DKK v Republic (Criminal Appeal E019 of 2022)
[2023] KEHC 20625 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20625 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E019 OF 2022

MS SHARIFF, J

JUNE 16, 2023

BETWEEN

DKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the conviction and sentence by Hon M. Sudi (P.M) in original Chuka CMC Sexual offences Case No. 46/2019 delivered on 11/02/2021)

JUDGMENT

1. DKK was arraigned before the subordinate court to answer charges of incest contrary to Section 20(1) of the *Sexual Offences Act, 2006*. The particulars being that on diverse dates between 1st August and October 2, 2019 in Maara Sub County within Tharaka Nithi County intentionally and unlawfully caused his penis to penetrate the vagina of one QGK, a child aged 5 years who was to his knowledge his daughter. He faced an alternative count of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. Upon arraignment, the appellant pleaded not guilty. The matter then proceeded to hearing.

3. PW-1 was the minor who testified that she stays with the appellant who is her father. That he defiled her 3 times a certain morning when her mother had gone to her place. That she later reported the matter to her teacher. She was later taken to hospital.

4. PW-2, SGR stated that the minor was her pupil attending PP2 and that one day, the father came to school threatening to burn the mattresses as the minor is being defiled by another pupil. When the appellant left, they interrogated the minor who stated that the father had been defiling her at night after her mother had deserted home. She said that the minor feared speaking out as the appellant had threaten to kill her.

5. PW-3 was Martin Njagi, the area chief. He narrated that one day while in a meeting with his officers, a community health volunteer reported to them that the minor was being defiled by the father, the appellant. He, in the company of the OCS raided the appellant's house at night and took the minor and the appellant for investigations. He found the minor sleeping in the appellant's room.

6. PW-4 PC (W) Esther Wanjiku stated that she visited the appellant's house in the night and found the minor ad the appellant sharing a room. She took them to the station and to Chuka General Hospital the following day. The minor told her that the appellant had defiled her.

7. PW-5, Joseph Mwenda a clinical officer from Chuka General Hospital examined the minor and noted normal genitals, hymen was lacking. He also noted no fresh bruises and or tears.

8. The appellant was put on his defence and elected to give a sworn statement. He stated that he was arrested on 1/10/2019 and taken to police station. He stated in the other days, he had been working.

9. The trial magistrate after considering the evidence convicted and sentenced the appellant to 20 years imprisonment term. The appellant being aggrieved filed this appeal raising the following grounds;

    a. The trial magistrate erred by convicting the appellant without adequate evidence.

    b. The learned trial magistrate erred by convicting on the strength of evidence that was full of inconsistencies and uncorroborated in violation of Section 163(1) of the *evidence act*.

    c. The learned trial magistrate erred by disregarding his defence without cogent reasons.

    d. The prosecution's evidence was insufficient and unsatisfactory.

10. The appeal proceeded by way of written submissions. Both parties filed their respective submissions which have been taken into account.

Analysis and Determination.

11. My duty as first appellate court was stated in *Okeno v Republic* [1972] EA 32 at 36 where it was stated;

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R*., [1957] EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v R*, [1957] EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v Sunday Post*, [1958] EA 424."

12. The appellant was charged with the offence of incest under Section 20(1) of the *Act* which provides;

> 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:

13. From the section, the ingredients to be established by the prosecution are; an indecent act or an act that causes penetration; and, the victim must be a female person who is related to the perpetrator in the degrees set out in Section 22 of the *Act*.

14. Indecent act is defined by Section 2 to mean;

    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.

15. On the other hand, penetration means; 'the partial or complete insertion of the genital organs of a person into the genital organs of another person"

16. It is not in contest that the victim is the appellant's daughter and her mother had since left the home. The fact of relationship is thus proved.

17. The next issue to be proved is penetration as defined by the Act. A recap of the evidence tendered in the trial court was that the issue was discovered when the appellant went to the victim's school threatening to burn mattresses alleging that the victim had been defiled by another pupil in the school. Upon this, the victim was interrogated by PW-2 and the minor disclosed that the appellant had been having sex with her. The medical evidence presented showed no major injuries consistent with penetration.

18. This leads me to interrogate how penetration can be proved. In *Mohamud Omar Mohamed v Republic* [2020] eKLR, the court cited the Ugandan authority in *Bassita v Uganda* SC Criminal Appeal No 35 of 1995 where the Supreme Court held:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."
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> For evidence to be capable of being corroborated it must:
>
> (a). Be relevant and admissible Scafriot {1978} QB 1016.
>
> (b). Be credible *DPP v Kilbourne* {1973} AC 729
>
> (c). Be independent, that is emanating from a source other than the witness requiring to be corroborated Whitehead J IKB 99
>
> (d). Implicate the accused

19. From the record, the victim stated that the appellant used to insert 'kitu chake' in her private parts. She also narrated the same to her teacher, the clinical officer and the police officer. I note from the record that the victim was overwhelmed during her testimony and even broke down in tears wherefore the trial court referred her for counselling.

20. I have also considered the medical findings which showed; normal genital, missing hymen, no fresh bruises/ tears, no pus cells or spermatozoa noted. The victim was living with the appellant and given her testimony that the appellant had inserted his penis in her vagina thrice at night and that the incident

did not happen on the date of his arrest, and further regard being had to the evidence of PW2 SGR the victim's teacher who stated that the victim was usually timid I do find that penetration was proved. There was no possibility of finding fresh bruises given that the appellant had been defiling the victim for some time. The absence of hymen attests to this fact

21. I have carefully reviewed the trial court's record, the submissions filed in this appeal and the legal position on the subject and I am of the firm view that the evidence presented in court was sufficient to make a finding of guilt.

22. On the balance I find that this appeal is devoid of merit and it is hereby dismissed. The appellant's conviction is confirmed and the sentence upheld.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT CHUKA THIS 16TH DAY OF JUNE 2023.

MWANAISHA. S. SHARIFF

JUDGE