The fact that the child was timid and fearful when she appeared in court and before PW3 and PW4 points to and corroborates her evidence that the appellant had threatened her. I find it hard to believe that a child of 5 years who was not being led by an adult in her narration could tell false stories about her father. The appellant's defence is evasive and does not cast any doubt on the prosecution's case. I hold that the evidence leads to irresistible conclusion that the child was penetrated and by the appellant.

29. The charge facing the appellant indicated that the child was daughter to the appellant. There was no birth certificate produced to prove this. There were no medical documents or lab test reports to show relationship between the child and the appellant. However, the child identified the appellant as his father. She was also clear that the mother had abandoned them and she was living with the father. The appellant did not deny the relationship before the court neither in this appeal. None of the grounds of appeal has challenged the finding of the court on this fact. Nothing in this appeal turns on that ingredient.

30. In his third ground of appeal, the appellant faults the magistrate for failing to appreciate that essential witnesses were not called. He does not identify which witnesses or which part of the ingredients of the offence were not proved due to lack of witnesses. It is not a must that the prosecution calls all people who came into conduct with the events leading to the charging of the accused person. Even a single witness would be enough to prove an offence if his evidence is tight enough to convince the court. In Tobias Wanjala Kalenda v Republic [2019] eKLR, it was held that;

> On the complaint that crucial witnesses were not called, it is trite that no particular number of witnesses are required for the proof of any fact in absence of any provision of law to the contrary as provided under Section 143 of the *Evidence Act*.'

31. This ground has no basis and I dismiss it.

32. The appellant has also complained that the magistrate failed to appreciate that the complainant was an incredible witness whose testimony should not have been trusted as she was of doubtful integrity. Again, the appellant is making a general statement against the complainant and the court without specifying the character or acts which would make the court believe that the complainant had no or was ofmdoubtful integrity. To the contrary, I find the child's testimony very consistent and believable. She was a child of tender years and she had no reason to lie against her father especially where the other people involved in the case were not family members. This ground similarly fails.

33. The final ground of appeal is based on the complaint that the magistrate failed to consider that there was a grudge against the prosecution witnesses and the appellant and the complainant's mother's family. The child's mother did not testify in this matter. She did not participate in the investigations. Actually, it is on record that she declined to be involved in the case when she was called by PW2. She was not in the vicinity of the area at the time of the incident, during the investigations and during the entire proceedings. None of the prosecution witnesses showed any grudge against the appellant neither were they with the complainant's mother. In his sworn statement, the appellant did not allude to this hostility between him and the witnesses. The child had nothing to benefit from the incarceration of the appellant.

34. As I conclude, I state that the appellant was a father to the complainant. He was expected legally and morally to protect the child from abuse. He had not shown any sign of taking up his role as a father. For

lack of better words, not even animals prey on their young ones the way the appellant did. He deserved the punishment meted on him by the lower court.

35. The totality of the above is that I find no merit in the appeal and I hereby dismiss it. The conviction and sentence of the lower court is upheld.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.