DMM v Republic (Criminal Appeal 103 of 2019)
[2025] KECA 1525 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1525 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 103 OF 2019

W KARANJA, J MOHAMMED & LK KIMARU, JJA

OCTOBER 3, 2025

BETWEEN

DMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nyeri (H.I. Ong'undi J.) delivered on 22nd February 2019 in HCCRC No. 42 of 2017)

JUDGMENT

Background

1. DMM, (the appellant) was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* before the Principal Magistrate's Court at Karatina.

2. The particulars of the offence were that on 3rd January, 2013 at Turi location in Mathira East District within Nyeri County, Central region, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of CWM, a child aged 9 years who was, to his knowledge, his daughter.

3. The appellant faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

4. The appellant denied both charges and the prosecution called six (6) witnesses in support of its case.

5. The brief facts before the trial court were that CWM (PW1) testified that she lived with her father, (the appellant), mother and brother and that on 3rd January, 2013 at about 1.00pm, her mother (PW2) asked her and her brother to return home after picking tea. She testified that they arrived home where they met the appellant who gave them food which they ate. After the meal, PW1 decided to lie down on the sofa to rest while her brother went out to play. She stated that the appellant picked her up and took her to his bed where he removed her underwear, applied cooking fat on her vagina, covered her

mouth and defiled her. It was her evidence that the appellant threatened to kill her if she disclosed to anyone that he had defiled her.

6. It was PW1's further evidence that soon thereafter, their mother returned home and called out for her but she did not respond as the appellant had covered her mouth. That her mother entered the house while the appellant hurriedly wore his trouser. That by the time their mother reached the bed, the appellant was fully dressed while PW1 was not. She added that the appellant hurriedly left the house leaving PW1's mother screaming. Further, that PW1 informed her mother what had transpired. PW1 testified that she and (PW2) then went to the· local police post to make the report and returned with police officers but did not find the appellant in the house. It was PW1's evidence that she and PW2 later went to Kamunyaka Police Post where they reported the incident for the second time and were issued with a note to proceed to the hospital. She stated that she and PW2 went to Karatina District Hospital accompanied by P.C Kahindi and P.C Kimeto where PW1 was treated. She testified that she subsequently recorded statements and the appellant was arrested. On cross-examination PW1 testified that her mother arrived about 5 minutes after the appellant had started defiling her. That although she did not cry during the ordeal, she felt pain.

7. PMM, (PW2) who is PW1's mother testified that on 3rd January, 2013 she was picking tea with her two children (PW1 and PW1's brother) and when they were done, she asked them to go home as she proceeded to take the tea leaves to the factory. It was her testimony that she arrived home at about 2.00pm and found her son playing outside the house. She did not see PW1 and decided to call her. It was her evidence that PW1 did not respond to her call the first time but she responded from the bedroom the second time that she was called.

8. PW2 stated that she proceeded to the bedroom where she found PW1 and the appellant. PW2 testified that she found PW1 half naked as she did not have her underwear on and her skirt had been pulled up to her stomach. That PW1 was lying on her back on the bed while the appellant was seated on the bed dressed up. It was her testimony that she asked the appellant what he had done to the child (PW1) but that he did not respond. She testified that the appellant wore his shoes and headed to the door.

9. PW2 added that she started screaming to attract neighbours whereupon the appellant escaped. PW2 testified that she checked PW1's private parts and noticed some white substance which PW1 informed her was cooking oil which the appellant had applied on her. PW2 testified further that she took PW1 to the police station where she was assigned two police officers who accompanied her to their home but found that the appellant had escaped. She testified that she subsequently reported the matter to Kamunyaka Police Post where they were issued with a P3 form. That they subsequently proceeded to Karatina Hospital where PW1 was examined and a P3 form filled. PW2 testified that she married the· appellant in 2006 by which time she had PW1 who was about 3 years old. PW2 testified that the appellant was therefore PW1's step-father. On cross-examination PW2 denied that the charges against the appellant were fabricated.

10. JMM, (PW3) a village elder confirmed that the appellant was arrested after he had gone into hiding since the date of the alleged offence. It was his testimony that the appellant was 'accosted by a mob who later handed him over to the police.

11. Dr. Stephen Wangombe, (PW4) produced the P3 and PRC forms as exhibits. PW4 noted that PW1 was examined on 3rd January, 2013 when he noted that she had a whitish discharge, redness of the external genitalia and that her hymen was broken. PW4 opined that the absence of the hymen coupled by a bacterial infection and redness of the vagina were suggestive of vaginal penetration.

12. PC Wycliff Odhiambo, (PW5) a police officer at Kamunyaka patrol base confirmed that the appellant was escorted to the police station by members of the public on 13th June, 2013. PW5 testified that he re- arrested the appellant and booked him at the police station.

13. CPL Kahindi Masolen, (PW6), the Investigating Officer, testified that they received a defilement report on 3rd January, 2013. It was his evidence that the victim, PW1 had been accompanied by her mother who claimed that PW1 had been defiled on the same day by the appellant who was her father. It was PW6's further evidence that PW1 was escorted to hospital and he later recorded the witness statements. Further, that at the hospital, PW1 was examined and was found to have been defiled as her hymen was not intact. That the appellant had in the meantime gone into hiding and was arrested on 13th June, 2013 when he returned to his home.

14. After close of the prosecution case, the appellant was placed on his defence. He gave a sworn statement and called one (1) witness. The appellant testified that on 3rd January, 2013 he was at his house feeding his cows. That he then asked his wife (PW2) for milking cream but she answered him rudely. It was the appellant's evidence that he quarrelled PW2 which made her run away. That the appellant went ahead to prepare breakfast for the children and later engaged in casual labour of felling trees. Further, that at around. 11.00am, he spotted his wife (PW2) with their two children walking on the road when she informed him that she had left him but that she would "show him". The appellant testified that he worked until evening and resumed work the following day at 9. 00a.m.

15. He added that sometime in June, 2013, he returned home at about midnight, drunk and making noise. That the village elder arrived and escorted him to the police station where he was booked for creating disturbance. He stated that he was then taken to Karatina Police Station where he found his wife, (PW2) and daughter (PW1). He stated that the following day he was taken to court and was shocked by the allegations that he had defiled PW1. He denied committing the offence and claimed that he was framed as he had quarrelled with PW2.

16. Christopher Maina (DW2), who worked as a lumberjack confirmed that he was retained by the appellant on 1st January, 2013 to fell some trees. He testified that they worked together with the appellant on 2nd January, 2013 until evening. That on 3rd January, 2013 at about 11.00 am while working, he saw the appellant's wife pointing at them from a distance. That the appellant walked to where PW2 was and he heard her say that she had left the appellant and that she would "show him". It was his further testimony that PW2 was accompanied by one child. He testified that the appellant went back to work and that they continued working up to about 1.30pm when they proceeded to town for lunch.

17. It was DW2's further evidence that on the material day, he and the appellant stopped working at 4.00p.m.and returned the following day at 9.00a.m whereupon they worked until noon. That he and the appellant later went to Equity Bank where the appellant paid him his balance and they parted ways. He added that he met the appellant again in April 2013 and that the appellant told him that he had a job opening at lchamara where they proceeded and worked for a day. DW2 claimed that he never saw the appellant until June 2016 in King'ong'o prison when the appellant informed him that he had been charged with the offence of incest. DW2 asserted that he was working with the appellant on the material day.

18. Upon conclusion of the evidence, the trial court, vide a judgment dated 16th May, 2017, held that the prosecution had discharged its burden of proof in respect of the main charge against the appellant. Consequently, the appellant was convicted of the charge of incest and after consideration of the mitigation offered, he was sentenced to life imprisonment.

19. Aggrieved, the appellant filed an appeal to the High Court against the conviction and sentence. His grounds of appeal were inter alia that the trial court erred in law and fact by convicting him on the basis of evidence of PW1 which was admitted without strict conformity to the provisions of section 19(1) of the Oaths and Statutory Declaration Act; convicting him on charges that were not proved beyond doubt; failing to note that crucial witnesses were not called to tie the loose ends; failing to note the existence of a very evident grudge that arose from the prosecution witnesses, PW1 and PW2; and convicting him on highly contradictory evidence. In its determination, the High Court (H.I Ong'undi, J.) found that the appellant committed the act of penetration of PW1's genital organ with his male organ. Consequently, the 1st appeal was dismissed and the trial court's conviction and sentence were upheld.

20. Undeterred, the appellant filed an appeal to this Court raising grounds that: the High Court erred in law while relying on Section 124 of the *Evidence Act* and failed to consider the conflict of evidence by the complainant in regard to how his penis was wholly inserted into her genital organ for 5 minutes and when examined by the doctor no stain of blood was noted when the hymen was freshly broken; being influenced by the evidence of PW2, who stated that she examined PW1 and did not note any spermatozoa yet her evidence was contradicted by PW1 particularly on the colour of oil which was applied on her vagina; frequent quarrels between the appellant and PW2 which pointed to a grudge; lost direction in evidence while supporting the appellant's conviction in reliance of PW4's evidence without considering section 33 as read with Section 77 of the *Evidence Act* thus penetration was not adequately proved as required in law.

Submissions

21. At the hearing for the appeal, the appellant, acting in person and relied upon his written submissions. The appellant conceded the appeal on conviction and confirmed that his appeal is only in respect of the sentence. The appellant invited the Court to consider if there was a mandatory minimum sentence of a term of life imprisonment in the proviso to Section 20(1) of the *Sexual Offences Act*. It is the appellant's argument that the proviso does not create a minimum mandatory sentence. The appellant submitted that the failure to give the trial court discretion to take into account the mitigation offered by offenders, their characters and circumstance of the case violates their rights to dignity.

22. Ms. Mary Kang'ethe, the learned Prosecution Counsel represented the State and opposed the appeal. Counsel relied upon her written submission and asserted that the evidence tendered by the prosecution was beyond reasonable doubt. In her written submissions, counsel submitted that the sentence imposed by the trial court and upheld by the 1st appellate court was appropriate. Counsel urged us to dismiss the appeal for lack of merit.

Determination

23. This being a second appeal, our mandate is confined to matters of law under Section 361 of the Criminal Procedure Code. We only depart from concurrent factual findings where unsupported by evidence, based on a misapprehension, or are plainly untenable.

24. As the issue of conviction is not in dispute, we proceed to determine whether or not the sentence imposed on the appellant by the trial court and upheld by the 1st appellate court was justified.

25. The appellant argues that Section 20(1) of the *Sexual Offences Act* does not prescribe a mandatory minimum sentence and that life imprisonment denies courts discretion to consider mitigation and individual circumstances. The State opposes the appeal, asserting that the sentence is lawful and appropriate.

26. The appellant was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* which provides as follows:

> "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."

The trial court cannot therefore be faulted for handing down the said sentence or the 1st appellate court from upholding the said sentence.

27. Further, Section 22(1) of the *Sexual Offences Act* outlines the test of the relationship between the perpetrator and the victim in the following terms:

> " In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half-father and an uncle of the first degree and a mother includes a half- mother and an aunt of the first degree whether through lawful wedlock or not."

The appellant was therefore PW1's father by virtue of being married to PW2 who is PW1's mother, a fact that the appellant was well aware of.

28. This Court in the recent decision of Octavious Waweru Kibugi V Republic Criminal Appeal No. 41 of 2018 stated as follows:

> "On the issue of sentence, we defer to the recent decision of the Supreme Court in Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA} & 3 others {Amicus Curiae) (Petition E018 of 2023} [2024] KESC 34 (KLR) where the Court held that the minimum mandatory sentences under the *Sexual Offences Act* remain lawful until determined otherwise by the Supreme Court when the matter is properly escalated to that Court. That being the case, this being a second appeal, severity of sentence becomes a question of fact which is, by dint of section 361 (2) of the Criminal Procedure Code, outside our remit."

29. In the circumstances, we find that this appeal against sentence is devoid of merit and we dismiss it.

DATED AND DELIVERED AT NYERI THIS 3RD DAY OF OCTOBER, 2025.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar