PM v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 17214 (KLR) (19 November 2024) (Judgment)

Neutral citation: [2024] KEHC 17214 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MAKUENI

CRIMINAL APPEAL E030 OF 2023

TM MATHEKA, J

NOVEMBER 19, 2024

BETWEEN

PM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment – conviction and sentence in Kilungu PMCRC (S.O) E006 of 2022 (Hon. L.G.G Okwengu - SRM)

JUDGMENT

1. The appellant was charged in Kilungu PMCRC E006 of 2022 with: Incest contrary to section 20[1] of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on the diverse days from the year 2009 to 9th February 2022 at [particulasrs withheld] village, Nduu sub-location, Kithembe location, Kilungu sub-county within Makueni County intentionally being a male person caused his penis to penetrate the vagina of N.N.M, who was to his knowledge his daughter and impregnating her, a girl aged 17 years.

2. In the alternative charge, the appellant was charged for committing an indecent act with a child contrary to section 11[1] of the *Sexual Offences Act* No. 3 of 2006. Particulars being that on the diverse dates from 2009 to 9th February 2022 at [particulasrs withheld] village, Nduu sub-location Kithembe location, Kilungu sub-county within Makueni County, intentionally touched the buttocks, breasts/ vagina of N.N.M, a child aged 17 years with his penis.

3. He pleaded not guilty and the trial proceeded before the Hon. E. Muiru – Principal Magistrate.

4. She heard two witnesses; the complainant and her grandmother – the matter was then adjourned to enable the prosecutor carry out a DNA test to establish the paternity of the child born of the alleged offence.

5. The DNA report came back – but at the next hearing the matter proceeded before the Hon. G. Okwengu – Senior Resident Magistrate who heard the PW3 – the Clinical Officer, PW4 the Investigating Officer.

6. The prosecution closed its case and the accused person chose to remain silent.

7. The learned trial court delivered the judgment on 19/4/2023, found the accused guilty, convicted him and sentenced him to 10 years' imprisonment.

8. Aggrieved, the accused brought this appeal on the following grounds: -

    1. The honourable learned trial magistrate erred in law and in fact by convicting and sentencing the appellant on evidence of witnesses that materially contradicted each other on every bend and curve thereby making such conviction unsafe.

    2. The learned trial magistrate erred in law and in fact by convicting the appellant on events of 2009 that did not add up and the attendant medicals.

    3. The learned trial magistrate erred in law and in fact by not finding that the statement of PW1 was false and does not tally with the DNA test carried out between the appellant and the new born baby of the complainant.

    4. The honourable trial magistrate erred in law and in fact when he failed to critically analyses the evidence as wholly tendered and find it in favor of the appellant but proceeded to convict him on loose evidence based on inconsistencies, innuendos, lies and conjectures which even the prosecution doubted on its authenticity.

    5. The learned trial magistrate erred in law and in fact by shifting the burden of proof of the appellant against the provision of section 107, 109 and 111 of the *Evidence Act* thereby making the whole trial not being fair and in particular contrary to Articles 25[c] and 50 of the *Constitution*.

    .6 The learned trial magistrate failed to find that critical, necessary and important witnesses were not called by the respondent when the complainant testified that she used to sleep with the brother who was a necessary witness and he was not called which made the trial a nullity.

    7. The learned trial magistrate failed to recognize the DNA reported that the appellant was excluded as the biological father to the complainant's new born baby which was a clear indication that her testimony was false.

    8. The learned trial magistrate considered evidence by incompetent witness who purported to be specialists and experts in arriving at his decision thereby trampling of the appellant's rights to fair trial.

    9. The learned trial magistrate trial to consider the evidence of PW2 who called the area chief who had information about her area but the area chief refused to deal with the issue because there was vendetta between PW2 and the appellant.

    10. The conviction was pegged on a "balance of probability" threshold against the criminally age old held bar of "proof beyond reasonable doubts".

    11. The honourable trial magistrate erred in analyzing, evaluating and making wrong inferences on the evidence tendered thereby resulting in miscarriage of justice.

12. The conviction was pegged on unsupported empirical medical evidence not harvested through scientific evaluation whose opportunity was ripe and grounded but wasted contrary to section 36 of *Sexual Offences Act* thereby making it unsafe.

19. The trial magistrate erred in law and fact by not keeping a proper record and proceedings of the ongoings leading to miscarriage of justice.

9. He seeks:

1. The Appeal be allowed

2. Conviction be quashed

3. The sentence set aside

4. The appellant be acquitted unconditionally.

10. Parties proceeded to argue the appeal by way of written submissions. For the appellant – through the firm of Nyamweya & Co Advocates filed on 25/1/2023 and for the State through prosecution counsel Victor Kazungu filed on 29/2/2023.

11. The case for the prosecution was that the appellant is the father to the complainant N.M whose her mother died in 2009. That following that unfortunate event, her father began to sleep with her. It was her evidence that she, her brother and her father slept in the same room. That her father would come to her bed tell her to remove her clothes and sleep on her. That he did that many times – and threatened her with death if she told anyone.

12. She told the court that in November 2021 her periods stopped and she found she was pregnant. When she told her father, he told her not to tell anyone she was pregnant and he offered her Kshs. 10,000/= to do an abortion. She refused, and he threatened to beat her. She ran away from home.

13. On 8/2/2022 her father chased her from home. She ran to her grandmother's in Ulu and after she reported to her grandmother about all that had happened her grandmother took her to the children's office – where they made the report and the case came to court.

14. She said she feared that her father would harm her if she told anyone he was defiling her.

15. On cross examination she told the court that in 2009, she had not started school, that at some point she ran away to live with a neighbour to avoid sleeping with him. She told the court that the accused had refused to give hand to her over to her grandmother. She said she began to cause trouble because of what the accused used to do to her. She told the court that her father had taken her to Kilome police station for running away from home. She said she did not tell the police what the accused was doing to her.

16. PW2 MKM her grandmother, told the court that the complainant was her grandchild. She told the court that NM's mother died in 2003, and NM and her younger brother were left in the care and custody of their father – the appellant. She told the court that she went to the accused home to collect the young children – but he refused, telling them that he was going to raise his own children. That when she visited the appellant told her that he would not educate them when they were not in her custody.

17. It was her testimony that on 9/2/2022 the complainant arrived at her home at 3pm. She told her that she had been chased away from school on 8/2/2022 and when she went home her father found her at home, beat her and she had escaped to her home. PW2 told the court that she waited for the appellant

to call her/pick the child. The father never went to pick her, and never called. She reported the issue to the village elder that she was concerned that the complainant was school going, was supposed to sit exams, but her father was not doing anything. The village elder referred her to the area chief where the appellant's home was. She met the chief one Anna Mweu. The chief told her that she did not want to be involved in the case between the appellant and his child. She went back to the children officer who told her that this was now a police case. When she went to the police they were referred to hospital where the complainant was examined – and the doctor advised her to keep the child with her. She testified that that is when she realized that the child was pregnant and she did not probe to find out who had made the complainant pregnant.

18. After the testimony of PW2 – the court was told that the complainant was due to deliver. The prosecutor made the application: -

> " We apply for adjournment and also apply for DNA to be done once complainant delivers as she is due to deliver next month. We can have another date after DNA is done. In addition, we apply that complainant be placed at a safe house pending her delivery".

19. On 5/12/2022, the record states:

> " The DNA report is ready and it states that the accused is excluded as the biological father to complainant's baby.
>
> Court: DNA report is noted."

20. The Clinical Officer – Eric Kasiamani testified that he filled P3 for 17-year-old N.M who was born in 2003. At the time of examination 28/3/2022 she was 24 weeks pregnant. According to him, this was a case of defilement.

21. No. 106935 PC Catherine Mwikali was the Investigating Officer. She was called by a Children Officer on 14/3/2022 at 1:50 pm about a case of incest.

22. Her testimony was:

> " PW4 No. 106935 PC Catherine Mwikali. I do recall on 14th March, 2022 at 1:50 pm I was called by a Children's Officer and told that the grandmother who stated the father had been raping her. I called her and she told me that after the death of the mother the father had been following her and defiling her. She was chased for school fees and the father wanted to defile her and she was given 10,000/= and advised her to abort. The victim then ran to the grandmother who brought her to the police station and reported the case. On 14th March 2022 the victim was tested and was 24 weeks due. I then arrested the accused who came to the children's office. He is the father to the girl."

23. On cross examination she told the court that no prior report had been filed before the children officer called her – the report was made by the children's office. She did not know whether the accused had made any report at Kilome police station.

24. In his judgment the learned trial magistrate concluded: -

> " When put to his defence the accused person chose to remain silent. The evidence of prosecution witness was not rebutted or challenged in any way. From the foregoing reasons, I find that the prosecution has proved its case beyond reasonable doubt, I consequently

convict the accused person of the offence of incest contrary to section 20[1] of the *Sexual Offences Act* and pursuant to section 215 of the *Criminal Procedure Code*".

25. For the appellant the following issues were set out for determination: -

    1. Whether the DNA results of the new born baby of the complainant tallied with those of the appellant.
    2. Whether penetration at four [4] years old will go unnoticed.
    3. Whether the prosecution called all the necessary witnesses.
    4. Whether the appellant was afforded a fair trial.
    5. Whether the prosecution proved their case beyond reasonable doubt.
    6. For the respondent

Issues for Determination

1. Whether there was penetration by a relative under section 20 of the *Sexual Offences Act*,
2. Whether the appellant was properly identified.
3. Whether there were notable inconsistencies in the testimonies of the witnesses.
4. Whether the sentence meted out to the appellant is safe.

26. I have carefully considered the grounds of appeal, the record, the submissions by both counsel and the issue is whether the charge against the appellant was established to warrant the conviction and what was the effect of the failure by the 2nd trial magistrate to consider the DNA evidence.

27. The charge of incest will be established where an act of penetration/indecent act will have been committed against a victim, a female, related to the perpetrator in the degree of consanguinity set out by section 20 of the *Sexual Offences Act*.

> Incest by Male Persons
>
> 1. 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 causes penetration or the indecent act was obtained with the consent of the female person
>
> 2. If any male person attempts to commit the offence specified in subsection [1], he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.
>
> 3. Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the

> power of the court to issue orders referred to as "section 114 orders" under the *Children's Act*, 2001 [No. 8 of 2001] and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period.

See *JKM v R* [2020] eKLR.

28. There is no dispute as to the relationship between the appellant and the complainant. The certificate of birth produced, the evidence of PW2, the evidence of the complainant all establish that the complainant is the daughter of the appellant. Hence – the two were in a degree of consanguinity set out by section 20.

Did an act of penetration occur between the appellant and the complainant?

29. The case for the prosecution is that the defilement of the complainant began in 2009 when she was 6 years old and that this was only discovered in 2022 when she was 19 years old – and only because she was pregnant.

30. It is the prosecution case that the defilement culminated into rape – which culminated into a pregnancy – the ultimate proof that there had been sexual intercourse between the complainant and her father.

31. When the DNA was conducted through the application of the prosecution and an order of the court, upon the birth of the complainant, child – the test results excluded the appellant as the father of the said child.

32. The State submitted thus: -

> 1. The mere fact that the DNA test results excluded the appellant does not necessarily mean that he did not penetrate the complainant. They submit that whereas the appellant may not have impregnated the complainant, he penetrated her occasioning her to leave the appellant's home and went to live with her grandmother PW2.
>
> 2. In the case of *WLN v Republic* [2021] eKLR the court dealt with a similar matter by holding as follows:
>
> > "... I wish, however, to disabuse the appellant of the notion that, because he was excluded by DNA results, he did not defile the victim. He may have caused penetration of the child at other time which did not result into a pregnancy and so not covered by the DNA result ..."

33. For the appellant it was submitted thus: -The complainant lied to this honourable court that the pregnancy was caused by the appellant, which report has been disapproved by scientifically acceptable DNA report. The fact that the DNA results are contrary to the complainant's testimony, this raises doubts on the credibility of her testimony.In the case of *Eliud Ouma Agwara v Republic*, the trial court in its judgment noted as follows;

> " The DNA results report is an expert report and in the absence of any other contrary expert report the same cannot be challenged as such am of the findings that the accused is not the biological father to the complainant's child".

34. In the case of *WLN v Republic*, the court quoted Justice Odero as in the case of *Simon Gichuki Maina v republic* [2016] eKLR where it stated that;

> " Whilst paternity test cannot conclusively prove the fact of defilement, these DNA results cast genuine doubt on the evidence of the complainant and bring her veracity into question. If as proved appellant was not the father of her child, then the complainant must have had sexual intercourse with a person other than the appellant and that person fathered her child. Her identification of the appellant as the man who defiled her is cast into doubt. The very real possibility that the complainant only named [identified] the appellant purely to shield some other third party cannot be entirely ruled out.
>
> Nobody witnessed the defilement. Nobody saw appellant in the company of the complainant. The complainant's claim that the appellant fathered her child through this act of defilement has been disproved by scientific evidence. I find that pertinent and genuine doubts remain regarding the identification of the appellant by the complainant. Once a witness is found to have been untruthful in one aspect of his testimony, then the entire testimony of that witness is cast into doubt. The benefit of such doubt must be awarded to the appellant. As such he was entitled to an acquittal. The trial magistrate erred in rendering a conviction in this case. I therefore quash the appellant's conviction on the charge of defilement. The subsequent sentence of 25 years' imprisonment is also set aside.
>
> This appeal succeeds. The appellant is to be set at liberty forthwith unless he is otherwise lawfully held".

35. It is evident that the weight the court will place on the DNA results will depend on the circumstances of the case.

36. In this case the complainant's case was that it is her father who had made her pregnant, that he had even given or offered to give her money to abort in order to hide what he had been doing. That evidence was demonstrated to be false by the DNA evidence – that her father had not made her pregnant and it also threw into doubt her credibility as to whether or not he had done the things that she said he had done.

37. I find illumination in *Scoffield Biko Ogweno v Republic* HCRA 45 of 2015 my brother Justice D. Majanja stated thus:

> " The only evidence in support of the prosecution case on the issue of penetration is that testimony of PW1. The DNA test excluded the appellant as the biological father of the child and the medical examination carried out on 16th July 2012 was too remote to connect the appellant to the defilement as it was carried out a year and 5 months after the incident.

38. The learned magistrate failed to weigh the evidence of PW1, PW2, PW4 and DW4 as regards the DNA test and its results. Had the trial court done so he would probably have arrived at a different conclusion. The failure to do so made him misapprehend the essence of DNA test and more so when PW1 categorically stated she got pregnant as a result of that very act of her being defiled on a particular occasion by the appellant. Similarly had the trial court seriously considered the evidence of PW4 it would have come to a different conclusion concerning the age of the pregnancy as from the month of August to January 2014 as that period cannot by all means of calculation be six [6] months. The learned State counsel conceded this ground of appeal and I find that he correctly did so as the ground is meritorious. I therefore allow ground No. 6 of the appeal.

39. The *Evidence Act* proviso to section 124 – gives victims of sexual assault a certain protection – so that the court – when persuaded by the testimony of the victim alone – may proceed to convict-

40. However, when the core of the case for the prosecution is thrown out by scientific evidence the court is bound to examine the rest of the evidence to determine its credibility and whether – it supports the charge.

41. This court is indeed alive to the fact that a child whose mother is dead, is a child in need of care and protection. A single father can raise his children and should never be seen through the lens of suspicion in first instance. The mere fact of being a single father does not per se make him a predator of his children. Hence any alleged wrong doing on his part must be established in the requisite manner.

42. In this case – it is alleged defilement began when the complainant was 6 years old – and it went on into her adulthood. There were other persons who could have assisted this court> there was the brother to the complainant with whom they shared a bedroom and the neighbour to whose house the complainant is alleged to have run away to, and the chief who we are told refused to get involved. This raises question of adverse conclusions against the prosecution that there lies the possibility that these crucial witnesses would not have supported the case for the prosecution, or their evidence would have contradicted it.

43. There ought to have been some curiosity as to why the chief who is as to why the chief who under the *Children Act* is an authorized officer, would decline to deal with the case of a child in need of care and protection.

44. The prosecution did not address these issues – even taking into consideration the seriousness of the allegation – surely the Investigating Officer had a duty to investigate this case – and the prosecution has the duty and mandate to direct that proper investigations be carried out. So many questions were left un answered.

45. Looking at the record the 1st report the complainant made to her grandmother is that she had been sent away from school and her father beat her and she ran away – it appears from the record that the grandmother was not pursuing a sexual assault case – but a case of the father of the complainant not taking her back to school yet she was due to sit for exams.

46. The grandmother told the court that she later noticed that the girl was pregnant but never pressed her to find out who the culprit was.

47. There is nothing on record to show that the complainant told her grandmother that her father was defiling her. She said the complainant ran to her home for refuge twice – the first time she reported that the accused had beaten her, the 2nd time she reported she had been sent away from school, the father beat her and she ran away.

48. All the foregoing leaves no evidence to support the claim that there had been continuous defilement.

49. The children officer in this case must be lauded for doing her job calling the police to inform them of the case but I have to call out the police for failing in their duty to investigate the claim. It is noteworthy that the evidence of the Investigating Officer is that the children officer told her about the grandmother reporting the rape – of the grandchild by her father – but she did not testify as to whether she took any statement from the grandmother or the child. Her [the police officer's] statement is that the complainant was actually given Kshs. 10,000/= to carry out an abortion, contrary to the complainant that the appellant offered.

50. All this evidence does not add up – there was no rush to charge the appellant without carrying out investigations – the full investigations without the evidence of the brother, the chief, the neighbour – there is no supporting evidence of previous sexual abuse and *Bukenya v Uganda* [1972] EA 549 as cited in *Andrew Mulika Kithusi v Republic* [2014] eKLR where it was quoted with approval thus:

> " Thirdly, while the director is not required to call a superfluity of witnesses, if evidence which is barely adequate and it appears that there were other witnesses available who were not called, the court is entitled, under the general law of evidence, to draw an inference that evidence of those witnesses, if called, would have been or would have tended to the adverse to the prosecution case
>
> ...".

51. Also in *MTG v Republic*, the court quoted the case of *Bukenya & others v Uganda* thus, that;

    1. The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent.

    2. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case.

    3. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution.

52. From the foregoing it evident that the evidence before the subordinate court did not establish penetration by the appellant.

Ultimately did the prosecution prove the charge against the appellant beyond a reasonable doubt?

53. From the evidence on record – there was insufficient evidence to even place the appellant on his defence. The prosecution had the onus to prove beyond a reasonable doubt that there had been defilement of the complainant from 2009, that there had been rape from the time she turned into an adult, and that she had fallen pregnant out of the said acts. However, the prosecution failed to do so – because they failed to direct investigations.

54. I cannot over emphasize the fact that he failure of the DNA to connect the appellant with the pregnancy would not have exonerated the appellant of any acts penetration if they were established. In addition, the prosecution must necessarily resist the temptation to ride on the proviso to section 124 of the *evidence act* – by the insisting on professional and effective investigations of sexual offences and more so where the report is made long after the incident. Evidence must be gathered and weighed, victims' options must be considered before the matter is presented to court.

55. Having said that and having weighed all the evidence before me as required by *Okeno v Republic* [1972] EA 32 where the court set out the duties of a first appellate court thus: -

> " 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."

56. I am of the view that the appeal is merited. It is allowed. The conviction is quashed, the sentence is set aside and the accused is to be set at liberty unless otherwise legally held.

DATED, SIGNED AND DELIVERED, VIRTUALLY THIS 19TH NOVEMBER 2024 MUMBUA T MATHEKA

JUDGE

Appellant present virtually Ms Nelima/Ms Elizabeth Ms Nyakibia/Mr. Kazungu Counsel for appellant N/A

SIGNED BY: LADY JUSTICE MATHEKA, TERESIA MUMBUA

THE JUDICIARY OF KENYA.

MAKUENI HIGH COURT

HIGH COURT DIV

DATE: 2024-11-20 12:35:32