IKK v Republic (Criminal Appeal E004 of 2022)
[2024] KEHC 10654 (KLR) (6 September 2024) (Judgment)

Neutral citation: [2024] KEHC 10654 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E004 OF 2022

RC RUTTO, J

SEPTEMBER 6, 2024

BETWEEN

IKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Senior Resident Magistrate's Court at Nyeri Sexual Offence Case No. 64 of 2020 delivered by Hon. F. Muguongo (SRM) on 27th January 2022)

JUDGMENT

A. Introduction

1. The appellant being aggrieved by the decision of the trial court that convicted him for the offence of incest by male persons contrary to section 20(1) of the *Sexual Offences Act* Cap 63A has lodged this appeal against his conviction and sentence to serve life imprisonment.

2. The appeal is premised on the following grounds, that: -

    a. He pleaded not guilty to the charge and still remains the same.

    b. The learned magistrate erred in law and fact in failing to consider the entire body of evidence that was marred with contradictions, inconsistencies and un-corroboration, thus a miscarriage of justice occurred.

    c. The learned trial magistrate erred in law and fact when she failed to notice that the produced medical evidence had insufficient grounds to sustain this conviction since there were no treatment noted availed to withstand their authenticity.

d. The trial court erred in law and facts in failing to bear in mind that the investigation conducted in this matter was valueless as it was shoddily done hence inadequate to the life sentence that was imposed herein.

e. That the imposed life sentence is harsh and excessive in concern with the purported evidence.

B. Background

3. IKK, 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 were that on the 18th day of October, 2020 at [Particulars withheld] village, Nyeri central sub-county, being a male person intentionally and unlawfully caused his penis to penetrate the vagina of EJW a child aged 11 years who was to his knowledge his niece.

4. The Appellant pleaded not guilty to the charges and to prove its case, the prosecution called 4 witnesses.

C. Prosecution's case

5. PW1 stated that she was 11 years old, in Standard 5, and living with her parents. She identified the appellant as her uncle. It was her testimony that on 18th October 2020 she was at her grandmother's house in [Particulars Withheld], where her uncle was present. That her mother sent her to dispose of trash when the appellant called her to an incomplete building. When she asked him what the matter was, he did not respond and, at that moment, took her hand.

6. PW1 narrated how the appellant lifted her dress, removed her panty and made her lie down on the ground. She stated that the accused was wearing black trousers. She described that he engaged in inappropriate conduct with her and had sexual intercourse with her against her will. She also reported that the accused threatened to beat her if she told her mother about the incident. Further, she narrated how the appellant removed his trouser and inner wear and inserted his penis into her vagina. She stated that when she went back home, having promised her mother to tell her what happened when they were at home, she narrated to her what happened. That following this narration, the following day they went to hospital at Kiandu and they were referred to Nyeri hospital. She stated that she was examined by a male doctor in her front private part and they were advised to source a P3 form, which they did from Kigwaudi police station. In addition, PW1 stated that previously she had been defiled by a certain Morgan and despite telling, her mother she did not take any action. She also stated that she showered after the incident and didn't see anything unusual with showering.

7. On cross-examination, she stated that on 18th October 2020, she was at her grandmother's house with her siblings and two other uncles. She mentioned that she did not scream because the accused had warned her not to. She described that the accused wielded a stick with which he threatened to beat her, and she was afraid to report what had happened. She noted that her clothes became dirty when the accused put her on the ground. When her mother inquired about the stains on her clothes, she replied that she would explain when they returned home. She asserted that she was not lying and that the doctor could corroborate her testimony.

8. In re-examination, she stated that she was wearing a dress during the incident and changed into black trousers on their way home. She described the house where the incident occurred as being made of timber, incomplete, with an earthen floor, a roof, but no windows.

9. PW2, Dr. William Muriuki, stated that he is a medical doctor at Nyeri Provincial General Hospital(PGH). He presented a P3 form filled by Dr. Mururi, his colleague, who was unavailable as he had proceeded for postgraduate studies. PW2 also produced a PRC form filled out by the nurse

at the gender desk at Nyeri PGH. He testified that he was familiar with both their handwritings and could read them. Both documents were produced under sections 77 and 33 of the *Evidence Act*. He reported that a patient with a history of defilement was referred to the hospital on 22nd October 2020, after being examined on 19th October 2020 she appeared anxious. The report revealed an old broken hymen, bruises that were bleeding, and confirmed the patient was 11 years old since the date of birth was given as 29th November 2009. He concluded that the injuries to the vagina indicated a recent defilement.

10. On cross-examination he stated that the hymen can be broken through vigorous activities other than sexual intercourse such as bicycle and horse riding and some women are born without a hymen. He stated that presence or absence of spermatozoa is not proof of defilement. He stated that the doctor's work is to assess the patient and note the injuries which are then recorded in the P3 Form.

11. In re-examination he stated that the history given was consistent with the injuries noted in the child.

12. PW3, CMW stated that she is the mother to the PW1 and a sister to the accused. That on 18/10/2020 there was a function at their home in Kigwandi in Nyeri. She stated that the accused on the material day escorted them to the shops where he bought her children sweets worth Kshs. 5/- and promised to give the complainant Kshs. 50/- to which she did not pay no attention to. She stated that later when she sought the complainant to throw away trash, she did not come back immediately prompting her to go out to call her but there was no response.

13. PW3 stated that after some time she came back with money allegedly given by the appellant. At this point she noticed that PW1 eyes were red like she wanted to cry. She did not ask much but when they got back to their home she prodded and learnt how the appellant lured, threatened and defiled PW1. She then stated that she took the complainant to hospital on 19/10/2020 and were referred to Nyeri PGH where they learnt that the complainant had been sexually abused. She stated that the doctor filled a P3 form and that the complainant was given medication and on advisement went to the police station.

14. She also stated that the PW1 told her that the incident of 18/10/2020 was the second one with the first being in the month of May 2020 in the incomplete house at her mother's place.

15. On cross-examination, she stated that on that day everyone was at home, and she found the complainant searching for money with the accused. She reported that the complainant said the accused had defiled her. She mentioned that she did not suspect any defilement had occurred. She observed that PW1's eyes were red but did not notice anything about the clothes. She also stated that she and the accused had no differences.

16. In re-examination, she stated that she had not framed the accused and that there were no land disputes at home.

17. PW4 No. 118830 PC Daniel Cheruiyot stated that PW3 accompanied by PW1 went to the police post and made a report that PW1 had been defiled by her uncle the appellant herein on 18/10/2022. He noted that she was a pupil aged 11 years. He stated that he learned from PW1 that her uncle defiled her in an incomplete building at her grandmother's house on her way to dispose off litter. Further, that that was not the first incident by the appellant who had repeatedly defiled her and threatened her not to tell anyone.

18. He also stated that on 22/10/2020 he arrested the accused with the assistance of PC Peter Mathenge at 0530hrs. That the compound had incomplete houses made of wood. He stated that the accused was at least 41 years old. Further, that he issued a P3 form which was duly filled. The PRC form had been filled; hence he charged the appellant. He stated that he did not know the appellant prior to the arresting date.

19. On cross-examination he stated that he was directed by the OCS Nyeri to investigate the case and that he recorded statements on 4/11/2020. He stated that he was guided by the findings of the PRC form. On re-examination he stated that PW1 stated that she was defiled by her uncle the accused and that the doctor who examined her stated that there was evidence of penetration.

20. At the close of the prosecution case, the court found that a prima facie case had been established and the appellant was placed on his defence. The appellant chose to give sworn evidence and called one witness.

D. Defence case

21. DW1, IKK stated that prior to his arrest he was a casual labourer. He stated that on 18/10/2020 his mother had invited her grandchildren at home and therefore, there were many people. He testified that in the morning, he went to the shop and bought milk, bread and sweets for the children. He stated that he had his own house and thus no need for defiling a child in an incomplete house and that he would have feared to do such an act with many people around. It was his statement that PW3 ought to have forced PW1 to state who defiled her when they were at his parents' compound. He cast aspersion as to why they took so long in filling the p3 form (4 days from 18/10/2020).On cross-examination, he stated that PW1 is the child of his sister and that he does not know her age. He stated that they were all at home and that he can not tell why the child framed him and that he has no grudge with either the mother or with PW1.

22. DW2, JWK stated that PW1 is her granddaughter, PW3 is her daughter and mother to PW1, and the appellant DW1 is her son.

23. She stated that on 18/10/2020 her children came home and she was cooking with PW3 and that her other children were watching TV, to wit, Charles Nderitu and Maurice Muchiri, who had all come the previous day and that PW3 left with PW1 at around 1700HRS. She stated that PW3 called her son Charles and informed him that PW1 had been defiled and that they went to the police station. She stated that by her own investigations no defilement had happened and she is not aware of any bad blood between PW3 and DW1. Further, that she did not know the whereabouts of DW1 on that day since everyone was busy. On cross examination, she stated that when she heard the news of defilement, it took the cautioning of her son not to burn the suspect as she was so angry and she let the law take its course.

24. Upon evaluation of the entire evidence on record, the trial court, found the appellant guilty and convicted him for the offence of incest. He was sentenced to life imprisonment.

25. The Appellant was aggrieved by his conviction and sentence and filed this appeal seeking that the conviction be quashed and sentence set aside.

E. The Appeal

26. The appeal is as set out in the earlier paragraphs of this judgment. The appeal proceeded by way of written submissions with the Appellant relying on his undated written submissions filed on 15th June 2022 while the Respondent relied on its written submissions dated 18th July 2022.

a. Appellant's Submissions

27. The Appellant submitted that the trial court erred when it failed to consider the entire prosecution case which was contradicted, inconsistent and un-corroborated. He questioned the testimonies of PW1 and PW2 and invited the court to look at their testimonies at various lines.

28. The Appellant further submitted that the doctors who filled the P3 form and PRC Forms never testified, that is Dr. Mururi and Mrs Flambai and since they failed to come to court, Section 77 of the *Evidence Act* was breached.

29. The Appellant submitted that this court consider the mandatory minimum sentences imposed by the *Sexual Offences Act* of 2006 in light of Article 27 (1) (2) (6) of *the Constitution* of Kenya and to invoke the spirit of Transitional and consequential provisions.

b. Respondent's submissions

30. In its submissions, the Respondent framed four issues for determination as summarized below:

    a. Whether the prosecution had proved the case by discharging the required burden of proof;

    b. Whether the evidence was marred by inconsistencies and contradictions;

    c. Whether the Appellant was framed due to an existing grudge between the appellant and PW3; and

    d. Whether the sentence was harsh and excessive.

31. On whether the charges were proved beyond reasonable doubt,the Respondent submitted that Section 22 of the *Sexual Offences Act* was fully complied with, and it was established beyond a reasonable doubt that the victim was a relative of the appellant. That PW3 confirmed that the appellant was his brother hence an uncle of the complainant. The Respondent further submitted that the ingredients of the offence, including age, penetration, and the identity of the perpetrator, were satisfactorily proved.

32. On the issue of age, the Respondent submitted that the victim was 10 years old at the time of the alleged defilement by the Appellant. The Respondent further submitted that a birth certificate was produced by PW1's mother (PW3) that confirmed that PW1 was born on 7th November 2009.

33. On the issue of penetration, the Respondent submitted that PW1 described the act of penetration which evidence was extensively tested and cross examined and her evidence remained consistent. That the Respondent also called PW2, Dr. William Muriuki who produced P3 form and a Post-Rape Care form, confirmed that the victim had old broken hymen and fresh bruises that were bleeding. The Respondent submitted that the presence of an old broken hymen does not negate the fact that the victim had been defiled by the Appellant. That there was evidence that there was a recent second sexual encounter perpetrated by the Appellant. The Respondent submitted that the evidence produced during the trial clearly proved the element of penetration to the required standards.

34. On the identity of the perpetrator, the Respondent submitted that the victim is well known to the Appellant as his uncle and consistently identified the Appellant as the perpetrator.

35. On whether the evidence of PW1 was corroborated and if all material witnesses testified, the Respondent relies on Section 143 of the *Evidence Act* and the cases of Alex Lichodo v Republic [2006] eKLR among others, to submit that there is no requirement for a particular number of witnesses that ought to be called to prove a case and that all relevant witnesses and exhibits were availed before court to corroborate the charges against the Appellant.

36. On whether there were contradictions and inconsistencies, the Respondent submitted that the Appellant had not pointed out any material inconsistencies and contradictions and even if they were, they are minor and do not go into the root of the prosecution's case.

37. On whether the Appellant was framed due to an existing grudge between the appellant and PW3, the Respondent submitted that during trial, the Appellant in his defence indicated that he may have been framed but never indicated who had framed him and why he was framed. It was submitted that this narrative of an existing grudge was an afterthought only raised at the submissions stage and the theory was never tested and therefore should be disregarded by this court.

38. On whether the sentence was harsh and excessive, it was submitted that Section 20(1) of the *Sexual Offences Act* prescribes the offence of incest by male persons and outlines the corresponding penalty and therefore, since the evidence adduced proved that the victim was below 18 years, the sentence was a legal one under the law and should not be interfered with.

39. In urging the court to dismiss this appeal, the Respondent urged the court to affirm the findings of the trial court.

F. Analysis and Determination

40. This being a first appeal, it is the duty of this court to reconsider and re-evaluate the evidence adduced and the submissions made in the trial court so as to arrive at its own independent conclusion. In so doing, this court is required to always bear in mind that it neither saw nor heard the witnesses as they testified and must therefore give due allowance in that regard. These principles have been underscored in numerous decisions by the superior courts among them being in the case of Okeno vs Republic [1972] EA 32 in which the Court of Appeal stated thus:

> " It is the duty of a first appellate court to reconsider that evidence, evaluate it itself and draw its own conclusions in deciding whether the judgment of the trial court should be upheld."

41. The issues arising for determination in this appeal are:

    a. Whether the ingredients of incest were proved beyond a reasonable doubt;

    b. Whether the evidence was marred by inconsistencies and contradictions; and

    c. Whether the sentence was harsh and excessive.

a. Whether the ingredients of incest were proved beyond a reasonable doubt;

42. Section 20 (1) of the *Sexual Offences Act* provides as follows:

    20. Incest by male persons

        "(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".

43. From the above, the ingredients for the offence of incest are; proof that the offender is a relative of the victim within the prohibited degrees of consanguinity, proof of penetration or indecent act, and

identification of the perpetrator. Proof of age of the victim is another ingredient especially where the victim is a minor.

44. On proof that the offender is a relative of the victim, the appellant is the uncle of the complainant by virtue of being a brother to PW3 who is the mother of the complainant. This was not contested by the Appellant who testified that the complainant was a child of his sister. Hence the appellant was a relative of the victim.

45. On proof of penetration or indecent act, PW1 narrated that the Appellant had carnal knowledge with her by inserting his penis into her vagina implying there was penetration. PW1 was found to be a credible witness. PW2 corroborated the foregoing evidence by producing the P3 form and Post Rape form which confirmed that PW1 had fresh injuries and was bleeding on touch which in the absence of any other explanation confirms existence of penetration.

46. Turning to identification of the perpetrator, I need not emphasis that the Appellant's identification was by way of recognition. He was well known to PW1 as uncle Kuria. I hasten to add that the appellant does not dispute the fact that the victim knew him.

47. On the age of the victim which is paramount consideration in view of the sentence as prescribed under Section 20 (1) of the *Sexual Offences Act*. Accordingly, PW1 stated that she was 11 years old. PW3 who produced the birth certificate, which revealed that the complainant was 10 years old when the offence was committed. The complainant was born on 7th November, 2009. From the foregoing it is established and uncontested that that PW1 was a minor who was 10 years old at the time of the commission of the offence.

48. In view of the foregoing, this agrees with the finding of the trial court that all the ingredients of the offence of incest were satisfactorily met. The Appellant's defense fell short of dislodging the strong prosecution evidence against him. His evidence was mere denial that he did not do it. He never gave sufficient evidence to dislodge the prosecution evidence.

49. This court takes judicial notice of perpetuation of defilement cases where in most cases they are done in secrecy away from third parties, thus the rationale behind the proviso of section 124 of the *Evidence Act* which allows a court to convict on the evidence of a single witness, who in most cases is the victim, where the evidence is credible and admissible.

50. Consequently, the assertion by DW2, mother to both the appellant and complainants' mother, that no defilement happened does not hold since from the prosecution's case there is no evidence that DW2 witness the incident or she was within the vicinity of where the incident happened, being inside the unfinished house. Further in her own evidence DW2 stated that she did not know the whereabouts of the Appellant on that day since everyone was busy. This court therefore dismisses his defence as not sufficient to dislodge the prosecution evidence.

b. Whether the evidence was marred by inconsistencies and contradictions;

51. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> " 34. On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt

is as was stated, inter alia by the court in Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993, that:

> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

52. Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant. It is therefore imperative that in scrutinizing a witness's testimony for alleged contradictions and inconsistencies, the evidence should be evaluated holistically and not cherry-pick specific portions.

53. The appellant alleges that the contradictions arise between PW1 evidence that "my clothes became dirty when you put me on the ground. Mum asked me about the dirt but I told her that I will tell her when we go back home" and PW3 where she stated, "I can not tell if you defiled PW1 on the floor making her clothes dirty. I did not notice PW1's clothes being dirty only the eyes were red. If the clothes were dirty then only her can say."

54. The Appellant urged this court to find that the evidence of PW1 and her mother cannot support the conviction. This court notes that the contradiction is based on whether PW1 clothes were dirty. In the statements referred to above this court notes that the contradiction is to the effect that PW1 testified that when her mother asked about the dirt, she told her that she would tell her when they got home. On the other hand, PW2, the mother, says that she did not notice PW1 clothes being dirty only the eyes were red. While it may amount to a contradiction, the same is very remote.

55. The contradiction did not affect the substance of the prosecution case. In any case it is so remote that it does not affect the ingredients of the offence of incest, in addition it doesn't cloud the offence in a manner that the appellant is unable to appreciate what he is facing. In issue was the allegation that the appellant defiled PW1. Notably, PW3 was not an eye witness to the act. She was not told the incident immediately, but after they had reached home. Taken holistically, PW3 noted that there was something that was amiss with PW1 and she inquired, but details were disclosed to her back at home. Suffices to say, PW1 was only more comfortable to narrate the ordeal far away from the appellant.

56. It is my finding therefore that the said inconsistencies and contradictions submitted by the Appellant were very remote and, in any event, occasioned no prejudicial in any way. Consequently, this ground also fails.

c). Whether the sentence was harsh and excessive.

57. As regards the sentence, Section 20 (1) of the *Sexual Offences Act* provides that:

> "(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 cause penetration or the indecent act was obtained with the consent of the female person." (emphasis mine).

58. The offence of incest for which the Appellant was charged with prescribes a mandatory sentence of life imprisonment where the victim is a minor. The appellant urges this court to find that the life imprisonment sentence was harsh and excessive. He seeks that this court re-consider the mandatory minimum sentences imposed by the *Sexual Offences Act* of 2006 in light of Article 27 (1) (2) (6) of *the Constitution* of Kenya.

59. In sentencing the appellant, the trial court stated thus:

> " Section 20(1) of the *Sexual Offences Act* is so express on the nature of the sentence where the victim of incest is a child of less than 18years. This ties the hands of the court. Secondly the victim of the offence herein was a child of 10 years. A very tender age. This court has no option but to prescribe the sentence set by the law which is life imprisonment."
>
> Consequently, I find that the trial Court did not err in passing the sentence as it was adequately guided by the clear provisions of section 20(1) of the *Sexual Offences Act*.

60. This notwithstanding, the Court of Appeal in the case of *Akhonya v Republic (Criminal Appeal 269 of 2019)* (2024) KECA 327 (KLR) (15 March 2024) at Kisumu (Unreported) allowed the appellant's appeal by reducing the sentence of life imprisonment to a term of 30 years imprisonment for an offence of defilement. In so doing, the Appellate Court had this to say: -

> " 8. Our most recent jurisprudence has similarly declared life imprisonment as unconstitutional due to the indeterminate nature of the sentence. See Frank *Turo v Republic- Kisumu Criminal Appeal No. 157 of 2017* and Evans Nyamari *Ayako v Republic- Kisumu Criminal Appeal No. 22 of 2018*.
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> 9. In the Evan Nyamari Ayako case, this court in applying Articles 27 and 28 of *the Constitution* to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.
>
> 10. Consequently, we must allow the Appellant's appeal herein to the extent that we declare that the mandatory nature of the sentence of life imprisonment which was imposed on him by dint of Section 8 (2) of the *Sexual Offences Act*, is unconstitutional. So is the indeterminate term of the life imprisonment actually imposed on him.
>
> 11. In the specific circumstances of this case, however, we would agree with the Respondent that the objective seriousness of the case and the aggravating circumstances make the life sentence a commensurate sentence: the survivor of the ordeal was a girl of extreme tender years at 8 years old; and the atrocity committed on her resulted in extensive damage and impact to her. The offence called for a stiffly deterrent sentence; one that signals the society's opprobrium to the conduct of the appellant as it reflects the inherent seriousness of the offence."

61. I have considered the above superior court decisions, which I am duly bound by. Consequently, I do set aside the indeterminate life imprisonment sentence herein and replace it with a life sentence of 30 years in prison.

62. Ultimately, this court makes the following orders;

    i. The Appeal on conviction is dismissed and the trial court decision on the same upheld.

    ii. The Appeal on sentence partly succeeds to the extent that the indeterminate life imprisonment sentence is set aside and substituted with a life sentence of thirty years imprisonment.

    Orders accordingly.

RHODA RUTTO

JUDGE

DELIVERED, DATED AND SIGNED THIS 6TH DAY OF SEPTEMBER, 2024.

For Appellants:

For Respondent:

Court Assistant: