IW v Republic (Criminal Appeal 74 of 2020)
[2021] KEHC 1560 (KLR) (10 November 2021) (Judgment)

Isaack Wanyonyi v Republic [2021] eKLR

Neutral citation: [2021] KEHC 1560 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 74 OF 2020

LA ACHODE, J

NOVEMBER 10, 2021

BETWEEN

IW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The Appellant, IW, was charged on the main count with Incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006 (hereinafter referred to as the Act). The particulars thereunder were that he, on the 1st day of March 2019 at [Particulars withheld] area in Kimilili sub-county within Bungoma County unlawfully and intentionally caused his penis to penetrate the vagina of SW a child aged 4 ½ years (hereinafter referred to as the minor) who to his knowledge was his daughter.

2. The Appellant faced an alternative charge of Indecent Act contrary to Section 11(1) of the Act; It was alleged that on the 1st day of March 2019 at [Particulars withheld] area in Kimilili sub-county within Bungoma County, he unlawfully and intentionally caused his penis to come into contact with the vagina of the minor.

3. A summary of the Prosecution case is that PW1 left the Appellant with their children at home on 1st March 2019 and went to attend a funeral. When she returned, she noticed that her children were not in their original sleeping positions and the youngest child did not have her trousers on. The minor's legs were raised and there was a yellowish substance oozing from her genitals. She took the minor to hospital the next day and later made a report at Kimilili police station. The minor had reported that the Appellant had done "tabia mbaya" (bad manners) to her, pointing to her buttocks. The Appellant was subsequently arrested and charged.

4. The Prosecution called a total of four (4) witnesses and further produced exhibits including a P3 form, treatment notes and age assessment report in support of its case against the Appellant.

5. In his defence, the Appellant denied both the main and alternative charge. He alleged that the charges were trumped up at the behest of his wife. The Appellant attributed the charges to malice on the part of his wife whom he alleged was settling scores following the sale of a portion of the family land without her involvement. He accused her of purposefully abusing the process of the court.

6. The trial magistrate considered the rival positions and proceeded to convict the Appellant on the main charge. She sentenced him to life imprisonment.

7. Being dissatisfied the Appellant in exercise of his right of appeal, approached this court to quash both the conviction and sentence. His grounds of appeal in the amended Memorandum of Appeal dated 16th August 2021 stated:

   i) That the birth certificate in respect of proving the victim's age was not produced.

   ii) That the prosecution case had a lot of contradictions between the witnesses.

   iii) That the medical evidence and exhibits produced in court were insufficient to support the alleged offence.

   iv) That an essential witness was not called.

   v) That the learned trial magistrate did not consider the existing family feud.

   vi) That the learned trial magistrate erred in principle by convicting the appellant on the weakness of his defence and rejecting his defence which created reasonable doubt.

8. The appeal was canvassed by way of written submissions. The Appellant submitted that the prosecution evidence was full of contradictions and inconsistencies and in particular that the evidence of PW1 contradicted that of PW3 concerning the state of the minor at the time of going to hospital. He contended that the prosecution failed to prove the minor's age or give account of the minor's state when she was taken to hospital and who took her there.

9. He relied on the case of Bukenya & others vs. Uganda [1972] EA 549, to submit that the prosecution had failed to produce crucial witnesses and evidence, including the minors clothing and results of any forensic tests done on him and the minor. That therefore the prosecution did not prove its case beyond reasonable doubt. He also argued that the trial court failed to consider his defense.

10. Mr. Thuo the State Counsel opposed the appeal on behalf of the state vide written submissions dated 8th July 2021. He argued that the evidence led against the Appellant was watertight and the court should not interfere with it.

11. This being a first appeal, this court is mandated to analyze and re-evaluate the evidence afresh in line with the holding in the case of Odhiambo vs. 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."

12. Having perused the amended grounds of appeal, the evidence tendered before the trial court as well as the submissions, the issues that arise for determination are:

    (i) Whether the prosecution had proved its case beyond reasonable doubt;

    (ii) Whether the trial court disregarded the Appellant's evidence; and,

    (iii) Whether the sentence meted was harsh and excessive.

13. The Appellant was charged with the offence of incest contrary to section 20(1) of the Act which provides inter-alia:

> " Any male person who commits an indecent act or an act of 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 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."

14. The ingredients of the offence of incest under the foregoing provision are the relationship between the perpetrator and the victim, the act of penetration and where the victim is a minor, proof of age.

15. On the relationship between the Appellant and the Complainant, section 20(1) of the Act outlines relationships that are considered incestuous and includes that between a father and a daughter. In the present case, the relationship of daughter and father between the minor and the Appellant is not in dispute. The minor stated that the Appellant was her father while the Appellant admitted that she was his biological daughter. Their relationship therefore was one within the prohibited degree of consanguinity.

16. On the element of penetration, under Section 20(1) of the Act, the court relied on the medical evidence to prove penetration. See Dominic Kibet Mwareng vs. Republic [2013] eKLR in which the High Court on appeal held:

> " The other ingredient in a charge of defilement is penetration by a particular assailant at a particular time... In cases of defilement, the Court will rely mainly on the evidence of the Complainant which must be corroborated by medical evidence."

17. In the present case, the record shows that the minor testified that her father had done something to her. The minor in her examination in chief said in Kiswahili 'Baba alinifanyia tabia mbaya huku' while pointing at her rear.

18. I find that there is no variance in the evidence of PW1 and the minor. The particulars of the charge sheet refer to penetration of the vagina, but the complainant pointed to her rear when she testified. Whereas PW3 examined her vagina and noted it was reddened and the hymen missing, the child was penetrated as the medical evidence showed unequivocally but from behind as the child indicated.

19. Considering the medical evidence and that of the minor it is clear from the record and as confirmed by the minor in her examination in chief that 'baba alinifanyia tabia mbaya huku' while pointing at her rear. The child pointed at her rear indicating that the father penetrated her from behind and not necessarily that he penetrated her anus.

20. As far as the age of the minor is concerned, the particulars of the charge sheet read that the minor was a child aged 4 ½ years at the time of the alleged offence. PW1 testified that despite not having obtained a birth certificate, it was well within her knowledge that she gave birth to her on 19th August 2014. The offence having occurred on the 1st of March 2019, a quick calculation reveals that the minor was about 5 months shy of her 5th birthday at the material time. She herself testified in her voire dire examination that she was 5 years old, and this was also corroborated by the age assessment report, which indicated that the minor was aged between 4 – 5 years at the time of the hearing.

21. With respect to the apparent inconsistencies in the eyes of the Appellant whether the minor had difficulties walking on her way to the hospital; or whether she was walking normally; and/or whether she was escorted to the hospital, if at all, and by whom? This court notes that, from the prosecution case, there was a contradiction on the account of the state of the minor upon arrival. PW1 testified that the minor had difficulty walking while PW3 testified that the minor looked fine and was walking without difficulty.

22. As noted by the Uganda Court of Appeal in Twehangane Alfred Vs Uganda, Crim. App. No 139 of 2001, [2003] UGCA, 6 it is not very contradiction that warrants rejection of evidence. As the court put it:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

23. The foregoing notwithstanding, it is my finding that those variances are not fundamental to the ingredients of the offence preferred herein. In holding as aforesaid, I am persuaded by the decision in the Court of Appeal case of Erick Onyango Ondeng' v Republic [2014] eKLR where the court held that not every contradiction would cause the evidence of witnesses to be rejected. There would need to be more to the contradiction. Further the court found that the contradictions pointed out by the appellant did not point to any deliberate untruthfulness on the part of the witnesses.

24. On the issue of the identification of the person who penetrated the minor, the Appellant denied having defiled the minor and went on to suggest that PW1 framed him because she was aggrieved that he sold their matrimonial property without her involvement. On cross examination PW1 confirmed that she was not happy with the Appellants decision to sell the property without consulting her or considering their children's inheritance but denied having framed him. The Appellant also faulted the prosecution for failure to conduct DNA test linking him to the offence.

25. There are clear guiding principles upon which the court must analyse evidence of identification. As a rule, the best evidence of identification is that of recognition. See Francis Muchiri Joseph vs. Republic [2014] eKLR.

26. The physical identification of the Appellant is not in doubt as he was the father of the complainant. The only issue is whether he committed incest with the complainant. In this respect, he claimed that DNA was not done to establish the paternity of the child so as to conclusively prove whether he defiled the complainant.

27. A DNA test helps to fortify the prosecution's evidence but is not a requirement to establish the offence of defilement or rape. In AML vs. Republic [2012] eKLR the Court of Appeal succinctly held:

> " The second ground of appeal raised by the Appellant was that no DNA test was conducted on the Appellant himself. In my view no DNA test was necessary. .... The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

28. The Court of Appeal while discussing the issue of forensic testing and DNA in the case of Williamson Sowa Mbwanga vs. Republic [2016] eKLR, opined that:

> It is partly for this reason that section 36(1) of the *Sexual Offences Act* is couched in permissive rather than mandatory terms, allowing the court, if it deems it necessary for purposes of gathering evidence to determine whether or not the accused person committed the offence, to order that samples be taken from him for forensic, scientific, or DNA testing."

The upshot of the foregoing authority is that it is not necessary for a court to order a DNA test to prove penetration.

29. Additionally, it is trite that courts can convict on the sole evidence of a victim under section 124 of the *Evidence Act* as long as the court is convinced the victim is telling the truth and records reasons for such belief. In Arthur Mshila Manga vs. Republic, Criminal Appeal No. 24 of 2014 [2016] eKLR, the Court of Appeal held that

> " It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See Mohamed V. Republic [2008] KLR (G&F), 1175 and Jacob Odhiambo Omuombo V. Republic (supra). However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

30. The minor testified that her father did what she termed "bad manners" to her inside their house. The mother had left her five children with their father the Appellant and gone to a funeral at the neighbour's home. She returned at 11:00p.m. This was an infant of tender years and would not have been expected to use terms such as defilement. This court however infers as did the trial court that by the words "bad manners" as said by the victim and taking into account the medical evidence that the minor meant to say that she was defiled by her father whom she positively identified in the dock. In the absence of any evidence on record to contradict this assertion, I am convinced that the Appellant was positively identified as the perpetrator.

31. On whether there was sufficient evidence to convict the Appellant, he alleges that the failure to call a crucial witness, their neighbour (Rose), was fatal to the prosecution case and as such the prosecution failed to prove its case against him.

32. Section 150 of the *Criminal Procedure Code*, Cap 75 Laws of Kenya provides as follows:

> " A court may, at any stage of a trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine a person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case"

33. It is my view that the trial court may have benefited from the witness account of the neighbour Rose, who was called by PW1 the day after the assault to examine the minor and observed her urinate with difficulty. She also observed a mucus like substance on the minor. However, I find that her absence was not fatal to the prosecution's case in the circumstances of this case since there was satisfactory identification of the Appellant by the minor. The Appellant was placed at the scene by both the minor and her mother. The evidence of the minor was corroborated by PW1, PW3 and PW4 (the I.O). PW1 found the Appellant home with the minor when she returned from the funeral while PW3 and PW4 were informed by the minor that her father was the perpetrator.

34. In any event, corroboration in offences of this nature is not mandatory and the court can proceed and convict if the evidence is enough as held in Geoffrey Amkwach vs. Republic [2018] eKLR. It is my view that the evidence adduced by the Prosecution satisfied the ingredients of the offence.

35. As to whether the Appellant's evidence was disregarded, there is nothing on record to support that allegation. The trial court in its judgment clearly weighed the Appellant's defense and discarded it.

36. From the foregoing, I find that the Appellant has not demonstrated that his conviction deserves to be quashed and I find no reason to interfere with it.

37. On the sentence, the Appellant has not submitted on this limb of his appeal. Be that as it may, nothing stops this court from perusing the record and arriving at its own conclusion as was held in Nephat Kinyua Kathiomi vs. Republic [2021] eKLR.

38. The record shows that the Appellant was given an opportunity to mitigate by the trial Court. He stated that his wife was sickly. He further told the Court that he had six children who were dependent on him and were likely to suffer in his absence.

39. Section 8(2) of the Act provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20(1) of the Act provides that the accused shall be liable for a term not less than 10 years and if the female is under the age of eighteen, he shall be liable to imprisonment for life.

40. In the case of MK vs. Republic [2015] eKLR, the Court of Appeal held that Section 20(1) of the *Sexual Offences Act* does not provide a mandatory minimum sentence of life imprisonment, rather the proviso simply states that the trial court has discretion to impose a maximum term of life imprisonment. In upholding the decision of the trial magistrate, the Court proceeded to hold that the correct interpretation of the proviso in Section 20(1) of the Act is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

41. The minor in this case was an infant below the age of 5 years and it is the view of this court that the sentence of life imprisonment was appropriate and in accordance with the law. I therefore find no reason to interfere with it. Consequently, I find that the appeal is lacking in merit and is hereby dismissed in its entirety.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF NOVEMBER 2021.

.....

L. A. ACHODE

HIGH COURT JUDGE

In the Presence of.....Appellant in person.

In the Presence of.....State Counsel.