Ndilu v Republic (Criminal Appeal E50 of 2022)
[2023] KEHC 17819 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17819 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E50 OF 2022

GMA DULU, J

MAY 18, 2023

BETWEEN

JOHN MUEMA NDILU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Sexual Offence Case No. E031 of 2021 delivered on 10th February, 2022 at Kilungu Law Court by Hon. E. M. Muriu (PM))

JUDGMENT

1. The appellant was charged in the Magistrate's Court with incest contrary to Section 20(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on September 28, 2021 at around 06:00hours in Kivani Location within Makueni County being a male person caused his penis to penetrate the vagina of GNJ a female child aged 10 years who was to his knowledge his father.

2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which being that on the same date and at the same place intentionally and unlawfully touched the vagina of GNJ a child aged 10 years with his penis.

3. He denied both charges. After a full trial, he was convicted on the main count of incest, and sentenced to life imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant has come to this court on appeal on the following grounds:-

    1. The Magistrate erred in law and fact by holding that the prosecution had proved the case beyond reasonable doubt against (him) while there was no such evidence to prove thereby deciding the case against the weight of the evidence.

2. The learned trial Magistrate erred both in law and facts in ignoring cardinal principles of criminal law and procedure that the burden (of) each ingredient of the charge beyond reasonable doubt (sic).

3. The learned trial Magistrate failed to make a finding that there existed some doubts in the prosecution case and further failed to make a finding that the benefit of the aforesaid to make a finding to acquit the appellant as a result thereof (sic).

4. The learned Magistrate erred both in law and facts in failing to find that enough doubt was created to secure an acquittal of the appellant as celebrated in the case of *Aden Mohamed Abdi =Versus= Republic (2020) eKLR*.

5. The learned trial Magistrate erred both in law and facts in failing to adopt a proper voire-dire examination pursuant to Section 19(Cap 15) in respect of PW1 a child aged 10 years in compliance with the provisions and principles in the celebrated case of *Francisco Malove =Versus= Republic (1961) EA.*

6. The learned trial Magistrate erred in her interpretation of Section 124 of the *Evidence Act* (Cap 80) in convicting the appellant on the uncorroborated evidence of PW1 and therefore requiring corroboration within the meaning of Section 31(10) of the *Sexual Offences Act*.

7. The learned trial Magistrate erred in accepting uncorroborated evidence of PW1, failed to comply with the provisions of Section 124(Cap) Laws of Kenya (sic).

8. The learned Magistrate erred in convicting the appellant without considering that no other witness came to court who witnessed the incident relied on hearsay evidence and as such evidence remained that of a single witness.

9. The Magistrate failed to consider the defence case adequately and failed to make a finding thereof.

10. The learned Magistrate erred by failing to make due regard to the material contradictions, discrepancies and inconsistencies in the prosecution case thereby creating and reaching a wrong decision causing miscarriage of justice.

11. The learned Magistrate erred in failing to believe the appellant's defence and further failed to give proper or any reasonable grounds of rejecting the appellant's defence from the evidence adduced.

12. The learned trial Magistrate erred in law and facts in failing to consider the evidence as a whole before ordering a guilty finding against the appellant.

5. The appeal was canvassed through written submissions. I have perused and considered the submissions filed by the appellant as well as the submissions filed by the Director of Public Prosecutions.

6. This being a first appeal, I have to be guided by the legal principle that as a first appellate court, I have a duty to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences – see *Okeno =Versus= Republic [1972] EA 32.*

7. I also have to bear in mind that the burden was on the prosecution to prove every element of the offence, as required under Section 107 and 108 of the *Evidence Act* (Cap 80). In addition, as this is a criminal case, the standard of proof on the prosecution is beyond any reasonable doubt.

8. I have considered the evidence on record. In proving their case, the prosecution called four (4) witnesses. The appellant on his part tendered sworn defence testimony and did not call any additional witness.

9. The elements of the offence of incest are the relationship of the victim and the culprit. Secondly sexual penetration. Thirdly, the identity of the culprit. In the present case, as the victim is alleged to be a child, the age of the victim was an element of the offence to be proved by the prosecution.

10. From the evidence of the prosecution and even the defence on record, it is clear to me that the victim PW1 and the appellant are a father and a daughter. The victim PW1 NGJ testified to this relationship. PW2 JMM the mother of PW1 testified to this relationship. The appellant who testified as DW1 also admitted the said biological relationship in his defence.

11. I find that the prosecution proved beyond any reasonable doubt that the appellant and PW1 were a father and a daughter.

12. Was penetration of a sexual nature on PW1 proved? PW1 stated that she was penetrated sexually that morning (September 28, 2021) and informed PW2 about the incident. The medical evidence of PW4 Eric Kasiamani the Clinical Officer at Kilungu hospital was to the effect that the hymen of PW1 was missing. The vagina opening was wide open. He also stated that PW1 went to hospital on October 12, 2021.

13. In my view, sexual penetration as alleged was not proved beyond reasonable doubt. First reason is that the mere fact of the hymen of PW1 missing is not conclusive evidence of sexual penetration, as the hymen of a girl or a woman can be missing for other various reasons. Secondly, the fact that there was a delay between September 28, 2021 the date of alleged offence, and October 12, 2021 when PW1 went to hospital, a period of about two (2) weeks, creates a doubt as to the truthfulness of the testimony of PW1.

14. Thirdly, the undisputed fact of the long delay in PW1 going to hospital for medical examination, meant that the results of the medical examination carried out, could not scientifically establish whether or not sexual penetration occurred on PW1 on September 28, 2021. I thus find that sexual penetration of PW1 as alleged was not proved beyond reasonable doubt.

15. Was the appellant the culprit? Having found that sexual penetration on PW1 was not proved, I also find that the appellant was not proved to be the culprit. In addition to the above reasons, there is evidence on record that the relationship between the appellant and PW2 his wife was sour, as PW2 said in evidence herein that the appellant had formed the habit of sodomising her instead of engaging in normal sex. Secondly, PW2 testimony was to the effect that they reported the incident to Kola Police Station immediately on September 28, 2021, while PW3 PC Julius Mutune the investigating officer, stated that the report of the incident was made to Kola Police Station on October 12, 2021. This was a serious contradiction in the prosecution evidence.

16. In my view, the evidence of PW1 and PW2 regarding this incident was not believable, and the trial court should not have believed the same. The provisal to Section 124 of the *Evidence Act* (Cap 80) regarding the evidence of PW1 is not applicable in our present case.

17. I find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit.

18. With regard to the age of the alleged victim PW1, PW2 relied on a birth certificate of PW1 which was not challenged by the appellant who knew the alleged victim well as his daughter. I find that the age of the alleged victim PW1 was proved beyond reasonable doubt.

19. The appellant has also complained that proper voire-dire examination was not conducted on PW1 as required under Section 19 of the *Oaths & Statutory Declarations Act* (Cap 15). From the record, I find that voire-dire examination was conducted and thereafter the trial Magistrate found that PW1 did not understand the nature of an oath, and allowed her to tender unsworn evidence.

20. I find no substantive error on the part of the trial Magistrate on voire dire examination and dismiss the complaint.

21. As I have found that sexual penetration on PW1 was not proved, and the identity of the appellant as the culprit was also not proved, the appeal will succeed. Conviction will thus be quashed and sentence set aside.

22. Consequently, 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.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 18TH DAY OF MAY, 2023 AT VOI.

GEORGE DULU

JUDGE

In the presence of:-

Appellant

Mr. Sirima holding brief for Mr. Kazungu for state

Mr. Otolo court assistant