PI v Republic (Criminal Appeal E052 of 2023)
[2024] KEHC 15795 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15795 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E052 OF 2023

AC BETT, J

DECEMBER 6, 2024

BETWEEN

PI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgement, conviction and sentence of Hon. E. Wasike, Principal Magistrate, in Butere S.O Case No. E005 of 2021 delivered on 11th October 2023)

JUDGMENT

1. The Appellant herein, PI, was convicted of incest contrary to Section 20 (1) of the *Sexual Offences Act* No.3 of 2006 and was subsequently sentenced to 30 years imprisonment. The particulars of the offence were that on diverse months of December and January 2021 at Kakamega County, the Appellant caused his penis to penetrate the vagina of I.A, a female aged 10 years, who to his knowledge was his daughter.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* with the particulars being that on diverse months of December and January 2021 at Kakamega County, the Appellant intentionally the vagina of I.A, a female aged 10 years, with his penis. No finding was made on this charge.

3. Being aggrieved with the said conviction and sentence, the Appellant vide a Petition of Appeal dated 25th October 2023 brought the instant appeal on the following grounds:-

    a. That the learned magistrate grossly erred in both law and facts in convicting the Appellant on inadequate medical evidence.

b. That the learned trial magistrate erred in law and facts by erroneously basing the Appellant's conviction on evidence that was contradictory, inconsistent, uncorroborated, fabricated, afterthought and malicious in nature.

c. That the learned trial magistrate erred in both law and facts by sentencing the Appellant to 30 years imprisonment without considering the discretional powers in sentencing.

d. That the learned magistrate erred in both law and facts by failing to consider that crucial witnesses did not testify to help the court get the truth.

e. That the learned magistrate erred in both law and facts by not appreciating and evaluating the Appellant's plausible defence.

f. That the learned magistrate erred in both law and facts by failing to consider that from the evidence of the siblings and the biological mother the offence could have been assault but not incest.

Brief Background

4. In summary, the prosecution's case was that the complainant, I.A, was on several occasions defiled by the Appellant, who is her father. The prosecution availed 5 witnesses to advance its case.

5. I. A (PW1) stated that she used to live with her parents but she was taken to her grandmother's place by her aunt since her parents would beat her a lot. She testified that one time when she was at her grandmother's place, a man did 'tabia mbaya' to her when her siblings were playing outside. She stated that the man removed his trouser and inner wear and then removed her skirt and her pant and put his 'thing' in her 'thing' and went away after finishing. She averred that she reported to her grandmother what had happened since her grandma noticed that she had some liquid coming out of her private parts. She again stated that the incident took place at her home before she was taken to her grandmother's home. She testified that her grandmother took her to hospital and she was treated. She alleged that she did not know the man who defiled her and that she did not tell the police who defiled her.

6. E.A (PW2) who is the complainant's grandmother testified that she started living with PW1 in July 2020. She averred that the complainant's mother requested her to live with the complainant since she used to suffer from being abused by her father. She claimed that the complainant's mother had told her that the complainant had developed a serious urinary issue. She stated that she also noticed that the complainant would always wet her pant and when she asked her, she stated that her father would beat her often. She further stated that when she enrolled the complainant in school in 2021, the teachers also noticed the same problem and the head teacher ordered for the child to be taken to hospital. She testified that the doctors confirmed that the child had been defiled. She stated that the child was referred to MTRH Eldoret and the medical officers informed her that the child had revealed that she was defiled by the father. She testified that the matter was reported at Butere police station and action was taken against the father. She averred that the child had refused to tell her anything but it is the doctors who told her that the child had revealed that she was defiled by the father.

7. A.A (PW3) who is the complainant's sibling stated she lived with the Appellant. She stated that she would be punished when she made a mistake. She stated that when they all used to live together, her siblings and herself would all be punished if they did something wrong.

8. Maina Aggrey Ambetsa (PW4) who is a Clinical Officer testified and stated that he received PW1on 23rd June 2021 when she was brought by her teacher with a history of defilement by her father. He stated that he examined the child physically and found that she had a white discharge and her hymen

was broken. He averred that a High Vaginal Swab test was done and he concluded that the child had been defiled. He produced the treatment notes Marked P Exh 1, P3 Form marked P Exh 2, and the PRC form marked P Exh 4.

9. Maurine Akwama No. 113913 (PW5) who was the Investigations Officer testified and stated that she received PW1 and her school Headmaster on 23rd June 2021and they reported that PW1 had been defiled severally by the Appellant. She averred that the minor was escorted to the hospital where she was examined and treated. She further testified that she interrogated the minor who narrated how the defilement took place. She averred that she traced the Appellant and arrested him. She produced the complainant's birth certificate which was marked P Exh 3.

10. The Appellant gave a sworn statement and called two witnesses. He stated that sometime in May 2021, his aunt told him that PW1 had been chased away from school due to fees and he organized for the fees to be paid and the child resumed school. He contended that in July 2021, he was summoned by the police where he was informed of the charges against him and was arrested.

11. (DW2) testified and stated that he is the village elder in the Appellant's village. He advanced that the complainant left the Appellant's home in July 2020 and the Appellant was arrested in 2021. He stated that the time the Appellant was charged with the offence, the complainant was not staying with him. He claimed that he knew the Appellant as a disciplined person and that he could not have committed the offence.

12. V.O.N (DW3) testified and stated that she is the Appellant's neighbour. She stated that the complainant left home in July 2020 and the complainant told her that she was happy she was going to Nairobi to stay with her aunt. She testified that at the material date that is alleged the Appellant defiled the complainant, the complainant was not at home but she was away in Nairobi.

Submissions

13. The court directed that the parties file written submissions. Only the Appellant complied and his advocate filed his submissions dated 8th August 2024.

14. The Appellant's counsel submitted on three grounds namely:

    I. Whether the prosecution proved the offence of incest beyond reasonable doubt.

    II. Whether the sentence meted on the Appellant was excessive and/ or harsh.

    III. Whether the Appellant should be acquitted.

15. On the first ground, counsel submitted that the prosecution had to prove four elements in order to prove the charge of incest against him. He posited that the prosecution ought to have proven the relationship between the victim and the perpetrator, whether the victim was a minor or an adult, whether there was penetration and the identity of the perpetrator.

16. He averred that the relationship between the victim and the Appellant was satisfactorily proven since he also acknowledged that the victim is his daughter.

17. On whether penetration had occurred, counsel advanced that the prosecution did not prove the element of penetration beyond reasonable doubt. They relied on the case of Ndilu Vs Republic (2023) eKLR where the court held that absence of hymen is not conclusive proof of sexual penetration since the hymen of a girl or woman can be missing for other various reasons.

18. On the identity of the perpetrator, they submitted that the trial court relied on hearsay evidence on the identification of the Appellant by relying on the testimony of PW2 who testified that the medics and the head teacher of the school the minor used to learn said that the minor had confessed that it is her father who defiled her. They posited that the trial court also relied on the inconsistent testimony of PW4 who stated that the minor confided in her that she had been defiled by her father while examining her when it is clear that PW4 was not an expert in that field but only a doctor. They averred that PW5 failed to corroborate the prosecution's evidence on identification since she did not produce any evidence placing the Appellant in the alleged scene of crime since her testimony was based on mere hearsay.

19. The Appellant's counsel argued that evidence on identification ought to be watertight to justify a conviction. They relied on the case of Mohamed Mafhabi & Others Vs Republic (1983) (unreported) and the case of Peter Kimaru Maina Vs Republic (2003) which enunciated this principle.

20. On the second ground, they contended that the legality of mandatory and minimum sentences was restated by the Supreme Court in Francis Karioko Muruatetu & Another Vs Republic and in the Judiciary Sentencing Guidelines. It was submitted that assuming that the Appellant was guilty, the court in sentencing him ought to have been guided by the above provisions of law. The Appellant's counsel also stated that sentencing the Appellant to 30 years imprisonment was too harsh on his part bearing in mind the provisions of the law, the Appellant's welfare as well as other legal factors.

21. On the third ground, it was argued that the Appellant should be acquitted since the prosecution failed to prove their case beyond reasonable doubt. They submitted that the prosecution failed to positively identify the Appellant as the perpetrator. They averred that the court only relied on the fact that the minor had urinary problems and the fact that the minor was in the custody of the Appellant to give the unlawful conviction. They submitted that the Appellant ought to have been convicted for assault since the minor testified that the appellant used to beat her and the same was corroborated by PW3, her sister.

22. Lastly, it was submitted that the prosecution failed to prove the case of incest against the Appellant beyond reasonable doubt in the trial court thus this court should overturn the judgement of the trial court and allow the Appeal as prayed.

Analysis

23. This being a first appeal, it is important that this court is conscious of it's duty as a first appellate court, to reassess evidence produced in the trial court and come up with its own findings while bearing in mind that it did not possess the privilege of neither seeing or hearing the witnesses. This principle was well captured in Okeno v. R [1972] EA. 32 where the court stated that:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's finding and conclusion. It must make its own finding and draw its own conclusions only then can it decide whether the magistrate's finding 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."

24. Consequently, I have carefully considered the evidence in the trial court and the findings of the trial magistrate, the Petition of Appeal, the Submissions filed by the Appellant and the authorities relied

upon therein and it is understood that the main issue for determination is whether the prosecution proved its case against the Appellant beyond reasonable doubt.

I. Did the Prosecution prove the charge of incest against the Appellant beyond reasonable doubt?

25. Section 20(1) of the *Sexual Offences Act* provides:-

> " 20(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 cases penetration or the indecent act was obtained with the consent of a female persons."

26. The court in MG v Republic (2022) eKLR interpreted the ingredients of incest as follows:-

> " Thus, the ingredients for the offence of incest are:
>
> (i) Proof that the offender is a relative of the victim.
>
> (ii) Proof of penetration or indecent Act.
>
> (iii) Identification of the perpetrator.
>
> (iv) Proof of the age of the victim."

27. To determine whether the charge of incest was well proven against the Appellant, this court endeavors to interrogate whether each element was proven and to the required standard.

28. On the proof that the offender is a relative of the victim, the complainant is said to be the daughter of the Appellant herein. The Appellant also acknowledges that he is the father to the complainant. This element was therefore proven beyond reasonable doubt.

29. On the proof of the age of the victim, PW 5 produced the complainant's birth certificate marked P Exh. 3 which showed that the complainant was born on 19th September 2010, meaning she was around eleven years old at the time of the defilement. This element was also beyond reasonable doubt.

30. On the proof of penetration, the complainant testified that a man unknown to her defiled her when she was at her grandmother's place. PW4 also testified that upon examination of the minor, he noted the absence of the minor's hymen, whitish discharge and a High Vaginal Swab confirmed that the complainant had been defiled. PW4 reached a conclusion that indeed the minor had been defiled.

31. The court in Sammy Charo Kirao v Republic [2020] eKLR quoted with approval a decision by the Supreme Court of Uganda in *Bassita v Uganda S.C. Criminal Appeal No. 35 of 1995* where the court stated:-

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the proved by the victim's own evidence and corroborated by the medical evidence or other evidence. Though desirable it

is not hard and fast rule that the victim's evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

32. Based on the reasoning of the court in the above-mentioned case, when the testimony of the complainant is corroborated with medical evidence, the element of penetration is considered proven beyond reasonable doubt. In the instant case, the testimony of the minor was well corroborated by the medical evidence in record and I find that this element was as well proven beyond reasonable doubt.

33. On the last ingredient of identification, it is clear from the court record that the complainant did not identify the Appellant in her testimony. She testified that a certain man took her while her siblings were playing and defiled her. She also stated that her grandmother noticed some liquid coming from her private parts and asked her what had happened. She again stated that the incident occurred while she was at their home before she was taken to the grandmother's place. She averred that she did not know the identity of the man that defiled her. The Appellant was identified as the perpetrator by PW2 who is the complainant's said grandmother. She alleged that she was told by the doctors that the complainant had said that she had been defiled by her father. She also stated that the complainant refused to tell her anything regarding the incident. PW4 who was the clinical officer testified and stated that the child said that she had been defiled up to December 2020. He did not say whether the child told him who had defiled her. PW5 who was the Investigating Officer testified that the child narrated to her how the defilement took place but she did not state whether the child told her who had defiled her. She testified that it is the Head Teacher who reported to her that the minor had been sexually assaulted by the Appellant.

34. Evidence on identification of an accused person as a perpetrator is vital to confirm the guilt or innocence of an accused. The prosecution ought to present watertight and reliable evidence on identification of an accused as a perpetrator. It is quite dangerous for a court to rely on flimsy evidence on identification to convict an accused person.

35. The court in the case of Mwangi v Republic (2022)eKLR held as follows on the vitality of evidence on identification:-

> "In reference to the identification of the appellant as being the person who perpetrated the offence, it is trite that in sexual offences, the positive identification of the victim is what connects them to the offence. It is therefore extremely important that any evidence on identification must be thoroughly and carefully scrutinized to avoid any miscarriage of justice. In the case of Kariuki Njiru & 7 others v Republic, Criminal Appeal No 6 of 2001 (Unreported) the court held as follows: "Law on identification is well settled, and this court has from time to time said that the evidence relating to identification must be scrutinized, and should only be accepted and acted upon if the court is satisfied that the identification is positive and free from the possibility of error."

36. What comes out in the instant case is that the trial court found that the Appellant was sufficiently identified through hearsay evidence. It is trite that oral evidence, such as the one that the trial court relied on, should be direct.

37. Section 63 of the *Evidence Act* provides: -

> " 1. Oral evidence must in all cases be direct evidence.
>
> 2. For the purposes of subsection (1) of this section, "direct evidence" means—

a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;

b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;

c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds."

38. The court of appeal in the case of Kinyatti v Republic [1984] eKLR held as follows on the issue of admissibility of hearsay evidence:-

> " Hearsay or indirect evidence is the assertion of a person other than the witness who is testifying offers as evidence of the truth of that asserted rather than as evidence of the fact that the assertion was made. It is not original evidence.
>
> The rule against hearsay evidence is that a statement other than one made by a person while giving oral evidence in the proceedings is inadmissible as evidence of stated facts. The evidence of a statement made to a witness by a person who is not called as a witness may or may not be hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is not admissible when it is proposed to establish by the evidence not the truth of the statement, but the fact that it was made."

39. The trial magistrate therefore grossly erred in convicting the Appellant herein based on evidence from people who neither witnessed the alleged defilement nor procured a confession from the complainant as to who the perpetrator was.

40. From the complainant's testimony, another party is introduced as a person who defiled her. She does not identify the said person but neither did she identify the Appellant as the perpetrator of the defilement. Even in the event that the court was inclined to believe that the complainant used the word 'beat' to actually refer to defilement, it comes out clearly that the complainant was capable of discerning a beating from 'tabia mbaya', which is the term she used to refer to defilement.

41. The evidence the trial Magistrate relied on to convict the Appellant herein was therefore hearsay evidence from PW2 and PW3, which was inadmissible since the complainant did not corroborate the same.

42. Additionally, I find that the trial court failed to take into account the Appellant's defence. The Appellant's defence was that the alleged defilement happened when the child had already moved to the grandmother's place. According to the chargesheet, the minor is reported to have been defiled between December 2020 and January 2021. It is undisputed that the minor moved out of the Appellant's house in July 2020 and nowhere has it been alleged that she went back. It is therefore difficult to link the Appellant to the defilement since the complainant was living away from the Appellant when the incident happened.

43. I consequently find that the element of identification was not proved beyond reasonable doubt.

Determination

44. The upshot is that the Appeal is allowed, the conviction quashed and the sentence set aside. The Appellant shall be set at liberty forthwith unless he is otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 6TH DAY OF DECEMBER 2024.

A. C. BETT

JUDGE

In the presence of:

Mr. Acheno for Appellant

Ms. Chala for Respondent

Court Assistant: Polycap