KENYA LAW
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MMK v Republic (Criminal Appeal E042 of 2022) [2023] KEHC 20485 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20485 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E042 OF 2022

A. ONG'INJO, J

JULY 13, 2023

BETWEEN

MMK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the conviction and sentence of the Honorable Sadra Ogot, Senior Resident Magistrate at Msambweni Law Courts Sexual Offence No. 34 of 2019 on 2nd March 2022, Republic v Mwachupa Nduchi Kifonda)

JUDGMENT

1. The Appellant MMK was convicted and sentenced to serve a term of 63 years imprisonment from the period he was remanded in custody during his trial for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006 in Msambweni Senior Resident Magistrates court Sexual Offence Case No. 34 of 2019.

2. The particulars were that on the night of 7th and 8th October 2019, the Appellant at Mwereni Location within Kwale Country intentionally and unlawfully penetrated the vagina of KM a girl child aged 9 years with his penis knowing that she was his daughter.

3. The appellant was dissatisfied with the conviction and sentence and he filed petition of appeal on the following amended grounds filed on 30th January 2023: -

   i. That the learned trial Magistrate erred in law & fact by omitting to conduct voire dire examination on the Complainant.

   ii. That the learned trial Magistrate erred in law & fact by convicting the appellant on the basis of inconsistent evidence.

iii. That the learned trial court erred in law & fact by failing to find that the medical evidence did not prove the charges pressed against the appellant.

iv. That the learned trial court erred in law & fact by failing to see that crucial evidence was withheld by the prosecution.

v. The trial court imposed on the appellant a sentence that did not take into account mitigation.

4. The prosecution's case was that the complainant remained at home with her siblings and the father, the appellant herein, as the appellant sent the mother to go and weed. That the complainant's mother left to go to the shamba as the appellant also left to go to work. That in the evening the complainant went to their elder uncle's house as the appellant had not returned. That when the Appellant returned at 8.00pm, he went and collected his children, went and cooked for them and they went to bed after eating.

5. That at 10.00pm the Appellant told the Complainant they should go to her grandmother's place and get cattle. The complainant said it was dark and raining and she was asleep. That when she said she wanted to go with her younger sibling he told her "usipoenda nitakufanya vile nilifanya mjomba wako". The complainant said she was scared for her life and so she obeyed.

6. That she accompanied the appellant who however did not follow the known road. When she asked, he said it was a short cut. That they walked past the grandmother's house and when she asked where they were going, the appellant told her to enter the forest. The complainant said she got scared and she started running back to where they had come from but she could not find her way and when she fell the appellant caught up with her, undressed her and defiled her. After defiling her he warned her not to say anything to anyone.

7. That after he had defiled her she wore her clothes and she was cold and shivering and they went back through the grand-mothers house. When the grandmother said she should sleep, the appellant insisted they go home together as she was to go to school. The complainant said she told her grandmother, what had happened. The complainant said she did not sleep the entire night as she sat at the fireplace in the kitchen as the appellant went to the bedroom.

8. The following day at 8.00am, the Complainant said she went to her elder uncle's place who made a phone call to her mother. She said they remained at their uncle's place the entire day until the following day when they went to church and on return found the mother had come back home. That the complainant and her mother went and reported to the Chairman who referred them to the police as he was scared of the appellant.

9. After they reported to the police at Mwangulu, they were referred to hospital where the Complainant was treated and PRC & P3 forms filled. The complainant said the appellant went to the police station to try and withdraw the case but the police refused.

10. PW 2 LMG, the Complainant's mother testified that on the night of 7th October 2019, she had gone to the shamba in [Particulars withheld] . That she got a call from his brother-in-law that the appellant had defiled his own child. She returned and the complainant narrated what happened. She took complainant to Mwangulu Police Post on advise of her brother-in-law and later to Mwangulu Hospital and she was treated & P3 Form filled.

11. In cross examination, PW 2 said that it is her brother-in-law & Chizi who called and reported the child had been defiled by the appellant. She said she did not visit the scene as the child was taken there at night when it was raining and she could not tell where it was.

12. The complainant said the appellant threatened her mother and the Complainant and even his own brothers do not want anything to do with him. PW 2 said the appellant is the one who took the complainant to different schools and she could not say anything as he was the father. She said the appellant also went with the Complainant to Mombasa but she was too young and he could not take care of her.

13. PW 2 said that the complainant had never been reported to the police for truancy issues. PW 2 said talks at the appellant's uncle failed and matter was taken to the police. PW 2 was recalled for further cross examination and she said that the complainant did not burn the house. She said it was the other 2 children who burnt the house after the appellant married a new wife. She said the fight between her and the co-wife did not involve the complainant.

14. PW 3 Mwarugu John Clinical officer at Mwangulu Dispensary testified that he filled a P3 form in respect of KM who was taken to the hospital with history of having been defiled by the father 4 days prior to the said examination. He said there was physical injury in the genital and the hymen was broken. He said that there was tenderness when he tried to penetrate with examining finger. He said there was also foul smelling creamish vaginal discharge. PW 3 treated the complainant for STI. PW 3 produced treatment book and P3 form EXP 1 & 2.

15. In cross-examination, PW 3 said that whitish discharge was result of STI in a woman. He said the accused person was never tested. He said that the age of the complainant was given by the mother as 13 years. He said Mwangulu dispensary does not have age assessment facility.

16. PW 4 P.C. Henry Mbala from Mwangulu Patrol Base investigated allegations of defilement of the Complainant by the father which occurred on the night of 7th & 8th October 2019. He referred Complainant to hospital for medical examination & P3 was duly filled. That on 6/11/2019 the appellant presented himself at the patrol base seeking reconciliation. He was interrogated and arrested and charged. PW 4 said that appellant woke up the child to accompany him to the grandmother place to collect their animals. That on the way the appellant who was armed with a panga turned against his daughter and defiled her.

17. That they then went to the grandmother's place but did not collect the animals. That on return home the Complainant reported to her uncle who in turn called the mother and reported to her. That the Complainant's mother returned home and reported to the Chiefs office and she was referred to the police.

18. PW 4 said he did not go to scene of crime as the appellant went to the post crying for reconciliation and that the complainant and the mother were scared of the appellant. The investigating officer said the complainant was tense and was crying when she reported the offence. PW 4 also said in cross examination that the Complainant's clothes were not torn and he did not see any blood. He said the distance from the complainant's home to the patrol base was far and he can only rely on the doctor who examined the complainant. PW 4 said he was not bribed to bring false charges against the appellant. He said the complainant and the mother walked over 40k to the patrol base to go and report.

19. The Appellant gave sworn statement and said that on 20th September 2019 at 1.00pm, he was at work when he got a call from his wife that he had been beaten by the 1st wife and her house burnt by the complainant. That he went home and confirmed the house was actually burnt. That when he inquired the complainant's mother said she did not want a 2nd wife. That he sat the wives down and resolved the issue. That the following morning the complainant fought with a maasai child whose arm got broken. That he took the child to hospital at Kinango.

20. That on 13/09/2019 he got a call informing him the complainant had been absent from school for 2 days. That when he inquired from her mother why she had not been to school, she could not give a valid reason. That the complainant and the mother started abusing him and was ready to fight and that is why he fell out with the Complainant and her mother.

21. That when he went to the home of the maasai child's father he returned and found the complainant and her mother were not at home. That in the evening at 7.00pm he got a letter summoning to village elder office the following day. When he complied the following day at 8.00am he found the complainant and her mother and the village elder told him his wife wanted to leave him. That the wife told him she did not want a co-wife and when he told her they should go back home and talk she refused left for her home with the Complainant.

22. On 5/10/2019 the Complainant's mother went to collect her things and told him "Nitakuonyesha tofauti ya tisa and sita". He said he was shocked by that statement. That on 5/11/2019 at 5.00pm he got a call from Mwangulu police station to attend the following day at 8.00am. That when he went to the police station he found 3 officers, the complainant and her mother and he was arrested. He said he was told he had defiled the complainant and he denied.

23. In cross examination the appellant said the complainant was his child. He said his 2nd wife is Chizi Ndegwa. He said he married her in 2015 and that the 1st wife did not know about her until in 2019 as they were at different places. He said he brought his 2nd wife to complainant's mother home and they had issues. He said the 2nd wife Chizi was currently married and he could not call her as a witness. He said he reported assault of his 2nd wife to village elder and it was resolved locally. He said the case of arson was also not reported to the police. He said treatment documents for the maasai child are with the 1st wife. He said he left everything at home when he was summoned to the police station as he did not know the reason for summon. He said he could not remember where he was between 7th, 8th and 10th of October 2019.

24. The Appeal herein was canvassed by way of written submissions.

Appellant's Submissions

25. On voire dire examination, the appellant states that the trial court was satisfied with the capability of the complainant to testify on oath even without examining her on the crucial requirement to make an informed decision whether to receive her sworn evidence. That the trial court was duty bound under Section 19 of the *Oaths and Statutory Declarations Act* to establish whether the complainant, being a child of tender age had the capacity to testify on oath. That what the trial court did in the subject matter was to establish that the minor victim knew the difference between truth and lies, and whether she was aware of her surroundings, which test is independent of the knowledge of the nature of oath. The appellant cited the case of *John Muiruri v Republic* (1983) KLR 445.

26. On defective charge sheet, the appellant submitted that the entire trial was conducted on the basis of the charge of attempted defilement, according to the charge sheet, and at no point was an application made by the prosecution seeking to amend the charge sheet. That the law on framing of charges demands that any amendment during trial must first be made known to the accused person for purposes of pleading to the amended charge. That the totality of the evidence tabled before court alluded to an incident of incest which was not reported to the police in any of the claims reported by the complainant. That the learned magistrate ought to have ordered for an amendment pursuant to Section 214 of the Criminal Procedure Code. That the prosecution identified the need to amend the charge sheet with regard to the complainant's age and applied for the same which application was granted, and the said amended

charge sheet was read out to him which he pleaded not guilty. The appellant argues that the need to amend the charge sheet on the aspect of the complainant's age may have had some significance but not to the level of overriding the need to amend the charge sheet on the inconsistent versions of her story.

27. On the crucial evidence withheld, the appellant stated that according to the evidence of PW1, the grandmother knew the alleged incident but this witness was not brought to court to testify. The appellant relied on the case of *Bukenya v Uganda* (1972) EA 549 where it was held that the prosecution is duty bound to make available all witnesses necessary to establish the truth even if their evidence may be inconsistent to its case otherwise failure to do so may in an appropriate case lead to an inference that the evidence of the uncalled witnesses would have tended to be adverse to the prosecution. That such witnesses should be summoned in accordance with Section 144 (4) of the *Criminal Procedure Code* to ensure that the evidence in their possession which is vital for the just decision of the matter does not escape the attention of the court to the detriment of the accused person. The appellant states that the prosecution tabled evidence that was barely adequate.

28. On insufficient medical evidence, the appellant argued that medical examination conducted on the complainant revealed what was contrary to the allegations. That during medical examination, the examining finger penetrated with difficulty while in normal circumstances a finger penetrates easily. That the medical officer was in fact categorical that the broken hymen could have been occasioned by other factors such as exercise and forceful injury and that there is no discernible difference between breaking of hymen resulting from penetrative defilement and that which results from other factors. The appellant contended that the prosecution failed therefore to prove their case beyond reasonable doubt because the shortfalls and illegalities in the evidence were manifest and the trial court was clearly wrong in ignoring them to his detriment.

29. On sentence, the appellant submitted that for the offence of attempted incest which he was charged with, the prescribed penalty is 10 years imprisonment. That on the other hand, for the offence of incest, the prescribed sentence is life imprisonment. That however, the trial court never stated in its judgment that it aggravated the conviction from one of attempted incest as per the charge sheet to that of incest as per the recorded conviction. That even in the erroneous event that a conviction for incest was recorded, the sentence of 63 years would appear to have been on the basis of the prescribed penalty of life imprisonment. That where a penal law is worded with the prefix "is liable to", the stated penalty is not to be construed to be a mandatory one, and even in such cases, the courts have discretion to impose a lesser sentence than the stated one. The appellant cited the cases of Kichanjele s/o Ndamungu v Rep (1949) EACA 64, *Oponya v Uganda* (1967) E.A. 752, *DWM v Rep* (2016) eKLR to that effect.

30. The appellant also submitted that on the measure of the term of imprisonment, he relied on the Court of Appeal in Mombasa, Ali Abdalla Mwanza v Rep, Criminal Appeal No. 259 of 2012 where Visram, Karanja, Koome, JJA observed the implications of excessive sentences and partially allowed the appeal and substituted the sentence of 40 years with a term of 20 years from the date of conviction. The appellant therefore urged that the sentence be reviewed to one that takes into consideration life expectancy and the mitigating factors prevailing in the case.

Respondent's Submissions

31. The Respondent submitted that on the first ground of appeal, the learned magistrate correctly analysed the ingredients of the offence of incest and attempted incest to include knowledge that the person is a relative and penetration or indecent act as was held in the quoted case of *GMM v R*, Criminal Appeal No. 39 of 2018 where the appellant himself admitted to court during cross examination that he was the complainant's father and that the trial court was right in holding that the ingredient was proved by the prosecution.

32. The Respondent argued that the trial court correctly observed that the issue of penetration and identification were proved beyond reasonable doubt by the prosecution. The Respondent stated that the medical officer corroborated the testimony of the complainant and confirmed that she did not have hymen and had acquired a sexually transmitted disease. That the minor pointed to the accused, her father as the one who had defiled her.

33. The Respondent argued further that the appellant did not give details of the witnesses that he alleges the prosecution failed to bring or evidence not availed within reasonable time. The Respondent cited Section 143 of the *Evidence Act* which provides that no particular number of witnesses shall in the absence of any provision of law to the contrary be required for proof of any fact.

34. The Respondent also submitted on the last ground of appeal that they agreed with the trial court which considered in detail the accused's defence and rightly observed that the appellant's testimony was weak and uncorroborated. The Respondent therefore urged the court to find that the conviction was sound, the sentence under the charge was lawful and not excessive, and prayed that the appeal be dismissed for lack of merit.

Analysis and Determination

35. The appeal herein will therefore be determined based on the grounds of appeal, submissions by the appellant, and evaluation and analysis of the records of the trial court guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> "The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

36. After considering the amended grounds of appeal filed from 30th January 2023, Records of the trial court and submissions the issues for determination are as follows: -

    i. Whether the trial Magistrate conducted voire dire examination

    ii. Whether the prosecution evidence was inconsistent and whether the medical evidence prove the charge against the Appellant

    iii. Whether the prosecution withheld material evidence

    iv. Whether the Appellants mitigation was considered before he was sentenced

Whether the trial Magistrate conducted *voire dire* examination

37. On 20th January 2021, before the Complainant testified, the process of voire dire examination was conducted and the court concluded the minor was aware of the surroundings and knows the difference between truth and lie and was ordered to give sworn testimony. Upon conclusion of her testimony she was cross examined by the Appellant and she responded to the appellant questions competently and the court therefore finds that the trial court complied with the provision of Section 19 of the Oaths and Statutory declaration act. The complainant was found to possess sufficient intelligence to justify

reception of evidence on oaths and the Appellant had the opportunity to test the intelligence of his own daughter in cross examination.

Whether the prosecution’s evidence was inconsistent

38. Although the appellant had raised the ground that the prosecution’s evidence was inconsistent, his submission was in respect to a defective charge sheet in which he said that the complainant reported that she was defiled in 6th November 2019 and yet the charge sheet refers to the night of 7 & 8 October 2019. He said the report the complainant made was attempted incest as alluded in evidence in court. The appellant argued that the court failed in error when it allows the prosecution to represent evidence that was not availed to him contrary to Article 50(2) (b), (c) & (j) of *the Constitution*. The appellant argued that the mismatch in the testimony of the complainant has been presented in the police and what she told the court was fatal to the prosecution case as it was not known whether there was an attempted incest or actual incest.

39. This court has looked at the complainant’s evidence and she was very categorical that she was defiled by her father. Refer to the proceeding of the 1st paragraph of pg. 17, the Clinical Officer, PW3, confirmed that the complaint’s hymen was absent, an indication that she had been defiled and there was also tenderness in the genitalia with foul smelling creamish discharge from the vaginal opening. There was therefore corroboration that the complainant was defiled.

40. The investigating officer PW 4 said that the report received was that of the defilement of the complainant by the father and not an attempted defilement. It has not come out from the evidence of record that a report of attempted defilement was made to the police.

Whether the prosecution withheld material evidence

41. The appellant claims that the complainant’s grandmother was a crucial witness and ought to be brought to court to testify what she knew of the matter. The complainant said that the appellant removed her from the house at 10.00pm when it was dark and rainy and told her that they were going to bring cattle from the grandmother’s place but he led her past her grandmother’s place where he defiled her in the forest. On their way back home, they passed by the grandmother’s home but they did not take the alleged cattle. When the grandmother suggested that the Complainant remains with her because she was cold and shivering, the appellant refused and said the complainant was to go to school the next day. Defilement was not done at the grandmother place but in a forest in the thick of the night when it was raining. The appellant was by then armed with a panga and the complainant had no option but to accompany him back home. The absence of the complainant grandmother as a witness does not take away the fact that she was defiled. As submitted by the respondents no particular number of witnesses shall be required of any fact as provided under Section 143 of the *Evidence Act*.

Whether the Appellants mitigation was considered before he was sentenced

42. Upon the appellant being convicted he was called upon to mitigate and he prayed to be given a non-custodial sentence to allow him look after his children and family. He also pleaded with the court that the 3 years he had spent in remand custody he had learnt his lesson. A pre-sentence report was called for by the trial Magistrate and upon consideration of the same the trial Magistrate said that the appellant was liable to life imprisonment regardless of his mitigation and he was therefore sentenced to serve a sentence of 63 years to take effect from 7th November 2019 when he was 1st arraigned in court.

43. By all standards the sentence is harsh and excessive considering that the appellant was 34 years and that by the time he serves 63 he will be 97 years old. In consideration of the life span of an average Kenyan, that would be beyond life imprisonment and does not serve the purpose for which sentences

are meted out. In the circumstances this court substitutes the sentence of 63 years with one of 25 years' imprisonment with effect from 7th November 2019.

44. In conclusion, the Appellant's appeal on conviction is dismissed as it lacks merit the appeal on sentence succeeds partially to the extent that the appellant will serve 25 years' imprisonment with effect from 7th November 2019. The appellant has 14 days right of appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS,

THIS 13TH DAY OF JULY 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Bebora- Court Assistant

Appellant present in person

Mr. Ngiri for the Respondent

HON. LADY JUSTICE A. ONG'INJO

JUDGE