WKM v Republic (Criminal Appeal E063 of 2021)
[2023] KEHC 17573 (KLR) (18 May 2023) (Judgment)

Neutral citation: [2023] KEHC 17573 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E063 OF 2021

GMA DULU, J

MAY 18, 2023

BETWEEN

WKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the conviction and sentence in Criminal Case No. 5 of 2021 at Kilungu Law Court by Hon. E. M. Muiru delivered on 6th May, 2021)

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Kilungu with sexual assault contrary to section 5(1)(a)(i)(2) of the *Sexual Offences Act* Number 3 of 2006. The particulars of offence were that on the night of 19th January, 2021 at unknown time in Mukaa Sub County in Makueni County intentionally and unlawfully used his fingers to penetrate the genital organ of MK a child aged 9 years who to his knowledge was his daughter.

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 during the same night and at the same place intentionally and unlawfully committed an indecent act with MK a child aged 9 years by inserting his fingers to her genital organ.

3. He denied both charges. After a full trial, he was convicted of the main charge of sexual assault and sentenced to 50 years 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 learned trial Magistrate erred in law and fact by failing to consider that the evidence of PW1 was not proved beyond reasonable doubt.

2. That the existence of bad blood between the appellant and the complainant's mother created a fertile ground for fabrication of the charges.

3. The trial Magistrate erred in law and facts when he failed to evaluate the evidence adduced by PW1 which lacks merits and was unbelievable.

4. The learned trial Magistrate erred in law and facts when he convicted and sentenced the appellant on the evidence of the prosecution witnesses which was uncorroborated and inconsistent.

5. The learned trial Magistrate erred in law and facts by failing to observe that the trial was conducted in contravention of Section 19 of the Oaths and Statutory Declaration Act concerning the reception and admissibility of evidence of a child of tender years, article 4 of *the constitution* of kenya and section 2 of the *Sexual Offences Act*.

6. The learned trial Magistrate erred in law and facts 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.

7. The learned trial Magistrate erred in law and facts when she dismissed his sworn defence in which he alleged the possibility of being framed up on the existing grudge without giving cogent reasons as provided under section 169 *Criminal Procedure Code.*

5. The appeal was canvassed through written submissions. In this regard, 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 start by reminding myself that as a first appellate court, I am duty bound to evaluate all the evidence on record afresh and come to my own independent conclusions and inferences but bear in mind that I did not have the opportunity to see witnesses testify in order to determine their demeanour – see *Okeno =Versus= Republic* [1972] EA.

7. In proving their case, the prosecution called five (5) witnessed. On his part, the appellant tendered sworn defence testimony and did not call any additional witness.

8. The appellant has raised both technical and substantive grounds of appeal. I will deal with the technical grounds first.

9. The appellant has complained that the trial court violated section 19 of the *Oaths and Statutory Declarations Act*, article 4 of *the Constitution* and section 2 of the *Sexual Offences Act*, with regard to the admissibility of the evidence of PW1 a child of tender years.

10. The complaint of the appellant, the way I understand it, is that the complainant PW1, being a child of tender years was not taken through voire-dire examination before tendering her evidence.

11. Indeed the complainant PW1 was said to be 9 years old. She was thus a child of tender years as defined under section 2 of the *Children Act* Number 8 of 2001, as she was a child under the age of ten years.

12. Under section 19 for the *Oaths and Statutory Declarations Act* (cap.15), she was required to undergo voire-dire examination to establish whether she knew the importance of saying the truth, as well as the nature of an oath.

13. The trial court record shows in fact that the court conducted voire-dire examination of PW1 before allowing her to testify, she did not testify on oath.

14. This shows, in my view, that the law under section 19 of the *Oaths and Statutory Declarations Act* was complied with by the trial court. The appellant complaint is thus dismissed.

15. With regard to the substantive grounds, elements of the offence of sexual assault, the age of the victim is not a necessary ingredient. However, since the charge sheet mentions the age of the victim, the prosecution was required to prove the age of PW1 beyond reasonable doubt. The second element of the offence was penetration of her genitalia. The last element of the offence is the identity of the culprit or whether the appellant was the culprit.

16. With regard to the age of the alleged victim PW1, she said in court that she was 9 years old. Her mother PW2 MM testified that PW1 was born on September 28, 2011. She relied on a birth certificate which was produced in court as an exhibit.

17. The appellant who was the father of PW1 did not challenge this evidence. In my view, the prosecution proved the age of the complainant (victim) beyond any reasonable doubt.

18. Did the prosecution prove beyond reasonable doubt that PW1 was penetrated through the vagina with a finger as alleged?

19. The evidence of the prosecution on the alleged penetration was that of PW1 the alleged victim alone, as no one witnessed the incident. Such evidence of a single witness victim of a sexual offence can sustain a conviction without corroboration, provided it is believable and so believed by a trial court for reasons to be recorded by the trial court. This legal position is contained in statute under the provisal to section 124 of the *Evidence Act* (cap 80).

20. Is the evidence of PW1 believable? In my view it is not believable, firstly because of contradictions between PW1 evidence and that of her mother PW2. In this regard, though PW1 said in evidence that after the incident she informed her mother PW2, the said PW2 told the court that her knowledge of the incident was from the information given by the teacher. This was a major contradiction, in the prosecution evidence and goes to the credibility of both PW1 and PW2.

21. Secondly, the said teacher PW5 JKM's testimony was that on 22nd January, 2021 a parent went to school and informed him that the mother of PW1 had informed her that PW1 had been defiled. This is also another material contradiction regarding the source of information on the allegation of the act of penetration or sexual assault, as it is not clear from the totality of the evidence of these witnesses on record, how and when the incident occurred, and who initiated the first report. Thus one cannot say which version is the true position, which puts the credibility of what PW1, as well as the truth of what she said in evidence in court, to be in great doubt.

22. The fact that PW4 Erick Kasiamani the Clinical Officer said in court that the hymen of PW1 was missing perse, is not proof that there was penetration of her vagina through a finger as alleged, as the hymen of a girl can be broken for various other reasons. In any event, there is no evidence on record herein, that the hymen of PW1 was freshly broken.

23. I thus find that the prosecution did not prove beyond any reasonable doubt that there was penetration of PW1's vagina by a finger or fingers as alleged.

24. Is the appellant the culprit? In my view, the prosecution failed to prove beyond reasonable doubt that the appellant was the culprit.

25. The first reason is that the incident allegedly occurred at night, while there is no evidence on record regarding lighting in the room. The evidence of PW1 on voice identification is also not descriptive of the voice and words used by the appellant. With regard to PW1's evidence of having identified the

appellant at the door, I note that the trial court was not told about the distance between the door and the bed nor how the bed was placed in relation to the door and how intense the light was.

26. The evidence of PW2 on the appellant being the culprit also is curious. It appears not to have come from what she was told by the complainant PW1 or the teacher PW4, but from her own prior perception or conviction or a dream. In this regard PW2 stated in evidence as follows:-

> On January 19, 2021 we went to sleep and I knew he had the habit of touching our daughter's private parts. He then told me even today he had seen one of our daughter Elizabeth had not worn her underpant. I got angry. I also told the girls not to be too close to their father.

27. The above date (January 19, 2021) is the same date of the alleged incident, thus it is apparent that there is all possibility that PW1 was merely repeating the conviction of PW2 in implicating the appellant with this serious offence. One could even enquire how the appellant could have the courage to do such an act as alleged PW2, in the house wherein PW1's mother PW2 was present. In those circumstances, the defence of the appellant on an existing grudge or misunderstanding is credible.

28. In addition to the above, PW2 stated in cross-examination that her relationship with the appellant, who was her husband, was not good, as he was hot tempered. She also said in cross-examination that she dreamt of something. This is another reason why the long sworn denial of the appellant is credible.

29. I find that the prosecution did not prove beyond reasonable doubt that the appellant was the culprit. I will thus quash the conviction and also set aside the sentence.

30. 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.

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

GEORGE DULU

JUDGE

In the presence of:

The appellant

Mr. Sirima holding brief for Mr. Kazungu

Mr. Otolo court assistant