JAL v Republic (Criminal Appeal 3 of 2020)
[2023] KEHC 19075 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19075 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 3 OF 2020

J WAKIAGA, J

JUNE 21, 2023

BETWEEN

JAL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence in Kangema S.O Case No 22 of 2018 by Hon P.M. Kiama (SPM) on 27th January 2020)

JUDGMENT

1. The Appellant was convicted and sentenced to life imprisonment on the offence of Incest Contrary to Section 20(1) of the *Sexual offences Act*. The particulars of which were that on unknown dates between the month of June and August 2018 in Mathioya Sub County within Muranga County intentionally touched the vagina of GWM with his penis who was to his knowledge his daughter, a child aged fifteen (15) years.

2. Being dissatisfied by the said conviction and sentence, he filed this Appeal and raised the following grounds of appeal:

   (a) That the learned trial Magistrate erred in law and fact by relying on the DNA test which was done unlawfully.

   (b) The learned trial Magistrate shifted the burden of proof to the Appellant.

   (c) The prosecution case was full of contradiction, malice, inconsistencies and an afterthought.

   (d) The prosecution case was not proved beyond reasonable doubt.

   (e) Essential prosecution witnesses were not called to testify.

(f) The Court failed to note the soar relationship between the Appellant and the complainant's mother as a result of an alleged infidelity and lack of financial support.

Submissions

3. The Appeal was heard by way of written submissions. On behalf of the Appellant it was submitted that no proper Voir dire was conducted as required in law as PW1 testified without being asked whether she understood the nature of oath and the purpose of telling the truth and did not follow the step outlined in *Joseph Opando v Republic* and therefore her evidence was not properly received.

4. It was submitted that PW3 did not carry out the DNA test to ascertain paternity which would have corroborated the evidence on identification and that in convicting the Appellant the Court relied on mere suspicion which could not form the basis for conviction as was stated in *Sae v Republic*. It was further contended that the DNA report was produced by PW3 who was neither a document examiner nor a medical Doctor/ Practitioner.

5. It was contended that the prosecution did not call as witnesses the child who was alleged to had been sleeping with the complainant on the same bed, together with her brother who was also sleeping in the same room. There was also Mama M who was informed of and interrogated the minor of her pregnancy. It was submitted that failure to call the said witnesses was fatal to the prosecution case in support of which reference was made to the cases of *Juma Ngodia v Republic* (1982-88) KAR 454 where the Court held that if the prosecution does not call vital witnesses without explanation, it runs the risk of the Court presuming that the evidence could have been unfavourable to the prosecution. The above position, it was submitted was in *Paul Karanja Kitara v R* [2016] eKLR.

6. It was submitted further that penetration was not proved as the Appellant rebutted the prosecution account which was not corroborated by a medical evidence which was produced by PW4 the Investigating Officer who was not a qualified medical practitioner under the provisions of Section 7 (4) of the *Clinical Officers Act* in support of which the case of *JOO v Republic* [2015] eKLR to the effect that the Court ought to be slow in making assumptions not supported by facts tendered before it.

7. It was submitted that the Court did not take into account the soar relationship between the Appellant and the complainant's mother as a result of his second wife and lack of financial support and that the complaint was as a result of the grudge created. It was finally submitted that the case was not proved to the required degree and therefore the Appeal should be allowed.

8. On behalf of the Prosecution, it was submitted that the victim confirmed her age to be 13 years and that the Appellant was her step father who was identified by recognition and that penetration was proved through the evidence of PW3 the Clinical Officer who testified that her hymen was broken and that she was pregnant and the result of the DNA test confirmed that the Appellant was the father of the child. It was submitted that the Appellant fell with the definition of Section 22 of the Act as the victim's father and that the sentence was lawfully provided for under Section 20 of the Act.

Proceedings

9. This being a first Appeal, the Court is under a legal duty to re-evaluate and asses the evidence tendered before the trial Court to come to its own conclusion thereon while giving allowance to the fact that it did not have the privilege of seeing and hearing witnesses.

10. PW1 GWM stated that the Appellant used to go to her bed and do bad things to her in her vagina using his penis several times and would tell her not to tell anyone about it until her mother noticed that she was pregnant which made her send her to Mama M who was their neighbour in whom she

confided. In cross examination she stated that the Appellant used to attack her when the other children had fallen asleep and that when he was not with their mother, he would be with the other woman. She stated that the Appellant would gain entry into her room through the window. She denied that they fixed the Appellant because of the differences with her mother.

11. PW2 JMN on August 4, 2018 found that the complainant who was 13 years old was pregnant and when asked the responsible person she refused to open up forcing her to send her to a friend called Mama M to who she disclosed that it was the Appellant her step father and that she never used to hear the Appellant leave the room. She confirmed that the Appellant's other wife had injured her and that since he started living with the other women, he had cut off all financial assistance to her including payment of school fees.

12. PW3 Dona Maithima a Clinical Officer produced P3 form on the complainant whose age was assessed at 13 years. At the time of examination her hymen was broken and she was pregnant.

13. PW4 Zebedi Akama received the complaint and recorded the statements. He rearrested the Appellant who had been arrested by PC Wesley Yukon. He further confirmed having taken the Appellant to KNA where his samples were taken for DNA which confirmed that he was the father of the child.

14. When put on his defence the Appellant gave a sworn statement and stated that in May 2018 he was in Sirimon Nanyuki and went back to Gathongo village in June 2018 and then back to Nanyuki in July and on 5th he came back home and slept with his wife on 6th but was arrested on 7th on allegation of having defiled a child on the influence of Mama M. In cross examination, he confirmed that he was married to the mother of the complainant since 2015 and that he had a close relationship with Mama M which had not reached the sexual stage before he hooked up with GK. He stated that the results of the DNA were interfered with and that the mother of the child wanted the charges dropped.

15. DW1 IE stated that the Appellant visited the husband of his sister at Nanyuki Hospital in May and June 2018 where he found him and that after the burial he went back with his wife.

Determination

16. From the submissions and proceedings herein, I have identified the following issues for determination:

    a) Whether proper Voir dire was conducted.

    b) Whether the prosecution case against the Appellant was proved to the required degree.

    c) What order should the Court make on this Appeal.

17. On the issue of Voir dire, the Court records show that the trial Court conducted a Voir dire examination upon which he stated "the child is ok to be sworn". The jurisprudence on Voir dire was stated in the case of *Johnson Muiruri v R* [1983] KLR 445 where the Court stated that in any proceeding before any Court involving a child of tender age as a witness, the Court is required to form an opinion on examination whether the child understands the nature of an oath in which case his sworn evidence may be received and if the Court is not satisfied his unsworn evidence may be received and the accused may not be liable for conviction on uncorroborated evidence.

18. A child of tender years for the purposes of examination was stated by the Court of Appeal in the case of *Maripett Lookomok v Republic* [2016] e KLR that the time honoured 14 years remains the correct threshold for Voir dire examination. The Court of appeal in *Japheth Mwambire Mbitha v Republic* [2019] e KLR stated that the purpose of Voir dire is to ensure that the minor understands the solemnity of oath and if not at least the importance of telling the truth.

19. Whereas the Court record shows that the trial Court did not use the conventional format the complaint when asked why she as in Court answered that she was to tell the truth and I am therefore satisfied that her evidence was received within the confines of the law and therefore the Appellant's complaint on the defect is more on the procedural defect than the substantive defect, which did not prejudice him in any form and would dismiss this ground of appeal.

20. On the issue of proof of the prosecution case, the Appellant's complaint is on how the DNA report which confirmed that he was the father of the child born out of the defilement of the complaint was produce and not on the authenticity of the said report. The said report was produced by the Investigating Officer, who was the one who requested for the test and the Appellant did not object to the production of the same and in compliance with the provision of Section 77 of the *Evidence Act*. I am therefore not satisfied that the Appellant was prejudice by the production of the said DNA.

21. On the claim that vital prosecution witnesses were not called, it is trite law that the prosecution has the sole discretion on the number and nature of witnesses to call in proof of its case and that the Court can make an adverse inference on the failure to call witnesses. In this cause, the witnesses whom the Appellant alleges to had not been call would not have added value to the prosecution case as their evidence was covered by the witnesses who were called by the prosecution.

22. On the issue of the allegation of the grudge between the Appellant and the complainant's mother, the record shows that the same was put to her by way of cross examination and the same confirmed that from the time the Appellant moved with the other women he stopped supporting her financially and she did not take any action. I have also taken into account how the complainant gave the name of the Appellant as the one responsible for her pregnancy and would dismiss the Appellant's contention that it was the mother who set up the complainant against him.

23. On proof of the prosecution case, the identity of the Appellant was not in doubt, he was living together with the complainant who was her step-father and her evidence was candid on how he used to defile her was corroborated by the DNA results. The age was proved beyond reasonable doubt and penetration was proved through the medical report and the fact that she was pregnant.

24. I therefore find and hold that the conviction of the Appellant was safe and free from error and would dismiss the appeal on conviction.

25. Sentence remains the sole discretion of the trial Court and would only be interfered with by the appellate Court unless the Court acted upon wrong principles or overlooked some material factors as stated in *Ogolla s/o Owuor* [1947] EACA 270.

26. Section 20(1) of the *Sexual Offences Act* provides for an imprisonment for life. In seeking for that sentence, the prosecution submitted that the victim was only 12 years old being a child had been made a mother at tender age and would not be like any other child.

27. The Appellant was in fiduciary position with the complainant and should not have destroyed her young life noting that in addition to the complainant's mother, the Appellant had three other women from whom he could quench his sexual thirst, if the issue was sex. I take the view that the same is a sexual pervert who desires the sentence mated out by the Court.

28. It therefore follows that there is no merit on the appeal against sentence.

29. In the final analysis the appeal is dismissed both on conviction and sentence and the judgement of the trial Court affirmed. The Appellant has a right of Appeal and it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 21st DAY OF JUNE, 2023

J. WAKIAGA

JUDGE

In the presence of:

Ms Nzuki for Prosecution

Jackline – Court Assistant