PIM v Republic (Criminal Appeal 40 of 2019)
[2023] KEHC 621 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEHC 621 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 40 OF 2019

RM MWONGO, J

FEBRUARY 9, 2023

BETWEEN

PIM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of M Kivuti SRM delivered on June 18, 2019 in Baricho SO Criminal Case No 24 of 2018)

JUDGMENT

Background

1. The appellant was charged with sexual offences against three minors as follows:

   Count I: Attempted defilement contrary to section 9 (1) as read with section 9 (2) of the *SOA* in that on May 5, 2018 in [Particulars Withheld] village Mwea West Sub-county he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of SM a child aged 7 years. In the alternative, he is charged with committing an indecent act with the child SM contrary to section 11(1) of the *SOA* in that on May 5, 2018 he intentionally and unlawfully rubbed his penis against the vagina of SM

   Count 2: Attempted incest contrary to section 20(2) of the *SOA* in that on May 5, 2018 in [Particulars Withheld] village Mwea West Sub-county he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of AK a child aged 8 years who to his knowledge was his niece. In the alternative, he is charged with committing an indecent act with the child SM contrary to section 11(1) of the *SOA* in that on May 5, 2018 he intentionally and unlawfully rubbed his penis against the vagina of AK

Count 3: Attempted incest contrary to section 20(2) of the SOA in that on May 5, 2018 in [Particulars Withheld] village Mwea West Sub-county he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of JN a child aged 4 years who to his knowledge was his niece. In the alternative, he is charged with committing an indecent act with the child JN contrary to section 11(1) of the SOA in that on May 5, 2018 he intentionally and unlawfully rubbed his penis against the vagina of JN

2. After hearing the evidence of eight prosecution witnesses and the accused, the trial court convicted the accused on each main count defilement and incest against each complainant. He was sentenced to 10 years' imprisonment on each main count.

3. Dissatisfied with the conviction and sentence, he has appealed to this court on the grounds that:

   i. The prosecution case was full of contradictions and inconsistencies.

   ii. The investigations were not up to standard.

   iii. The trial court failed to consider that there were grudges between the complainant and him.

   iv. Crucial witnesses did not testify.

   v. His defence and mitigation were not given due consideration.

   In a nutshell, the role of this court on a first appeal is to re-consider and re-evaluate all the evidence adduced in the trial court and to come to its own conclusions in light of the law taking care to note that it did not itself see and hear the witnesses testify and must give due regard for that. (*Okeno v R* (1972 EA 32).

4. The evidence in the lower court was essentially as follows.

5. PW-1 SM aged 8 years was the first complainant. She testified testified that she was in the company of her friends JN and AK when the appellant took them to his house. That they were all served with spaghetti and whereas she and AK refused to eat it, JN and the appellant ate the food.

6. She said that it was not long afterwards when the appellant started doing bad manners to them in turn. She testified that the appellant used his sexual organ to defile each of them and he would even kiss them.

7. It was her testimony that the appellant tried to entice them with meat but they all left and she shared her encounter with her mother who reported the matter to the authorities.

8. PW 2 AK, the second complainant stated that she is aged 8 years. She testified and corroborated PW-1 that they were three minors when the appellant invited them in his house and served them with tea and bread before he went on to defile all of them in turn as they lied on his bed.

9. That once done, he kissed them all and told them he loves them. She said that they left him cooking meat and they were punished for arriving home late. She informed her father what had happened.

10. PW 3 ENG testified that she was the mother to SM (PW1). That on May 5, 2018, she was in her house that had been under repair when she noticed her child was not within and upon inquiring, she was informed they had been seen with the appellant. When she asked the daughter where they had been, she informed her that the appellant had taken them to his house and did bad manners to them.

11. PW3 said she reported the matter to the police before taking the children to hospital for treatment. She recounted that she had no grudges with the appellant.

12. PW4 Christopher Gathoni Macharia the assistant chief recounted what transpired on May 5, 2018 after being called and told that the appellant had been defiling the minors. He interrogated the three minors who reiterated what the appellant had done to them.

13. It was his evidence that he called the OCS Sagana police station who sent in the police. He handed the accused to them.

14. PW 5 JN recalled the ordeal that took place on May 5, 2018. She repeated and corroborated the evidence of PW1 and PW2.

15. It was her testimony that the appellant was their uncle and he found the playing and convinced them to accompany him to his house where he served them with tea and bread and there after went ahead to defile each one of them in turn. She said that she reported the ordeal to her mother.

16. PW6 Nahashon Murimi is a clinical officer. He confirmed that he filled the P3 form for PW1 (SM) PW2 (AK) and PW5 (JN).

17. As regards the examination of the complainants, he confirmed that:- PW1 SM had no injuries on the labia minora or majora and the perineum was intact and cervix had no injuries;- PW2 AK had no evidence of penetration and there was no discharge or blood stain, no spermatozoa but she had pus cells. Her urinary test revealed pus cells with no evidence of penetration;- PW5 JN had no injuries on the labia minora or majora and that he was able to ascertain there was no penetration

    Consequently, he formed the opinion that in each case there was attempted defilement.

18. PW -7 – Joseph Wanjohi Makuta. He is a clinical officer at Sagana sub-county hospital. He examined the three children and concluded that there was no evidence of penetration. The children claimed that he had defiled them hence his conclusion was attempted defilement.

19. PW 8 – Sergeant Angela Mwikali of Sagana police station. She testified that the accused was arrested on the same day after being identified by the children. They also identified him at the police station.

20. On cross-examination she confirmed that the accused did not defile the complainants. Thus, he was charged with attempted defilement and incest

21. DW1, the accused PIM, testified that he spent the whole day at his farm planting sweet potatoes on the material day. He further confirmed that at about 3.00 pm PW1 PW2 and PW5 came to where he was calling him out by the name “uncle”. He also confirmed that he gave them tea and bread as they said they were hungry. He alleged that the girls left at about 4.00pm.

22. In cross examination, he admitted that AK is his niece and that SM and JN all call him ‘uncle’. He further stated that their mothers coached them to frame him, because they hate him, though he did not give reasons for the alleged hatred.

Appellant’s submissions

23. On ground 1-That the learned trial magistrate erred in both law and facts when convicting and sentencing the appellant on incomprehensible evidence

24. The appellant submits that the record is full of errors because the one that he was supplied with is faulty such that he cannot satisfactory rely on the same to prepare his appeal to this court.

25. On the other hand, it is the duty of this court to re-evaluate the evidence a fresh and arrive at an independent decision. In so doing the court must bear in mind that it has neither seen nor heard the witnesses, and give due regard for that.

26. As to ground 2 -The appellant submits that the evidence of PW1 was insufficient when subjected to *voire dire* examination. Section 19(1) of the *Oaths and Statutory Declarations Act* has something to do with receiving evidence of a child in the following words;

> " where in any proceeding before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not ,in the opinion of the court or such person, understand the nature of an oath ,his evidence may be received ,though not given upon oath if in the opinion of the court or such personae is possessed of sufficient intelligence to justify the reception of the evidence and is possessed of sufficient intelligence to justify the reception of the evidence and understand the duty of speaking the truth"

27. In the instant case it appears self- explanatory that PW1's evidence was not only in insufficient but also she was not subjected to *voire dire* examination as per requisite of the law.

28. On PW2s evidence he submits that the same is not shown to have existed and more so cross examination to PW-5 is not indicated. These omissions are pre-judicial on his part as they amount to insufficient evidence.

29. On ground 3; That the learned trial magistrate erred in both law and facts when he convicted and sentenced the appellant on uncorroborated evidence. It was the 2nd complainants evidence that the accused told them to remove their clothes after which he removed his clothes. He tried to insert his penis into her vagina. When she told him that she was feeling pain, he stopped. Her evidence was corroborated by the 1st and 3rd complainant who were both eyewitnesses and victims" in the foregoing evidence the three complainants either gave incomprehensible account of the alleged ordeal or their evidence was not wholly taken. in such cases we cannot say there was corroboration without comprehensible evidence from witnesses.

30. On grounds 4, 5 and 6 he argued that the trial court failed to call the mother of PW-2 who was also the mother of PW-5 as a witness. The appellant at the trial court implored the honourable court to avail the mother of the two minors but his pleas were not given due considerations. He raised the same issue at his defence hearing but all was in vain. Had the trial court granted his prayers it would have facilitated a chance on his part to cross-examine the mother of Anastasia upon the long standing grudge between him and her over the boundary. He submits that it is due to the grudge that he was fixed with the alleged offence.

31. On perusal of the proceedings, I have not seen any demand by the appellant that the mother of PW2 be called to give evidence.

Respondent submissions

32. From the evidence of PW1, PW2 and PW5, there is no doubt that they all were minors aged below 10 years. They all gave their account of what preceded the occurrences on May 5, 2018.

33. Their testimonies remained solid and collaborative. They were unequivocal that they were with the appellant on May 5, 2018 a fact that is not denied by the appellant. He states that indeed he was with the three minors who he served tea and bread and that it was only after B and S came at 4 pm looking for the three minors that he was able to release them.

34. Appellant warned them not to tell anyone of what had transpired. They all seem to have reported to different people about the same incident that matched each other hence corroboration was proved.

35. Medical examination proved that the complainant in this case AK had pus cells in her urine that indicated she had an infection. She was clear that when the appellant turned on her, she felt pain and pleaded with him to stop and he did. She testified that the appellant begun with Pw-1 (SM) then went to Pw-5 (JN) before she turned on her.

36. The evidence of PW1, PW2 and PW5 from the time they were picked by the appellant and served with tea and bread before he embarked on his adventure is a clear indication of the *mens rea* which is the intention that must be proved by the prosecution and the *actus reus* which constitutes the avert act which is geared to the execution of the intended act.

37. As to whether the age of the victims was proved. PW3 ENG gave the birth notification with serial number xxxx indicating that PW1 was born on January 27, 2012. The same was marked MFI-1.

38. In the case of Machakos HC CR Appeal No 296 of 2010 *Republic vs Fappyton Mutuku Nqui* the court held that:

> " The conclusive proof of age in cases under *sexual offences act* does not necessary mean certificate. Such formal documents might be necessary but other modes of proof are available and can be used in other cases".

39. Section 20(1) of the *Sexual Offences Act* provides that if the victim is aged below 18 years, the minimum sentence for the offence of incest is 10 years imprisonment while the maximum sentence is life imprisonment.

40. The prosecution submits that the sentence meted out to the appellant was correct. It cannot be lost or overlooked that the appellant committed a heinous crime and occasioned severe trauma and suffering to the young victims. They also submit that the action by the appellant demonstrated that around him, young and vulnerable children could be in jeopardy.

Issues for determination

41. The court finds the following to be the isssues which it must determine:

    i. Whether the accused attempted to defile the complainants.

    ii. The relationship between the accused and the complainants.

Analysis and determination

Whether the accused attempted to defile the complainants

42. Section 9 (1) of the *Sexual Offences Act* defines attempted defilement as follows:

> " A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement."

43. That is to say, where the accused took steps t to execute the defilement which did not succeed.

44. Section 388 (1) of the *Penal Code* defines the word "Attempt" as follows:

> " (1) when a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifest his intention

by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

(2) "it is immaterial except so far as regards punishment whether the offender does all that is necessary on his part for completing the commission of the offence or whether the complete is prevented by circumstances in depended of his will or whether he desists of his own motion from further prosecution of his intention".

(3) It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

45. The complainants as prosecution witnesses PW1, PW2 and PW 5 testified that on May 5, 2018, they were together playing when the appellant called them to his house; that whilst there he served them tea and bread before he ordered them to undress and started defiling them. Their evidence is concise, clear and essentially similar.

46. PW1, aged 8, gave the following evidence after a *voir dire* examination and upon affirmation. She was cross examined and remained steadfast. It was as follows:

> " PW1: The accused removed our clothes and did us bad manners he put us to the bed....He did bad manners to us on the bed. He lay on me. He had removed our clothes. He didn bad mannners to me on my '*susu*' where I usually pass urine through. He put it on top of my susu and I felt pain. He did bad manners to us in turns..."

47. PW2 also aged 8, equally gave evidence following a voir dire examination and on oath. Similarly, she was cross examined and remained steadfast. He evidence was as follows:

> " PW2: He told us to remove our clothes and to lie on his bed. He reoved his clothes and did *tabia mbaya* on us. He did it on all of us. He did it on my *susu* where I pass urine through. He put his *susu* which he uses it to pass urine in my *susu*. He tried to insert it in my *susu*. It was painful I told him I was feeling pain and he stopped..."

48. The evidence of PW5 was given following a *voir dire* examination. The court was not satisfied that she understood the solemnity of an oath and allowed her to give an unsworn statement upon which she was cross examined and remained steadfast. She stated:

> " PW 5: He then did *tabia mbaya* on us (bad manners). He started with AK . He lay her on his bed. AK lay under him. He had removed her clothes. He did bad manners to AK here (points to her private parts)...He then did bad manners to SM on the bed....When he was done with SM he did bad manners to me. He did it using his *kasusu*. Its located here (points to her private parts). He put it in my private part. It was painful..."

49. The complainants all identified the appellant in open court and their evidence was corroborative of each other.

50. It is true as argued by the appellant that the medical evidence did not show that there was any defilement in the sense that there were no bruises or injuries on the genitalia of the three minors, nor was there evidence of spermatozoa. That would be expected if the act did not result in actual penetration.

51. The *Sexual Offences Act* sections 9, 11 and definition of indecent act in section 2 are as follows:

> " 9.
>
> (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
>
> (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years."
>
> "11.
>
> (1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.
>
> "Sec 2 ' indecent act' means an unlawful intentional act which causes-
>
> (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.
>
> (b) …."

52. Reading these provisions together, it is clear that all that is required in an offence of attempt to defile or to commit an indecent act is to prove that there was an attempt to penetrate but that the penetration did not occur, or that there was contact with the genitals of the victim.

53. In light of this, the medical officer resorted to attempted defilement when penetration was not seen to have occurred from examination of the victims. The evidence of contact with the genitals by the appellant is however clearly shown by the evidence of PW1, 2 and 5.

54. In the case of *David Aketch Ochieng V R*, [2015] eKLR Makau J held that:

> " ….For a successful prosecution of an offence of an attempted defilement, the prosecution must adduce sufficient evidence to the required standard to prove an attempted penetration. This may in my view include bruises, or lacerations from complainant's vagina, and/ or bruises or lacerations of culprit's genital organ and finding made discharge such as semen or spermatozoa outside the complainant's vagina or innerwear without there being penetration."

55. But absence of the bruises, lacerations, or discharges cannot be evidence of absence of or sufficient to show that there was no attempted defilement. The law recognizes that mere contact with genital areas of a victim is sufficient to form the basis of an indecent act. If such an indecent act involved a failed attempt to penetrate it becomes an attempt to defile.

56. This leads to a focus on the evidence of the three girls and the issue of the truthfulness of their evidence and its corroboration.

Corroboration of evidence

57. In the instant case the offence was committed in absence of witnesses other than the three minors (PW1, PW2 and PW5) the complainants. In my view they corroborated one another.

58. The appellant complained that section 124 of the *Evidence Act* cap 80 Laws of Kenya. Was not satisfied. The said section provides:

> "(Sec. 124.) Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him."

59. In essence the appellant was arguing that the trial court did not satisfy itself that the complainants were telling the truth. Further, that from the medical evidence provided and the investigating officer's evidence, there is no corroborating evidence of attempted defilement of the complainants. It was for the prosecution to prove attempted defilement.

60. In the case of *FKM v Republic* [2021] eKLR Dulu J held that:

> With the legal principle in criminal cases that the burden is always in the prosecution to prove their case against an accused person beyond any reasonable doubt – see *Woolmington vs DPP* (1935) AC (an English case) – any shade of a reasonable doubt has to be given to an accused person, and the magistrate should have done so.

61. In sexual offences, however, where the minor is the victim of the offence, the evidence of that minor, if believed by the trial court, can, even without corroboration, found a conviction. The proviso to section 124 of the *Evidence Act* must be taken into account in reading the section, which is as follows:

> "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth." [Emphasis added]

62. Dealing with a similar issue in the case of *Mohamed v R*, (2008) 1 KLR G&F 1175, this Court held that:

> "It is now well settled that the courts shall no longer be hamstrung by requirements of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that he child is truthful."

63. The Court of Appeal sitting in Mombasa in *Sahali Omar vs Republic* [2017] eKLR stated and held that:

> "On the first issue, the appellant took issue with lack of corroboration of the complainants' evidence, which he said ran afoul of section 124 of the *Evidence Act*...The import of that provision is that ideally, the evidence of a child of tender years in criminal proceedings should always be corroborated; notwithstanding the *voir dire* examination of the child under section 19 of the *Oaths and Statutory Declarations Act*. In short, that even though the court is satisfied that the child is competent to tell the truth, their testimony should nonetheless be corroborated by independent evidence. However, the section also allows for an exception. Under the proviso thereto, the court is allowed to solely rely on the evidence of a child of tender years if the child is the victim, provided the court first satisfies itself on reasons to be recorded, that the child is being truthful...It is a well established rule of law that the unsworn testimony of a child of tender years must be corroborated. However, where a child of tender years gives sworn testimony or is affirmed, corroboration is unnecessary. (See. *Patrick Kathurima v R* (*supra*) and *Johnson Muiruri v Republic*, (1983) KLR 445 and also *John Otieno Oloo v Republic* [2009] eKLR)...In addition, the proviso to section 124 of the *Evidence Act* affords an exception to this general rule in cases of sexual assault where the child in question is not only the sole witness but also the alleged victim. So that as far as PW1 was concerned, even though neither PWs 2, 3, 4 or even 5 (the medical practitioner) could directly support her testimony, the court could nonetheless rely on it provided it recorded its reasons. In this case, the trial court is seen to have addressed itself thus:
>
> "...The complainant did not mention anyone else. The offences were committed during the day. The accused was well known to PW1, PW2, PW3 and PW4."
>
> The appellant has not taken any issue with the reasons recorded by the trial court. This, in addition to the fact that PW1 and PW2 gave evidence under affirmation, the ground on corroboration should fail."

64. From the above corroboration is not required of the evidence of a child of tender years if it is given on affirmation or on oath. Therefore, what is required of the trial court is to be satisfied that the victim is telling the truth.

65. In *John Otieno Oloo v Republic* [2009] eKLR it was stated:

> "In our view, the second, third and fifth grounds of appeal revolve around two main complaints which are first whether the evidence of C, J 2 and A should have been subjected to what in law is referred to as voire dire examination before being received and to determine in what way such evidence would be received whether on oath or not on oath. The second complaint is as to whether the evidence of C, J2 and A required corroboration.....
>
> The evidence which implicated the appellant was that for a child aged 13 years old C A (PW2), a child aged 15 years J O O 2 (PW3) and a young person (teenager) aged 17 years A A O (PW4). The lower court record does not show that C (PW2) and J 2 (PW3) were examined as to their capability of understanding the meaning of oath. However, they gave evidence on oath and were cross-examined by the appellant. We do not think that the failure by the trial magistrate to comply with the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap 15) Laws of Kenya occasioned any miscarriage of justice."

The relationship between the accused and the complainants

66. The appellant was charged with the offence of attempted incest contrary to section 20(2) of the sexual offence Act No 3 of 2006.

> 20.
>
> (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:
>
> Under Section 20(2), if the offence is an attempt to commit the offence of Incest, upon conviction the offender is liable to imprisonment for not less than ten years."

67. In *G M K v Republic* [2012] eKLR it was held that:

> " The essential element in the offence of incest is an "indecent act" which means and unlawful intentional act which causes -
>
> (a) any contact between any part of the body of a person with the genital organs, breasts or buttocks of another but does not include an act that causes penetration;
>
> (b) exposure or display of any pornographic material to any person against his or her will."

68. Thus the ingredients for the said offence – incest and attempted incest – are:

i) Knowledge that the person is a relative

ii) Penetration or indecent act

69. In this case the trial court relied on the 2nd complainant's (PW2) evidence that the appellant is her mother's brother. Further, PW5 testified that the appellant was their uncle. The appellant in cross examination in his defence admitted that "AK is my niece". So this issue is not controversial, and any sexual contact with her would fall within the ambit of section 20 SOA.

Disposition

70. In light of all the foregoing, I am of the considered view that the evidence of the three minors was corroborative and that their account was truthful, and remained unshaken and intact after cross examination.

71. I see nothing in the appeal that would persuade me to overturn the learned trial magistrate's conclusions. Accordingly, the conviction and sentence of the lower court are hereby upheld and the appeal is dismissed in its entirety.

72. Orders accordingly.

DELIVERED SIGNED AND DATED THIS 9TH DAY OF FEBRUARY, 2023 AT KERUGOYA.

.....

R MWONGO

JUDGE

In the presence of:

1. Mamba for state

2. Applicant/accused: present at Nyeri Maximum

3. Murage, court assistant