NNG v Republic (Criminal Appeal 44 of 2017)
[2019] KEHC 12491 (KLR) (11 October 2019) (Judgment)

Neutral citation: [2019] KEHC 12491 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CRIMINAL APPEAL 44 OF 2017

LW GITARI, J

OCTOBER 11, 2019

BETWEEN

NNG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From original conviction and sentence in Sexual Offence No. 19 of 2015 of the Senior Principal Magistrate's Court at Gichugu)

JUDGMENT

1. The appellant NNG (to be referred to as the appellant) was convicted on two counts of incest contrary to Section 20(1) of the *Sexual Offences Act* and sentenced to serve life imprisonment.

2. He was dissatisfied with the conviction and sentence and filed this appeal which raised the following grounds: -

   i) That the trial magistrate erred in law and facts by not according me affair hearing as stipulated in *the constitution* under chapter 50, I was not given a chance to cross-examine the complaints, their statements were just read in court in their absentia.

   ii) That the trial magistrate erred in law and facts by not considering that the evidence tendered did not support the charges.

   iii) That the trial magistrate erred in law and facts by not considering the grudge that existed between the appellant and the complainant's mother that resulted to manufacture of the of the charges.

   iv) That the trial magistrate erred in law and facts by not considering that the evidence on the medical officer was not comprehensive and did not prove penetration.

3. The appellant prays that the appeal be allowed, the conviction be quashed, the sentence be set aside and be set at liberty.

4. The court gave directions that the appeal be disposed off by way of written submissions.

   For the appellant submissions were filed by Igati Mwai & Co. Advocates. He submitted that the prosecution relied on hearsay evidence and suspicion. He further submits that the appellant had separated with his wife and this case was instigated by her to settle scores. It is further submitted that the complainants were coached by other witnesses on what to tell the court. It is further submitted that the appellant was not examined by the clinical officer.

5. He submits that the evidence by the complainants was not convincing and the same could have been disregarded.

6. For the state submissions were filed by Geoffrey Obiri, Assistant Director of Public Prosecutions who was the prosecution counsel. He submitted that the two counts against the appellant were proved beyondreasonable doubts. That it was proved that it was the appellant who committed the offence and he is the father of two complainants. There was penetration and the children's were less that ten (10) years old. He prays that the judgement be confirmed and the appeal dismissed.

Brief Facts: -

7. The complainants in this case IN and YN were students at [particulars withheld] Primary School. Sometimes in July 2015 the class teacher of one of the complainant IN called her and asked her why she did not come to school the previous day. One of the complainants YN informed the teacher EMK (PW3) that since their mother left home in 2014 their father called them to be sleeping with him on the same bed.

8. She further disclosed that their father caresses them on the whole body applies saliva and Arimis oil to lubricate the vagina then penetrates their vagina first using fingers then his penis. The matter was reported to the head teacher. The complainants were called and IN and she disclosed to the teacher that their father used to apply saliva and on their vaginas and Arimis oil then penetrate then every morning before the go to school. The report was made to the police and the two complainant were rescued.

9. They were examined by Ibrahim Kimani Wainaina (PW6) a clinical officer at Kianyaga sub-county hospital.

   He testified that he examined IN on 6.8.15 on a complaint of having been defiled by her father several times with the last incident being on 4.8.2015.

10. On examination he found that the hymen was broken but not freshly. He did a high vagina swab which revealed that she had gonorrhea infection. He treated her with antibiotics ad post exposure prophylaxis to prevent HIV. The clinical officer confirmed that the child was defiled. He produced the P3 form, exhibits, treatment notes, P.exhibits -1- laboratory test reports exhibit 3 and post rape care form exhibit 4.

11. PW6 examined YNN who complained of having been defiled several times by her father since the year 2014 and the last incident being on 4.8.15. On examination, the hymen was broken and not freshly. The high vaginal swab revealed that the child had gonorrhea infection. The child was treated. He filled a P.3 form, exhibit 7 and treatment notes exhibits 5 laboratory request form exhibit 6 and post rape care form.

12. The appellant was then arrested and charged.

13. In his defence the appellant denied that he defiled the complainants.

Analysis Of The Evidence And Deermination: -

14. This is a first appeal and this court has duty to analyse the evidence, evaluate it and come to its own independent conclusion but bearing in mind that this court never had the opportunity to see the witnesses and assess their demeanor and leave room for that.

15. This is in in line with the holding in Okeno - R- 1972 E.A 32.

16. I have considered the evidence tendered before the trial magistrate. The evidence of PW1, 2 and 3 is based on what the complainants told them. The head teacher Julius Miano Munene, ordered an inquiry after which he decided to hand over the matter to the police.

17. The 1st complainant IN (PW4) testified that she was a student in class 3. She identified the appellant as her father.

    That her mother left them with their father in 2014 and left them with the appellant. Thereafter her sister Y fell sick and the appellant told her and Y to move to his bedroom. The appellant would apply saliva on her private parts then Arimis oil. He would then insert his penis in her private parts – vagina. She testified that the appellant would do the same to her sister Y. PW4 testified that the appellant had done that to them several times after undressing them and caressing their body. She went and informed her teacher. The matter was reported to the police and she was taken to Kianyaga Hospital where a doctorexamined her and filled treatment notes and a P3 form.

18. PW5 – YN testified that she was nine (9) years old at the time she testified. She identified the appellant as her father and went on to tell the court that her mother ran away from home and left them in the custody of their father. She told the court that the appellant did bad manners to her and her sister I. She told the court that appellant used to apply saliva and Arimis petroleum jelly in her vagina then insert his penis in her vagina. The minor testified that he appellant used to do that daily. She testified to her teacher who took action and reported to the police. She was examined at Kianyaga Hospital and a P.3 form was filled and treatment notes.

19. PW7 Stephen Mbaya Tawa testified that he received the report and interrogated the two complainants. He established that an offence had been committed and escorted the tow children where they were examined and their P3 forms were filled. The appellant went to the police station and he arrested him. He was then charged.

20. PW7 testified that he had ages of the minors assessed. IN was between 8-10 years while YN between 6-8 years. The birth notification showed that I.N. was born 10.3.2005 while YN was born on 16.9.2007. The age assessment reports were produced as exhibits 10 and birth notifications exhibits 11 and 12.

21. The evidence tendered was cogent and cannot be termed as hearsay as submitted by the appellant. The teachers who are PW1 2 and 3 received the information from a teacher. They called the complainants who narrated first hand to them as to what the appellant used to do to them.The *Evidence Act* provides that oral evidence must in all cases be direct evidence Section 63 and all facts must be proved by oral evidence. Section 63 (2) (a) (b) & (c)Provides: -

    (2) For the purposes of subsection (1), "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 inthat manner"

It requires that direct evidence be adduced by the person who said he saw, heard or perceived in any other manner.

22. Hearsay on the other hand is evidence that a witness did not see with his eyes or heard with his ears or perceived in any other manner but is based on what he was told by the one who saw, heard or perceived in any other manner.

Dictionary meaning of hearsay is given as: -

" information received from other people which cannot be substantiated; rumour"

The evidence of PW1, 2, and 3 who talked to the TWO complainants cannot be termed as hearsay since the two complainants told them what happened and the two complainants testified in court on what they told witnesses and gave direct evidence in open court. To the extent that PW1, 2, and 3 talked to the complainants, to that extend thatis direct evidence. In Kinyati -V- Republic 1985 KLR. The Court of Appeal held that the rule against hearsay is that a statement other than the one made by a person while giving oral evidence in the proceedings is admissible as evidence of a stated fact.

That the evidence of statement made to a witness by a person who is not called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence was to establish the truth of what is contained in a statement. Itis not hearsay and is admissible when it proposed to establish by the evidence not the truth of the statement but the fact that it was made.

23. The evidence adduced by PW1, 2, and 3 was meant to be a basis of how they came to learn that the complainants were defiled and upon which they reported to the police. It falls within the exception to the rule that hearsay evidence is admissible. It would be different of the PW1, 2 and 3 were the only witnesses. Their evidence would amount to hearsay but this was cured as the two complainants were called and gave direct evidence. They also confirmed that they told PW1, 2 and 3 what they told the court. So the evidence of PW1, 2 and 3 was corroborated by the direct evidence of the complainants. The ground the evidence tendered was hearsay cannot stand.

24. The second issue raised in the submission is that the appellant was not examined. What I have to consider is what the prosecution was supposed to prove.

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

" Any male person who commits an indecent or an act which caused 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 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".

The prosecution needed to prove that the appellant was related to the complainants as their father, that there was penetration and the age of the complainant. It also needed to prove that the appellant committed the offence or was the perpetrator of the crime.

26. The prosecution discharged this burden as firstly there was no dispute that the appellant was the biological father of two complainants. PW4 testified that the appellant NN was her father.PW5 also gave similar testimony that the appellant was her father.

The appellant himself in his defence categorically stated that PW4 and 5 are his daughters. The relation between the complainants and the appellant, that of father and daughter was proved.

27. Secondly, the fact of penetration was proved. The complainants testified that after their deserted their matrimonial home, the appellant moved them to his bedroom where the three used to share a bed. They testified that the appellant used to defile them during the night before they slept and in the morning. PW4 and 5 who are the complainant gave details on how the appellant would penetrate them after applying saliva and Arimis petroleum jerry on their vaginas. They gave details of what they appellant used to do to them. The trial magistrate states at Page of the record: -

> " The accused claims that he was framed by PW1, the head teacher. However, it is not the head teacher who established that the children were being defiled. The children confided in the teachers. PW2 and 3 and a report was given to the head teacher.
>
> PW1 talked to the children later. DW2 and 3 stated that their father did not commit the offence. PW5 testified that DW2 and 3 also used to defile them during the day. Both DWI, 2 and 3 did not strike me as honest people. The accused claims he used to sleep with Yvonne in the same bedroom because she was unwell yet he did not know that his children had gonorrhea.
>
> His demeanor during the investigations of the case is also suspect.
>
> Why did he stop the children from going to school when he learnt that the teachers had talked to them? I do not believe either the accused, DW2 or DW3. I found their evidence to be evasive and self-serving.
>
> The children were honest. Their evidence was strong and was not shaken even in cross-examination. The treatment notes, P3 form laboratory request form and post rape care forms for both Immaculate and Yvonne were produced as prosecution Exhibits 1-8 respectively.
>
> In the end I find that the minor complainants herein were defiled. I also find that it is the accused who defiled the minors. The offence was committed over a period of time. By the same person. There can be no case of mistaken identity in this case. The children had a hard time, giving evidence in the presence of the accused. They were frightened. They cried and did not want to see the accused. I do not believe the defence of the accused.
>
> I dismiss the same as a mere denial. These findings effectively settle the second issue.

28. The evidence of the two complaints on the fact of penetration was corroborated and confirmed by medical evidence adduced by PW6 the clinical officer.

His testimony was that the two complainants gave a history of having defiled by their father severally. They both had their hymen broken but not freshly.

They both had gonorrhea infection. This evidence shows that the two were defiled and virginity lost long time ago. It is evident that they were defiled by the same person due to the presence of a similar sexually transmitted diseases in both of them.

The trial magistrate finds that the appellant had penetrated the two minors. The foregoing was based on tangible evidence. I find that the prosecution discharged the burden of proof that the minors were penetrated. For the complainants who are below ten years to have the virginity broken, not freshly and infected with a gonorrhea is prove that they were penetrated.

The two minors who are the daughters of the appellant the one who complained to their teachers and gave evidence in court that the appellant defiled them. They had no reason to frame him. The appellant made frantic efforts to go to school and to the police when his evil acts came to light. The issue being framed is hollow as there was evidence in black and white that the complainants were defiled.

29. The age of the minors was proved by the age assessment reports and the birth notifications. They were below eighteen at the time of the incident. I find that the prosecution discharged the burden to proof all the ingredients of the offence of incest. Failure to have the appellant examined is immaterial and does not change the finding that he is the one who defiled the complaints who were his daughters.

Issues For Determination: -

1) Fair hearing.

   Article 50 (20 (k) of *the Constitution* provides that:

   "Every accused person has a right to a fair trial which includes the right to adduce and to challenge evidence".

   The record of the trial magistrate shows that the appellant was given an opportunity to cross-examine the witnesses which he did at length. He gave his defence and called witness. The 1st ground is a sham and not bone out by the record.

   The complainants gave evidence in court after a voire dire examination. It is extraneous for appellant to say that their statements were read out in in their absence.

2) That the evidence tendered did not support the charges:

   This is far from the truth as the evidence tendered was cogent and relevant. It was well corroborated and left no doubt as to what befell the two minor complainants. There are no merits on the allegation.

3) That the trial magistrate erred by overlooking the grudge between the appellant and his wife: In his entire defence, the appellant never alleged that he was framed arising to the grudge he had with his estranged wife. It was therefore not in domain of the trial magistrate to consider a matter which was not raised before her. In any case the trial magistrate found that the children were honest and were not out to frame their father. The ground is a sham.

4) Evidence of Medical officer was not comprehensive and did not prove penetration

   PW6 the clinical officer at page 29 of the record stated:

   > " The children had a sexually transmitted infection.
   >
   > Their hymen were broken. That is why I concluded that there was penetration and defilement".

The children (complainant's) were subjected to a comprehensive examination which involved physical examination of the genitalia and laboratory investigation of high vaginal swab and urinalysis. The evidence of PW6 was comprehensive. He conducted all the examinations which were relevant on allegation of defilement.

I find that the medical evidence was comprehensive and concussively established that the complainants were defiled. The ground is without merits.

5. Conviction based on insufficient contradictory and uncorroborated evidence

The appellant did not point out any contradiction in his submissions. I have said enough on the evidence.

This ground is a sham.

6. Defence of the appellant was not considered

From the judgement of the trial magistrate at Page 49 line 14

> " The accused claims that he was framed by PW1, the head teacher. However, it is not the head teacher who established that the children were being defiled.
>
> The children confided in the teachers. PW2 and 3 and a report was given to the head teacher. PW1 talked to the children later. DW2 and 3 stated that their father did not commit the offence. PW5 testified that DW2 and 3 also used to defile them during the day. Both DWI, 2 and 3 did not strike me as honest people.
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> The accused claims he used to sleep with Yvonne in the same bedroom because she was unwell yet he did not know that his children had gonorrhea.
>
> His demeanor during the investigations of the case is also suspect. Why did he stop the children from going to school when he learnt that the teachers had talked to them? I do not believe either the accused, DW2 or DW3. I found their evidence to be evasive and self-serving.

30. The trial magistrate did what was expected of her as she analysed the defence and stated the reasons for not accepting it.

31. It is therefore far from the truth for appellant to claim that his defence was not considered. The allegations are without basis and lacks merits.

32. In conclusion:

The prosecution proved the charge beyond any reasonable doubts. The appeal is without merits.

I dismiss the appeal.

DATED AT KERUGOYA THIS 11TH DAY OF OCTOBER, 2019

L.W. GITARI

JUDGE