RMO v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 19684 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEHC 19684 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E002 OF 2022

WA OKWANY, J

JULY 6, 2023

BETWEEN

RMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against the Conviction and Sentence of Hon. W. C. Waswa – RM Nyamira dated and delivered on the 10th day of November 2021 in the original Nyamira Chief Magistrates' Court Sexual Offence Case No. 6 of 2020)

JUDGMENT

1. The Appellant herein, RMO, was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 9th January 2020 and 11th January 2020 at Nyamira South sub-county within Nyamira County, being a male person caused his genital organ, his penis, to penetrate the genital organ, vagina, of CMM (particulars withheld) a child aged 9 years, who was to his knowledge his daughter.

2. The Appellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006 Laws of Kenya. The particulars were that on diverse dates between 9th January 2020 and 11th January 2020, at Nyamira South Sub-County within Nyamira County intentionally and unlawfully touched the genital organ, vagina of CMM a child aged 9 years with his genital organ, his penis.

3. The Appellant pleaded not guilty to both charges and the case proceeded to a full trial in which the Prosecution called a total of 4 witnesses as follows: -

4. PW1 CMM, the victim, testified that she was, on the night of 11th January 2020, sleeping with her sister one C when her father, the Appellant herein, told her to go into his bedroom and sleep with her

youngest brother M . She stated that her father soon thereafter came to the bedroom and undressed her before having sex with her and removed her blouse and T-shirt and then her inners and also removed his trousers and did 'bad manners' to her in her vagina (she pointed to her vagina). She testified that she felt pain and her father threatened her that if she screamed, he would cut her into pieces. She further testified that she later informed her mother of what had transpired after which she was taken to hospital for treatment and then to the Police Station to report the incident.

5. PW2, Mr. Hosea Mweresa, a Clinical Officer based at Nyamira County Hospital examined the victim on 13th January 2021 and noticed that she had a vagina tear with a freshly broken hymen. He testified that the HIV test was negative and concluded that there was penetration. He produced the Treatment Notes P.Exh 1(a), the P3 Form (P.Exh1 (b) and the Lab results P.Exh 1 (c).

6. PW3, was HK (particulars withheld), the victim's mother produced the victim's birth certificate (P.Exh 2) which showed that PW1 was 8 years old at the time of the incident. She testified that the Appellant was her husband and the victim's biological father. She explained that she was, on the night of the assault away from home as she was at Nyamira County Hospital taking care of her sick mother only to get home the following morning and learn of the sexual assault. She stated that the victim informed her that this was the second time that the Appellant was raping her. She further stated that the Appellant had threatened her severally over such behaviour and that even though she reported him to her relatives, the Appellant refused to change his ways. She identified the Appellant in court as her husband.

7. PW4, No. 118045 P.C. Rukia Shabaan, investigated the case and issued the victim with P3 Form. She also arrested the Appellant and charged him with the offence of incest. According to PW4, the complainant herein informed her that she was on 9th January 2020 alone in the house as her siblings had gone to fetch water when her father took her to his room and locked it from inside and took off her clothes and forcefully defiled her and threatened to slice her with a panga that was under the bed. He then told her not to tell anyone. It was the testimony of PW4 that on 11th January 2020, while the victim was sleeping with her sister, the Appellant again told her to go and sleep with her younger brother in his bedroom where he defiled her a second time. The victim then informed her sister of what had befallen her who in turn informed their mother. The victim was issued with a P3 Form and the Appellant arrested and charged.

8. At the close of the Prosecution's case, the trial court found that the Appellant had a case to answer and placed him on his defence. The Appellant elected to give a sworn testimony and called no witnesses.

The Defence Case

9. The Appellant's confirmed that the victim was his daughter while PW3 was his wife. He testified that PW3 was in the habit of leaving the children alone unattended which led to disagreements between them. He testified that he at one point found his wife having sex with a neighbour's employee and that even though the issue was resolved, PW3 still threatened to do something to him. On cross-examination, he testified that he went to work on the material night from 7.00 p.m. to 11.00 p.m. when he decided to sleep at his workplace in the company of his uncle George Osoro.

10. At the close of the trial, the trial court found that the prosecution had proved its case to the required standard and convicted the Appellant of the main count of incest. He was sentenced to serve life imprisonment.

11. Aggrieved by the decision of the trial court, the Appellant filed the instant appeal through his Counsel M/S G.M. Maengwe & Co. Advocates on 6th January 2022 and listed the following grounds of appeal: -

    1. That the learned trial magistrate erred in law and fact by convicting the Appellant on a charge whose particulars were fatally defective.
    2. That the learned trial magistrate misdirected himself in law and fact by convicting the Appellant in analysing the evidence on Record hence arriving at a wrong decision in law.
    3. That the learned trial magistrate erred in law and fact by convicting the Appellant based on contradicting testimony by the Prosecution witnesses.
    4. That the learned trial magistrate erred in law and fact by failing to reconcile material discrepancies/contradicting testimony in the Prosecution evidence hence causing injustice to the Appellant.
    5. That the learned trial magistrate erred in law and fact by convicting the Appellant by relying on hearsay evidence.
    6. That the learned trial magistrate erred in law and fact by failing to hold that the Prosecution never called eye-witnesses to give evidence in the circumstances.
    7. That the learned trial magistrate erred in law and fact by denying the Appellant a bond and a chance to bring and/or call his witnesses.
    8. That the learned trial magistrate erred in law and fact by convicting the Appellant without considering the defence raised by the Appellant.
    9. That the learned trial magistrate erred in law and fact by denying the Appellant an opportunity to bring and or call enough witnesses.
    10. That the learned trial magistrate erred in law and fact by failing to consider that the legal provision for providing for mandatory minimum and maximum sentence under section 20 of the *Sexual Offences Act* No. 3 of 2006 (sic).
    11. That the learned trial magistrate erred in law and fact by considering that the Appellant was not accorded adequate time to prepare his defence.

12. The Appellant filed an amended grounds of appeal on 3rd February 2023 and listed the following grounds: -

    1. That the learned trial magistrate erred in law by acting on the wrong principles of law and upheld an unlawful sentence. The proviso under section 20 (1) of the *Sexual Offences Act* provided for a sentence of 10 years up to life imprisonment. Life imprisonment is therefore not a mandatory sentence.
    2. That the learned trial magistrate erred in law and fact by awarding life imprisonment to the Appellant but failed to note that penetration of the complainant was not proved against the Appellant.
    3. That the Appellant's defence was not considered.

13. The Appeal was canvassed by way of written submissions which I have considered. The main issues for determination are whether the conviction was safe and whether the sentence was legal and appropriate.

The Appellant's Submissions

14. The Appellant submitted that Section 20 (1) of the *Sexual Offences Act* does not provide for a mandatory life sentence and that the age of a victim ought to be considered when meting out a sentence. He relied on the Court of Appeal decision of *M.K. v Republic* (2015) eKLR where it was held that a person convicted of incest when the female victim is under 18 years is liable to a term of imprisonment of between 10 years and life imprisonment. The Appellant therefore argued that the sentence imposed on him is illegal and ought to be set aside.

15. The Appellant also submitted that the elements of the charge of incest were not proved as stipulated under Section 22 of the *Sexual Offences Act* and in particular, that penetration as defined under Section 2 thereof. He argued that it would not have been possible for his daughter to go to school or not bleed if indeed he had he had defiled her. According to the Appellant, the complainant's evidence was not credible. He cited the case of *Ben Maina Mwangi v Republic* [2006] eKLR where the court found that it would be expected that a complainant would be in excruciating pain or strain and bleeding if she had been penetrated.

16. The Appellant submitted that the victim's testimony, being a child of tender years ought to be treated with caution and that since the medical evidence adduced by the Prosecution did not indicate any vaginal discharge or presence of spermatozoa and no bruises, there was no basis for the trial court to conclude that penetration had been proved. He further submitted that there was no medical evidence that the hymen was freshly torn to indicate that it was as a result of penetration by the Appellant as alleged. He cited the Court of Appeal case of *Arthur Mshilla Manga v Republic* [2016] eKLR. The Appellant also submitted that the Prosecution's evidence on penetration did not go beyond the aspect of a broken hymen and cited the case of *P.K.W. v Republic* [2012] eKLR where the Court of Appeal held that a broken hymen was not the only proof of penetration, that other factors ought to be considered to prove penetration and the case of *Michael Odhiambo v Republic* [2005] eKLR where the court held that raptured hymen was not conclusive proof of defilement and other injuries were necessary to prove penetration in a charge of defilement.

17. The Appellant further submitted that his defence that this wife had a vendetta against him after he discovered her love affair with a neighbour's employee was never considered by the trial court and that the Prosecution had a burden to prove the falsity of the defence in accordance with section 107 (1) (2) of the *evidence Act* as stated in the case of *Victor Mwendwa Mulinge v Republic* [2014] eKLR. He further cited the case of *Uganda v Ssebayala and Others* (1969) E.A. 204 where the court held that the Accused did not have to establish the truthfulness of his alibi, all he had to do was create doubt in the prosecution's case. He stated that the Prosecution did not present cogent evidence to sustain a conviction beyond reasonable doubt and he urged the Court to quash the conviction and allow the appeal.

The Prosecution/ Respondent's Submissions

18. The Prosecution submitted that sentencing was at the discretion of the trial court as discussed by the Court of Appeal in the case of *Ngao v Republic*, Criminal Appeal No. 5 of 2020 [2021] eKLR and *Juma Abdallah v Republic*, Criminal Appeal No. 44 of 2018. It was submitted that in both decisions, it was held that the Supreme Court in *Francis Karioko Muruatetu and Another v Republic* did not invalidate mandatory sentences or minimum sentences in the Penal Code or any other law and that the sentence by the trial court was therefore legal due to the victim's age.

19. The Prosecution also submitted that penetration was proved by the minor who described her ordeal in great detail. Reference was made to the case of *Chilejo Saha v Republic* [2017] eKLR where the court listed euphemisms such as 'bad manners'; pricked me with a thorn from the front part of his body'; inserted his dudu into my mapaja (thighs)'; 'he used his thing for peeing' and 'he used his munyunyu' as descriptive enough of defilement. It was further submitted that the medical examination indicated that there was a vaginal tear and that the hymen was freshly broken thus proving penetration. It was the Respondent's case that the Prosecution's evidence was too weighty to be displaced by the defence case. They urged the Court to dismiss the appeal and uphold the conviction and sentence.

Analysis and Determination

20. The duty of a first appellate court is to re-analyze and re-evaluate the entire evidence from a trial court and arrive at its own findings and conclusions. This is the position that was stated in the case of *David Njuguna Wairimu vs. Republic* [2010] eKLR, where the Court of Appeal held thus:-

> " The duty of the first appellate court is to analyse 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 appellate 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."

I. Whether the Conviction was Safe.

21. Section 20 of the *Sexual Offences Act* stipulates as follows: -

> 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:
>
> Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which cases penetration or the indecent act was obtained with the consent of a female person.

22. The offence of incest is proved when the following ingredients are established: -

    a. That there was penetration, or an indecent act as defined by law.

    b. That the Accused must be related to the victim as defined under Section 22 of the *Act*.

23. In the instant case, PW1 testified that her father defiled her and threatened her while at it. PW1 testified as follows: -

> " My father was also present...It was at night. He told me to go and sleep with the child who was in my father's bedroom....My father came into the room and removed my sweater. He also removed my blouse and t-shirt. He removed my inners, 'akanifanyia tabia mbaya' (he did bad manners to me). My father removed his trouser. 'Alinifanyia tabia mbaya hapa' (he did bad manners here) – points to her genitals/vagina. My father used his private parts

'kunifanyia tabia mbaya'. I felt pain and my father threatened me that if I scream, he will cut me into pieces. He finished and told me to go sleep with Calister..."

24. The evidence of PW1 was corroborated by the testimony of PW2, the Clinical Officer, whose evidence indicated that there was a tear on the victim's vagina and her hymen was freshly broken. Other tests yielded negative results with no spermatozoa present.

25. On his part, the Appellant submitted that a raptured hymen was not conclusive proof of penetration because it could be occasioned by other factors. He also argued that the victim did not bleed and was not in pain because she was not defiled, otherwise, she could not have gone to school. It was his conclusion that the absence of tears, spermatozoa and pus cells was conclusive proof that there was no penetration.

26. Section 2 of the *Act* defines penetration as follows: -

> " The partial or complete insertion of the genital organ of a person into the genital organs of another person."

27. From the above definition. It is clear that penetration need not be complete which means that even partial penetration suffices to prove penetration. In *Mark Oiruri Mose v Republic* [2013] eKLR the Court of Appeal held thus: -

> " In any event the offence is against penetration of a minor and penetration does not necessarily end in release of sperms into the victim. Many times the attacker does not fully complete sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ."

28. Similarly, in *Erick Onyango Ondeng vs Republic* [2014] eKLR it was held as follows on penetration: -

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

29. The trial court held as follows in respect to the complainant's testimony: -

> " The medical evidence on record clearly proves that there was penetration. This evidence corroborates the evidence of PW1 that she was defiled on 11th January 2020. Hence, this court finds that the prosecution has proved the ingredient of penetration beyond reasonable doubt."

30. I have weighed the victim's evidence against the Appellant's defence and I note that she was consistent throughout her testimony and that her evidence was not shaken by cross examination. The Appellant's defence confirmed the victim's testimony that she was at home with him and her siblings on the material night. The Appellant confirmed that his wife left him with the young child on the material day. The complainant's testimony reveals that the Appellant lured her into his bedroom, under the pretext that she was to take care of her young brother, only to turn around and defile her.

31. I have also considered the Appellant's alibi defence that he went out to work and was with his uncle on the material night. I note that this evidence only came up at the defence stage during his cross-examination. The Appellant did not call the witness he was allegedly with on the material night to corroborate his evidence. It is trite that alibi defence ought to be raised early enough to enable the Prosecution to look into its veracity and avoid subjecting the wrong person to an arduous criminal

trial. Indeed, the Court of Appeal sitting in Kisumu in the case of *Erick Otieno Meda v Republic* [2019] eKLR outlined the principles for considering alibi evidence thus: -

> " In considering an alibi, we observe that:
>
> a. An alibi needs to be corroborated by the other witnesses, and not just a mere regurgitation of the events from the accused's point of view.
>
> b. An alibi defence needs to be introduced at an early stage so as to allow it to be tested, especially during cross-examination of the trial.
>
> c. The alibi defence or evidence may often rest on the credibility of the accused and the reliability of the evidence that he or she has presented in court.
>
> d. The accused does not need to prove the alibi, but the prosecution must have presented its case that the accused is guilty beyond a reasonable doubt so as to allow the alibi to fail. (See *Mhlungu - v - S* (AR 300/13) [2014] ZAKZPHC 27 (16 May 2014)." (Emphasis added).

32. My finding is that the victim's testimony was consistent, candid and compelling. Her evidence was fortified by the medical evidence of the clinical officer who found that apart from the freshly broken hymen, the complainant also a tear on her vaginal wall. I find that the evidence on record was sufficient to prove the ingredient of penetration. It is my further finding that, in the circumstances of this case, the Appellant's argument that the absence of spermatozoa negates the act of penetration does not hold any water as it is clear that there was penetration. The victim testified that she felt pain after the incident contrary to the Appellant's claim that PW1 was not in pain thus explaining why she was able to go to school the following day.

33. Turning to the issue of consanguinity/relationship between the Appellant and the victim, Section 22 of the *Sexual Offences Act* states as follows: -

> 22. Test of relationship
>
> 1. In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half-father and an uncle of the first degree and a mother includes a half-mother and an aunt of the first degree whether through lawful wedlock or not.
>
> 2. In this Act
>
> a. "uncle" means the brother of a person's parent and "aunt" has a corresponding meaning;
>
> b. "nephew" means the child of a person's brother or sister and "niece" has a corresponding meaning;
>
> c. "half-brother" means a brother who shares only one parent with another;
>
> d. "half-sister" means a sister who shares only one parent with another; and
>
> e. "adoptive brother" means a brother who is related to another through adoption and "adoptive sister" has a corresponding meaning.

3. An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

4. In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the Children's Act No. 8 of 2001.

34. In the present case, I find that the degree of consanguinity was not contested. Both PW1 and her mother PW3 testified that the Appellant was the victim's biological father. The Appellant confirmed that PW1 and PW3 were his daughter and wife respectively.

35. The evidence on identification was also not disputed. PW1 was certain that her father was the one who defiled her. The trial court made the following observations in the judgment; -

> " This court believes that PW1 was telling the truth. Reasons being that PW1 is a girl of tender age and when she adduce evidence before court, she broke down in tears when she saw her father in court while she was adducing evidence. Her evidence was consistent even during cross-examination."

36. I find that the trial court correctly analysed the evidence presented before it before making its findings. I am cognizant of the fact that the trial court had the opportunity to observe the witnesses' demeanour as they testified in order to determine their truthfulness. I find no reason to depart from the findings of the trial court on the issues of penetration, identification and consanguinity. It is to be noted that the Appellant was the victim's own father and was therefore well known to her.

37. Furthermore, Section 124 of the *Evidence Act* which stipulates that: -

124. Corroboration required in criminal cases.

Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.

38. In *George Kioji v Republic*, Cr. App. No. 270 of 2012 the Court of Appeal in Nyeri held thus: -

> " ....The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80 Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

(See also Court of Appeal decision in *Samuel Kilonzo Musau v Republic* [2014] eKLR).

39. It is my finding that the Appellant's alibi defence, coming late during his cross-examination, was an afterthought and amounted to a mere denial that did not displace the prosecution's case. I note that at no time, prior to his cross-examination, did the Appellant mention that he was not in his house on the material night. He did not even cross-examine the victim in this regard. I find that the conviction was safe and I hereby uphold it.

II. Whether the sentence was legal and appropriate.

40. It is trite that sentence is meted out at the discretion of the trial court. This is because a trial court has the privilege of seeing and observing the demeanor of an accused person before pronouncing an appropriate sentence depending on the facts of each case. In *Bernard Kimani Gacheru vs. Republic* [2002] eKLR, the Court of Appeal held:-

> "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

41. The offence of incest attracts a minimum sentence of 10 years imprisonment which may be enhanced to life imprisonment where the victim is a minor. In the present case, the trial court noted the tender age of the victim (8 years) and her relationship with the Appellant before arriving at the conclusion that a deterrent sentence was appropriate under the circumstances.

42. In *R v Mohamedali Jamal* (1948) 15 E A C A 126, the Court of Appeal for Eastern Africa observed: -

> "It is well established that an appellate Court should not interfere with the discretion exercised by a trial Judge or Magistrate except in such cases where it appears that in assessing sentence the Judge has acted upon some wrong principle or has imposed a sentence which is either patently inadequate or manifestly excessive."

43. I have considered the nature of the offence and the victim's tender age of 8 years at the time of the offence. As the victim's own father, the Appellant was expected to be her protect her from any harm or danger especially in the absence of her mother who was reported to have been held up in hospital with an ailing parent. It is therefore very disturbing and disheartening that the Appellant turned against his own child and sexually assaulted her without any mercy. I note that not only did the Appellant defile his child, but he also threatened her with death if she ever raised an alarm or resist his advances.

44. The actions of the Appellant portray him as a heartless individual who should not be allowed to roam freely in the society as he is likely to pose grave danger to other children going by the manner in which he attacked the complainant who is his own flesh and blood. I find that this is a case where the law must step in and shield young children from such harm. This Court takes judicial notice of the fact that the harrowing experiences of sexual assault leave lasting impression and a lifetime of torture in the minds of the victims.

45. I am persuaded that, in the circumstances of this case, the deterrent sentence meted out by the trial court was legal and justified. I find no reason to interfere with the said sentence.

46. In the end, I find that this appeal lacks merit and I accordingly dismiss it.

47. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIA MICROSOFT TEAMS THIS 6TH DAY OF JULY 2023.

W. A. OKWANY

JUDGE