BMM v Republic (Criminal Appeal E0119 of 2021)
[2023] KEHC 1074 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1074 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E0119 OF 2021

GMA DULU, J

FEBRUARY 13, 2023

BETWEEN

BMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original judgment of Hon. C.A Mayamba in Kilungu Principal Magistrate's Court CMCR (S.O) No.E015 of 2021 pronounced on 15th December 2021)

JUDGMENT

1. The appellant was charged in the magistrate's court with incest contrary to section 20(1) of the *Sexual Offences Act* No 6 of 2006. The particulars of offence were that on the month of April and May 2021 at unknown dates at Kyamuoso Location in Makueni County intentionally caused his penis to penetrate the vagina of MMM a child aged 10 years knowing or having reason to believe to be his daughter.
2. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same unknown dates and at the same place intentionally touched the vagina of MMM a child aged 10 years with his penis.
3. He denied both charges. After a full trial, he was convicted on the main charge of incest and sentenced to life imprisonment.
4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal, and relied on the following grounds –
    1. The trial magistrate erred by failing to observe that the trial was conducted in contravention of section 19 of the *Oaths and Statutory Declaration Act* concerned with the reception and admissibility of evidence of a child of tender years, Article 4 of the *Constitution*, and section 2 of the *Sexual Offences Act*, as well as presiding over a unfair trial against his Constitutional rights.

2. The learned trial magistrate erred in law and in fact when he convicted and sentenced him without observing that the charges before court were defective for both being at great variance with the evidence on record.

3. The learned trial magistrate erred in both law and facts by convicting him without considering that there was no evidence to prove penetration without which the prosecution could not prove the offence of incest to the required standard in law beyond reasonable doubt.

4. The learned trial magistrate erred in both points of law and fact by failing to apply section 124 of the *Evidence Act* and to observe that the prosecution case was full of contradictions and inconsistencies which rendered the prosecution case unbelievable.

5. The learned trial magistrate erred in both law and fact when he dismissed his defence which alleged possibility of being framed up due to an existing grudge without giving cogent reasoning as provided under section 169 of *Criminal Procedure Code*.

5. The appeal was canvassed through filing of written submissions. In this regard, I have perused and considered the submissions filed by the appellant and those filed by the Director of Public Prosecutions.

6. This being a first appeal, I have to be guided by the established legal principle that as a first appellate court, I am expected to evaluate all the evidence on record, and come to my own independent conclusions and inferences. See *Okeno –vs- Republic (1972) 32*.

7. I have evaluated the evidence on record. In proving their case the prosecution called four (4) witnesses. The appellant on his part tendered unsworn defence testimony and did not call additional witnesses.

8. The appellant has raised technical as well as substantive grounds of appeal.

9. With regard that the charges being defective, I find no defect on the charge sheet. If the evidence of prosecution witnesses did not support the charge, in my view that goes to proof of the charge, but does not establish that the charge is defective.

10. With regard to his complaint that the complainant testified without voire dire examination, I note that indeed Pw1 MM was taken through voire dire examination by the trial court. She said that she was 10 years old. I find no basis for the appellant's complaint. I dismiss the same.

11. The elements of the offence of incest are penetration of a sexual nature. Second, the relationship between the accused and the victim. Thirdly, the identity of the culprit. In our present case, there is also age, which will determine the sentence.

12. In my view, from the evidence on record, the relationship of the appellant and the victim Pw1 was proved. Pw1 was a child of the appellant by customary adoption after the appellant married Pw2 DM, the mother of Pw1. I thus find like the trial magistrate that the appellant and Pw1 were father and daughter.

13. With regard to the age of the victim Pw1, a birth certificate was relied upon. It was issued in 2019 after he married Pw2 in 2017. It was recorded that Pw1 was born on November 24, 2011. I find that the age of the victim was proved beyond reasonable doubt.

14. As for sexual intercourse, the evidence was that of Pw1 and the medical evidence. Pw1 the victim said through oral evidence that the appellant penetrated her through the anus. The medical evidence of Pw3 Erick Kasiamani a Clinical Officer was that the vaginal lumen was wide open, and the hymen was perforated.

15. In my view, sexual penetration through the vagina as alleged in the charge was not proved firstly, because the victim Pw1 stated that she was penetrated through the anus, and secondly, the fact that the hymen was perforated did not mean that sexual penetration did occur, as the hymen could be missing for various other reasons, including exercise.

16. I thus find that sexual penetration through the vagina as was alleged in the charge was not proved.

17. With regard to the culprit, again the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. The first reason is that the victim Pw1 was clearly an untruthful witness whose evidence could not be saved by the provisal to section 124 of the *Evidence Act* (Cap 80), considering that she said that she was penetrated in the anus while the charge had nothing to do with anal penetration.

18. Secondly, the teacher to whom Pw1 was said to have initially reported the incident was not called to testify, in this case wherein Pw2 the mother of Pw1 was treated as a hostile witness because she did not support the prosecution case. The benefit of the weak and conflicting evidence of the prosecution had to be given to the appellant, and I do so.

19. I thus find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. The conviction will thus have to be quashed and sentence set aside.

20. Consequently and for the above reasons, I allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 13TH DAY OF FEBRUARY 2023, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE