SJS v Republic (Criminal Appeal 74 of 2018)
[2023] KEHC 22417 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22417 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL 74 OF 2018

SM GITHINJI, J

SEPTEMBER 21, 2023

BETWEEN

SJS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in criminal case No.9 of 2018 of the Principal Magistrate's Court at Garsen delivered by Hon E.Kadima –RM on 21ST November, 2018)

JUDGMENT

CORAM: Hon. Justice S. M. Githinji

Appellant in person

Ms Mkongo for the State

1. SJS, the appellant herein, was charged in the lower court with a main count of incest, contrary to section 20 (1) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of this offence are that on diverse dates between March 1, 2018 and May 23, 2018 in Tana Delta Sub-County within Tana River County, the appellant being a male person, caused his penis to penetrate the vagina of WR a female who was to his knowledge his daughter.

3. In the alternative, he was charged with an offence of committing an Indecent Act with a child, contrary to section 11 (1) of the *Sexual Offences Act* No 3 of 2006.

4. The particulars hereof being that on the diverse dates between March 1, 2018 and May 23, 2018 in Tana River County, the appellant herein intentionally touched the vagina of WR, a child aged six (6) years, with his penis.

5. The prosecution case is that the complainant or rather victim in this case who offered evidence as Pw-1, was on June 18, 2018 assessed at Malindi Sub-County hospital and found to be about 7 years old. Together with her other siblings they were living with their mother at Marereni prior to her death. When the mother died, she went to live with the father (the appellant herein) at [Particulars Withheld]. The homestead was for their grandmother and she was sharing a room with her aunt. At the time she was schooling at [Particulars Withheld] Primary School in PP2. According to the victim, the appellant used to wait till his sister who is the victim's aunt went to Garsen. He would then remove his penis and place it in her vagina. Whenever she screamed the appellant used to threaten her, saying he will beat her.

6. On May 25, 2018 Pw-2 who is a teacher at [Particulars withheld] Primary School, noted that the victim was sleeping on her desk. She refused to do homework and was crying. Her actions were weird. She gently asked her whether she was experiencing any problem at home. The teacher was aware that the victim had lost her mother. She at first said there was no problem. Later she said the father used to visit her bedroom, pick her from the rest of siblings and could take her to a verandah where he inserted his fingers into her vagina before using his penis to do the same. To be certain of the claim, Pw-2 took her to Madam Rose and she reported the same allegation. They reported to the head teacher, the Pw-3 in this case.

7. Pw-3 interrogated the victim and she was consistent on what she had told the other two teachers. They decided to report the matter at [Particulars withheld] Police Station of which they did. Pw-6 investigated the case. He referred them to [Particulars Witheld] dispensary for treatment. Pw 4 examined the victim at the said Health facility. She noted that the victim's vagina was tender and hymen was absent. She made treatment notes and referred her to Garsen medical centre. Pw-5 examined her at the place on May 28, 2018. At the time she was not tender. It was noted the hymen was missing. The P-3 form was thus filled.

8. The appellant was then arrested and charged.

9. The appellant gave sworn evidence and called a total of four witnesses.

10. His defence is that the victim is his second born daughter and at the time of offering evidence she was 7 years old. Dw-2 had employed the appellant in her farm in December up to March 25th, 2018. They planted green grams and at night the appellant used to guard the seedlings. He had a room in which he was living within the farm.

11. Dw-3 indicated that on March 25, 2018 the victim and her brother went to school and were okay. At tea break she gave them tea and they went back to school. She learnt later of the alleged incident and wondered why the teachers did not involve her. She was the guardian of the children as their mother had passed on. She averred that during the time the appellant had been employed to guard a shamba. She even wrote to court complaining about the incident.

12. Dw-4 stated he went to school on March 25, 2018 with the victim and they had tea at break time. After that he did not see her and he informed Pw-3 as he heard she was taken to hospital.

13. Dw-5 stated on March 25, 2018 the victim was in the shamba. The school committee chairman went there and asked for him. He pointed him to the Chairman. He was then arrested. The appellant confirmed he was arrested on the said date while on duty in the farm.

14. The trial court evaluated the evidence and found the appellant guilty of the offence in the main count. He was convicted of it and sentenced to serve life imprisonment. Dissatisfied with the said conviction and sentence, he preferred an appeal before this court on the grounds that; -

1. Unequivocal *voire dire* was not conducted on the complainant.
2. Prosecution case was marred with discrepancies.
3. Amended charge was not properly placed on record.
4. Some crucial evidence was withheld by the prosecution.
5. Life imprisonment was wrongly held to be the minimum mandatory sentence for the offence.
6. The defence was not properly evaluated.
7. The sentence did not suit the mitigation offered.

The appeal was canvassed by way of written submissions.

15. I have considered the charges, evidence offered by both sides, judgment entered and the sentence meted, grounds of appeal and submissions by both sides.

16. The appellant indicates the voire dire was not conducted appropriately. I do fully agree with him. Under section 19 of the *Oaths and Statutory Declarations Act*, the role of a voire dire examination is to establish whether a child is possessed of sufficient intelligence to offer evidence, and to appreciate the nature and meaning of oath. The correct procedure of conducting a voire dire was well spelt out in the case of *Johnson Muiruri vs Republic* [1983] KLR 445. The court should record the questions put to the child and the answers offered before drawing it's conclusion. That was not done in this case. However, such is a procedural defect, and under Article 159 (2) (d) of the *Constitution* of Kenya 2010, justice should be administered without undue regard to procedural technicalities. The evidence of Pw-1 is therefore admissible and need be weighed together with the rest of the evidence.

17. Incest as an offence under section 20 (1) of the *Sexual Offences Act* No 3 of 2006, is committed in case of a male person, if the male person 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, and if found guilty of the offence, is liable to imprisonment for a term of not less than 10 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 is immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

18. The ingredients for this offence as were held in the case of *MGK vs Republic* [2020] eKLR are; -

    1. The perpetrator and the victim must be related within the categories expounded under section 20 (1) of the *Sexual Offences Act*.
    2. The perpetrator must have committed an indecent act as defined under section 2 (1) of the *Sexual Offences Act* or committed an act which causes penetration with the victim.
    3. Where the charge sheet discloses that the victim was a minor, for purposes of sentencing, the age must be established to the said effect.
    4. The perpetrator must be sufficiently recognized or identified as such or as the culprit.

19. Weighing the evidence on record, there is no dispute that the appellant is the father to the complainant. He himself conceded to the fact when he stated on cross-examination that the victim is his 2nd born child and was aged 7 years.

20. The issue which this court need determine is whether he committed an indecent act with the child or an act which causes penetration.

21. PW-1 in her short evidence indicated the father inserted his finger in her urinating organ before he inserted his urinating organ into hers. The point of interest and which need be noted is that the victim did not just complain or reported the incident out of her own volition. It's Pw-2, her teacher who noted she behaved weird and appeared unwell and sought to know what could have been the problem. It's then she disclosed it to her, another teacher and then the head teacher. She was consistent to all of them as to what had happened to her. It's the teachers in her company who reported the matter to the police. These witnesses, as well as the rest of the prosecution witnesses, had no cause whatsoever to fix the appellant herein. They were independent, honest witnesses who did what was right and deserved given the circumstances. Their evidence is believable. The evidence as to penetration is corroborated by the medical evidence where it was revealed her vagina was tender and the hymen was absent. This shows there was penetration. The offence was allegedly committed between March 1, 2018 and 23rd of May, 2018. The evidence of Dw-2 in relation to the raised alibi by the appellant, shows he was employed in the alleged farm from December to March, 25th, 2018. The alleged alibi does not cover the entire period within which the offence was alleged to had been committed. He therefore had the opportunity to commit the offence from March 25, 2018 up to May 23, 2018. Given the consistent, logical prosecution evidence, the defence cannot be true and it was rightly dismissed.

22. The appellant was sentenced to serve life imprisonment. He penetrated his daughter aged 7 years and as the teacher's observed the offence had devastating far reaching effect on the victim. He took advantage of the death of the mother of which placed her care under him. He deserved a stiff sentence. The sentence meted is within the law and I find no cause to disturb the same.

23. The upshot is that the appeal lacks merit and is hereby dismissed.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 21ST DAY OF SEPTEMBER, 2023

S.M.GITHINJI

JUDGE

<u>In the Presence of</u>; -

1. The Appellant in Person

2. Ms Mkongo for the State