PMM v Republic (Criminal Appeal E002 of 2020) [2021] KEHC 13710 (KLR) (8 July 2021) (Judgment)

Neutral citation: [2021] KEHC 13710 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E002 OF 2020

DK KEMEI, J

JULY 8, 2021

BETWEEN

PMM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From original conviction and sentence by Hon E.W. Wambugu (SRM) at Kithimani Senior Resident Magistrate's Court in Criminal Case Number 18 of 2018 delivered on 22.1.2020)

JUDGMENT

1. The Appellant herein, PMM, was charged with two counts. The main count was in respect of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The alternative charge was for the offence of committing indecent act with a child contrary to section 11(1) of the said Act.

2. He was sentenced to serve fifty (50) years' imprisonment for the main count. It was not indicated when the sentence was to run.

3. The particulars of the charges were as follows:-

   Count I

   The appellant "On the 8th day of May 2018 at [particulars withheld], in Yatta sub-county within Machakos County, intentionally caused his penis to penetrate the vagina of MM a child aged 8 years."

   Alternative Charge

   The appellant "On the 8th day of May, 2018 at [particulars withheld] in Yatta sub-county within Machakos County, intentionally touched the vagina of MM a child aged 8 years with his penis."

4. Being dissatisfied with the said judgment, on 10th March, 2020 the Appellant filed his Petition of Appeal and amended the same where he raised the following grounds: -

    1. That the prosecution failed to prove its case to the required standard.

    2. That the whole of the prosecution's case is riddled with material contradictions.

    3. That the trial court failed to consider and dismissed the appellant's defence of alibi.

    4. That the appellant was convicted on a defective charge sheet.

5. The appeal was canvassed by way of written submissions. Both parties duly filed their respective submissions.

6. The appellant submitted on each of the grounds raised in the appeal. On the ground of proof of defective charge sheet, it was submitted that the failure to include the word "unlawfully" in the particulars of the offence rendered the charge defective as no offence was disclosed. Reliance was placed on the case of Achoki v R (2002) EA. It was also submitted that the appellant ought to have been charged with incest under section 20(1) of the *Sexual Offences Act* and not defilement. The appellant took issue with the date of commission of the offence as the charge sheet indicated that the offence was committed on 8.5.2018 and yet Pw3's testimony was to the effect that the victim was defiled on 12.5.2018. On the issue of proof of the prosecution case, it was submitted that the complainant stated that bad manners was done to her and this was not sufficient description of the act of penetration. It was reiterated that the act was committed on 12th May, however the charge sheet indicated 8th May, 2018. The trial magistrate was assailed for assuming and finding that there were lacerations and injuries on the vagina of the victim yet the evidence of Pw3 was to the effect that the victim had an absent hymen. Reliance was placed on the cases of JOO v R (2015) eKLR. It was submitted that the evidence of a grudge was not taken into account by the trial magistrate. The appellant prayed that the conviction be quashed and the sentence set aside and that he be set at liberty. There was no submission on the defence of alibi.

7. In reply, counsel for the prosecution opposed the appeal. It was submitted that the evidence of commission of the offence proved the prosecution case; that age was proven vide the age assessment report; that penetration was proven vide the medical report. Reliance was placed on the case of FOD v R (2014) eKLR. It was submitted that the 50-year sentence was sufficient and the court was urged to uphold the conviction and sentence meted on the appellant.

8. This being a first appeal, this court is mandated to analyse and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo v Republic Cr App No 280 of 2004 (2005) 1 KLR where the Court of Appeal held that:-

> "On a first appeal, the court is mandated to look at the evidence adduced before the trial afresh, re-evaluate and reassess it and reach its own independent conclusion. However, it must warn itself that it did not have the benefit of seeing the witnesses when they testified as the trial court did and therefore cannot tell their demeanour".

9. In support of the prosecution case, there were 4 witnesses lined up. Pw1 was the complainant, and after a voir dire was conducted on her, the court was not satisfied that she understood the meaning of an oath and she gave an unsworn statement. According to her testimony, she was a class one pupil who was living with her father, the appellant. She testified that the appellant removed her clothes and his clothes and removed his inner wear and did "tabia mbaya". She recalled how she felt pain in her private parts and how her father used a condom; that this was a repeated action on several other days.

She recalled how the appellant picked her from her Aunt S home and did not take her to school. She recalled being taken to Katangi where she was treated and also she reported to the police. She told the court that she did not tell anyone what had happened as the appellant threatened to beat her if she told anyone. She told the court in cross examination that no one saw the act but however she was emphatic that the appellant was the perpetrator and no one else. On re-examination she told the court that she could not remember the date of the unlawful act.

10. Pw.2 was SMM who testified that the victim was her 8-year-old granddaughter who lived with the appellant as her mother had died. She recalled how on 8th May,2018 the victim came to her house and asked for food but however at 7 pm the appellant came for the victim and threatened to beat her. She told the court that on 9.5.2018, the victim came to her house asking for food and later the victim showed the injuries on her thighs to her, and who informed her that the appellant used to use a pliers to inflict injuries on her. The area sub chief was alerted and who advised her to take the victim to Katangi Dispensary. She testified that the victim revealed to the doctor that the appellant used to sleep with her. On cross examination, she testified that the appellant used to mistreat his children and that she had no grudge with the appellant.

11. The Appellant had prayed on 27.11.2018 that the trial starts de novo as he wanted to cross examine the victim. The court declined to allow the application and noted that the appellant was free to make an application that the victim be recalled for cross examination.

12. Pw.3 was RWI who testified of a medical examination that that she conducted on the victim who had been issued with a P3 form filled on 12.5.2018. She testified that she estimated the age of the victim as 8 to 9 years. She recalled how the victim recounted to her how the appellant used to defile her frequently until the 12th May and that the child was terrified of the appellant who threatened to kill her if she revealed what had happened. The victim reported how the defilement occurred from January, 2018 after the death of her mother and therefore examination observed the victim had a torn hymen that was not fresh as the child had been used to sexual intercourse. Examination also revealed injuries on the lower limbs. She reiterated how the child was fearful of being killed by her father. The P3 form was produced as an exhibit. On cross examination, she told the court that the appellant was not examined and that the victim's teacher noted her changed walking style. It was her testimony that the child did not seem to be fabricating her account of events.

13. Pw4 was Elizabeth Mukulu Peter, the investigating officer who recalled how on 12.5.2018 a report was made to her by the aunt of the 8-year-old victim. It was her testimony that there was initially a report of assault that was made against the appellant who was accused to using a pliers on the victim's thighs close to her vagina. She told the court that she saw the scars on the victim and referred her to Katangi Health centre where it was revealed that the victim had lacerations on her vagina and an absent hymen. It was her testimony that when the victim came back, she manifested fearfulness of her father and she later revealed that whenever she went home the appellant would force her legs open with a pliers and then defile her and thereafter threaten to kill her if she told anyone. She told the court that an age assessment conducted on the victim revealed that she was aged 8 years old. She stated that she learnt that the victim used to run and seek refuge at her aunt S home after the appellant had assaulted her and that the appellant is the victim's step farther. On cross examination, she stated that the appellant married the victim's mother when the appellant had already been born and hence he was her stepfather.

14. The trial court found that the appellant had a case to answer and the appellant was put on his defence and he opted to give unsworn evidence and call 5 witnesses but however, he changed and elected to give sworn evidence but called no witnesses. He testified that he was arrested on 8.5.2018. He lamented how his in laws did not come to testify in court and that the charges were fabricated. He denied defiling

the victim and added that there was a dispute as he declined to give out the children to his in-laws after his wife died and in the result he was framed.

15. Having looked at the evidence on record, the grounds of appeal and Appellant's and State's written submissions, the issues for determination were:-

    a. Whether or not the Prosecution had proved its case beyond reasonable doubt.

    b. Whether there are contradictions in the evidence of the prosecution that will vitiate the conviction against the appellant.

    c. Whether the trial court went into error in dismissing the appellant's defence.

    d. Whether the appellant was convicted on the basis of a defective charge sheet.

16. The Appellant seems to have no qualms about one of the elements of the offence as encapsulated under section 8(1) as read with section 8(2) of the *Sexual Offences Act*, to with that the victim was below 18 years. He challenged the evidence on the commission of the offence. The evidence that is on record that is consisted in the evidence of the complainant as corroborated by medical evidence confirms that she had vaginal lacerations, absent hymen, injuries on her labia minora and scars between the legs. Pw1 urged the court to believe that the appellant was the perpetrator. The appellant has denied the commission of the offence and maintains that he was framed because of a dowry dispute and a grudge with his in-laws. I am satisfied that the sequence of events as recounted by the prosecution evidence point to the fact that the appellant was together with the complainant so as to have an opportunity to commit the offence. The medical evidence that was adduced by Pw3 exhibits confirm that the complainant had lacerations on her genitalia as well as her thighs and an absent hymen. I am satisfied that Pw1 was truthful. This is because her fearful state observed by Pw3 and Pw2 and Pw4 indicate that she was distressed in regard to actions meted on her by what the evidence reveals as the appellant. This evidence all created circumstances favourable for identification. The only witness to the incident was Pw1. In Abdalla Bin Wendo and Another v. R. (1953), 20 EACA 166 cited with approval in Roria v. R. (1967) EA 583 the court made a number of observations with regard to the evidence of a single eye witness:—

    (a) The testimony of a single witness regarding identification must be tested with the greatest care.

    (b) The need for caution is even greater when it is known that the conditions favouring a correct identification were difficult. (c) Where the conditions were difficult, what is needed before convicting is 'other evidence' pointing to guilt.

    (d) Otherwise, subject to certain well known exceptions, it is lawful to convict on the identification of a single witness so long as the judge advises himself to the danger of basing a conviction on such evidence alone and is satisfied that the witness was truthful. The record is clear that the trial court was satisfied with the evidence of Pw1 and I see no reason to interfere with his reasoning.

17. I am convinced that the lacerations on the victim's genitals was occasioned by a male organ despite the fact that there was no eye witness account of the incident save for the account of the victim. The complainant used to live with the appellant and that it was highly unlikely for the victim to implicate her own step father who was her only guardian after her mother passed on. She was speaking the truth about what had been done to her. I am guided by section 124 of the *Evidence Act*.

18. The appellant assailed the learned magistrate for failing to consider the alibi raised by him. In Kiarie V Republic [1984] KLR the Court of Appeal held:

> " An alibi raises a specific defence and an accused person who puts forward an alibi as an answer to a charge does not in law thereby assume any burden of proving that answer and it sufficient if an alibi introduces into the mind of a court a doubt that is not unreasonable...

19. The appellant gave no such defence in the trial court as confirmed from the record. As such it is spurious for him to raise an issue to do with an alibi which never arose in the proceedings and even in his defence testimony.

20. Though I did not see the appellant testify, I am not convinced that he was telling the truth. He alleged he was framed but brought forward nothing to establish this. The failure of the appellant to account for his movements at the time the offence was committed as well as the evidence of Pw2 to Pw4 to the effect that the appellant lived with the victim meant that the appellant was properly identified as the perpetrator and that he was not framed. I am guided by the case of Dinkerrai Ramkrishan Pandya v R [1957] EA 336 where the East Africa Court of Appeal cited the case of Coughlan v Cumberland (3) (1898) 1 Ch. 704 where Lindly MR, Rigby and Collins L.JJ observed that "when the Question arises which witness is to be believed rather than another, and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on credibility of witnesses whom the court has not seen.

21. The appellant has assailed the prosecution evidence for being inconsistent and that the inconsistency is in regard with the date of commission of the offence; I am not convinced that there is any inconsistency that goes to the root of the case for as per the evidence, it is clear that the sexual act was a repeated occurrence on the victim who was the sole witness to the incident and as such her evidence would make or break the criminal trial. I am more inclined to believe her evidence over that of the appellant; it is cogent, consistent and corroborated by Pw2 to Pw4. No doubt had been created in the prosecution case, and I find that the prosecution did meet its standard of proof.

22. The trial court is assailed for convicting the appellant on a defective charge sheet that failed to include the word "unlawful" on the particulars of the charge and for failing to convict the appellant for the offence of incest and yet the evidence is indicative of a degree of consanguinity between the appellant and the victim.

23. In case of Sigilani v R (2004) 2 KLR 480 it was observed that the litmus test is whether the accused was charged with an offence known in law and the facts were presented in a manner so as to enable him prepare for his defence. Because the appellant knew the charge he was facing and he participated in the trial in a manner suggestive that he understood the charge he was facing there was no miscarriage in the failure to include the word unlawfully. In any event he did not raise the issue during trial meaning that he was not prejudiced by the failure to include the word unlawfully in the charge sheet. I am guided by section 382 of the *Criminal Procedure Code*. It is instructive that the appellant participated in the trial from start to finish without raising any objections thereby implying that he understood everything regarding the case and that he did not suffer any prejudice by the missing word ''unlawfully'' in the charge sheet. With regard to the submission that the evidence is different from the offence, it is noted that the appellant was convicted only to the extent that consanguinity was not taken into account, I am

of the view that it meets the same fate of not being raised during trial and no occasioning of miscarriage of justice. This ground raised by the appellant therefore fails.

24. Having analysed the oral and documentary evidence that was adduced by the prosecution witnesses, this court is satisfied that the learned trial magistrate arrived at the correct decision when he found and held that the prosecution had proved its case beyond reasonable doubt.

25. Finally, on the issue of sentence it is noted that the appellant was sentenced to serve fifty years' imprisonment for the offence of defilement under section 8(1) and 8(2) of the *Sexual Offences Act*. The aforesaid provision states that a person who commits an offence of defilement with a child aged 11 years or less shall upon conviction to be sentenced to imprisonment for life. Following the decision by the Supreme Court in Francis Karioko Muruatetu and 2 others Vs R [2017] eKLR courts now have discretion to tinker with the strict minimum sentences by considering mitigation of offenders. Indeed, the appellant herein tendered his mitigation. The effect of his actions on the victim who is his step daughter must also be considered. The appellant's conduct in preying on his young and defenseless step daughter was reprehensible as the minor has been traumatized for life with no other dependent guardian as her mother had already passed on. The appellant needs custodial rehabilitation. It is noted that the sentences imposed on these kind of offences after the decision in Muruatetu case (supra) range between 20 to 30 years imprisonment. I find that a sentence of thirty (30) years imprisonment is suitable for the appellant which should commence from the date of arrest namely 14/5/2018.

26. In the result the appeal on conviction is dismissed. The appeal on sentence succeeds to the extent that the sentence by the lower court is hereby set aside and substituted with a sentence of thirty (30) years imprisonment which shall commence from the 14/5/2018.

It is so ordered.

DATED AND DELIVERED AT MACHAKOS THIS 8TH DAY OF JULY, 2021.

D. K. KEMEI

JUDGE