FMB v Republic (Criminal Appeal 195 of 2018)
[2025] KECA 10 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 10 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 195 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

FMB ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Busia (K.W. Kiarie, J.) dated 15th March, 2018 in HCCRA No. 58 of 2016)

JUDGMENT

1. The appellant, FMB, was the accused person in the trial before the Chief Magistrate's Court at Busia in S.O.A Case No. 28 of 2015. He was charged with the offence of incest by male person contrary to section 20(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 24th day of January, 2015, within Busia County, the appellant, being a male person, caused his penis to penetrate the vagina of SW, a female juvenile who was to his knowledge his step daughter. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Busia.

4. The High Court (K.W. Kiarie, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 15th March, 2018.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised five (5) grounds in his self-crafted Memorandum of Appeal, which are that:

    1. Both the trial and first appellate courts erred in law by adopting the prosecution evidence which lacked probative value to support the charges as envisaged in the evidence.

    2. Both the lower courts erred in law by relying on hearsay evidence produced by a person whose credibility was questionable.

    3. Both lower courts erred in law by disregarding the gross violation of the appellant's constitutional right to fair trial, rendering the entire trial a mistrial.

    4. The lower courts erred in law by disregarding the entire defence and defence evidence.

    5. The lower courts erred in law by relying on an incurably defective charge sheet.

6. At the trial, only three witnesses testified. PW1, the complainant, testified that on the material night of the incident, her mother went for a funeral and left her home with her sister and step- father (appellant). Later that night, as she was sleeping with her sister, the appellant took her to his bed and inserted his hand into her vagina. The record indicates that the complainant was a hesitant witness and refused to testify further.

7. Sgt. Gladys Legson was the investigation officer and the second witness. She testified that on 30th January, 2015, an informer made a report of a girl child who had been defiled by her father. She went to child's home in [Particulars Withheld] Village, in the company of OCS IP Martha Gitau, and found the father (appellant), mother (complainant's mother) and child (PW1) having lunch together. They took PW1 and the appellant to Nambale Dispensary for medical examination. From her investigations and the medical report she received, she formed the opinion that the appellant had committed incest with the complainant. She confirmed that the appellant was not the biological father of the complainant but had married her mother. She took the complainant for an age assessment which showed that she was below twelve years old. She produced the age assessment form.

8. The last witness was Cornelius Ambase (PW3), the clinical officer who examined both PW1 and the appellant. He observed that PW1was 7 years old; had swellings on both labia majora; hymen was broken; vaginal walls were haegellenic; genital area was tender; and had a thick whitish discharge from the vagina which extended to the labia majora. A urinalysis, HVS and HIV tests were also done. The urinalysis revealed pus cells and calcium oxalate crystals. HVS test revealed that the complainant had gram-positive cocci. The HIV test was negative. He concluded that there was penetration; that the degree of injury was grievous harm caused by a blunt weapon. As regards the appellant, PW3 observed that the penile shaft appeared normal and he had a yellowish discharge in the urethra.

9. When he was placed on his defence, the appellant gave unsworn testimony and called no witnesses. He denied committing the offence and explained how he was arrested at his home.

10. Further from the trial court proceedings, it is noteworthy that after PW1 testified, E.N. (PW1's mother) became uncooperative and refused to testify. Eventually, both EN and PW1 disappeared from their home. The investigating officer and the prosecutor thought that it was the appellant who had conspired with them to so disappear to prevent EN from testifying. Even then, both the trial court and the High Court were persuaded that there was sufficient evidence to convict the appellant.

11. The appeal before us was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions.

12. This being a second appeal, our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In *Samuel Warui Karimi v. Republic* [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See *Chemangong -v- R*, [1984] KLR 611."

13. We have carefully considered the appeal, the submissions of the parties and the authorities cited in support of the appeal against both conviction and sentence. We will address each of the five issues raised by the parties in seriatim below.

14. The first issue was the age of the complainant. He complained that the age had not been proved beyond reasonable doubt since the P3 form and PW3's testimony indicated that the she was seven years old while the age assessment form indicated that she was twelve years old. Moreover, the appellant complained that the birth certificate was not produced in evidence. He relied on this Court's decisions in *Arthur Mshila Manga v. Republic*, Criminal Appeal No. 24 of 2014, and *Kaingu Elius Kasomo v. Republic*, Criminal Appeal No. 504 of 2010. The respondent was of the view that what was important in the case, being one in which the appellant had been charged under section 20(1) of the *Sexual Offences Act*, was for the prosecution to prove that the complainant was below eighteen years of age; and that the evidence established that beyond reasonable doubt.

15. It is true that the record shows that the P3 form indicated that she was around seven years old; and the testimony of the treating clinical officer showed as much, the age assessment form produced in evidence indicated that her age was "below 12 years old." This is not a per se contradiction as the appellant argues. The age assessment is simply not specific as to the tender age of the complainant but is categorical that she is below twelve years old. On the other hand, the treating clinical officer is specific that the girl was seven years old. In any event, as the respondent argued, this was an offence under section 20(1) of the *Sexual Offences Act*. The age requirement under that section is below eighteen years old – an ingredient that was satisfied in the case.

16. Secondly, the appellant contended that the fist appellate court failed to adequately consider fatal contradictions and inconsistencies in the prosecution case which, he argued, raised doubts that ought to have been construed for his benefit. The appellant pointed to the following as contradictions in the prosecution evidence: that the name of PW3, Cornelius Ambase, appears in the P3 Form as "Cornelius Sambasi"; that the date of the incident was given in PW3's evidence as 29th January, 2015, and yet the charge sheet indicated that the incident occurred on 24th January, 2015; and, finally, that PW1 indicated that the appellant penetrated her using his hand while PW3's evidence was that penetration was caused by the penis. The appellant cited *Vincent Kasuyula Kingoo v. Republic*, 2014 eKLR, and *Charles Kiplangat Ngeno v. Republic*, Criminal Appeal No. 77 of 2009 (UR) to argue that such contradictions raised reasonable doubt about the prosecution case and entitled an accused person to an acquittal. The

respondent argued that these contradictions are not fatal; that they do not go to the root of the charged offence; and that they should be disregarded.

17. We agree with the respondent that the inconsistencies pointed out by the appellant are inconsequential for the conviction. Not every inconsistency or contradiction in prosecution evidence is fatal to a conviction. The rule, stated by this Court in *Erick Onyango Odeng' v. Republic* [2014] eKLR citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v. Uganda* Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 is as follows:

> "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 case."

18. In the present case, the inconsistency in the name of the clinical officer – "Sambasi" and "Ambase" – is clearly typographical error and is inconsequential. So is the inconsistency in the date indicated in the P3 form: 29th January, 2015 instead of 24th January, 2015. Neither of these issues go to the root of the conviction or otherwise prejudice the appellant.

19. The only potentially serious contradiction is that of the evidence of PW1 – that the penetration was by the hand – and that of the clinical officer – that the penetration was by the appellant's penis. Both the trial court and the High Court accepted the prosecution theory that since it was at night and the minor victim was of tender years, it is likely that she could not readily tell the difference between a hand and a penis. This is an eminently plausible explanation of this inconsistency. We note that the testimony of PW3 which is backed up by documentary evidence in the form of P3 form and treatment notes are quite categorical that there was penetration – and that the complainant tested positive for gram-positive cocci – a sexually transmitted bacteria. We accept the concurrent findings by the two courts below and find no reason to impugn the prosecution theory.

20. The third issue raised by the appellant was that his constitutional rights were violated because he was not given witness statements during his trial. This, he argued, was in violation of Article 25(c) of the *Constitution*. His submissions also imply that he was not given proceedings in order to prepare for his first appeal at the High Court. The respondent submitted that contrary to the appellant's allegations, the record showed that the prosecution supplied the appellant with witness statements, and this was confirmed by the trial court in its proceedings.

21. We have looked at the trial court record and it bears out the respondent's view that the appellant was supplied with witness statements or failed his minimal obligation to inform the court that he did not have them. The record shows that on 09/06/2015 and again on 26/08/2015, the trial court ordered that the appellant be supplied with witness statements. The trial was postponed a number of times as a key witness had disappeared. When it finally took off on 20/01/2016, the appellant did not inform the trial court that he was not ready to proceed for the reason that he did not have witness statements. Moreover, we note that at the first appellate level, the appellant raised an omnibus complaint that his rights to fair trial were violated without specifying which ones. As a result, the High Court did not reach any conclusions on this specific complaint and it is doubtful that it can be raised at this stage.

22. The appellant also complained that his conviction was tenuous because the mother of the complainant did not testify and, further, that he was not the complainant's biological father. The respondent's response to this was that there was sufficient evidence even in the absence of the complainant's mother; and that for the prosecution to succeed under section 20(1) of the *Sexual Offences Act*, it only needed

to prove that the appellant was married to the complainant's mother which the appellant readily concedes. The other elements of the offence namely, penetration; identity; and age, were satisfactorily proved, the respondent contended.

23. Our jurisprudence has consistently shown that there is no rule that requires all the witness to be called in a trial. The rule is that the prosecution is only required to call a sufficient number of witnesses to establish a pertinent fact. The complementary rule is one stated in the famous *Bukenya v. Uganda* (1972) EA 549, where the Court of Appeal for Eastern Africa held that:

> " The prosecution must make available all witnesses necessary to establish the truth, even though their evidence may be inconsistent. The court has the right, and the duty to call any person whose evidence appears essential to the just decision of the case. Where the evidence called barely is adequate the court may infer that the evidence of uncalled witness would have tended to be adverse to the prosecution."

24. The Bukenya exception (where the court will draw an adverse inference when a witness is absent) is only applicable where that witness was an essential one; and where the extant evidence is barely adequate to establish a particular fact. Neither of these conditions is present here: In the present case, the prosecution was able to establish all the elements of the offence without the aid of the evidence by the mother of the complainant. Differently put, that evidence was not essential for the conviction of the appellant. Further, there was extant evidence showing that the appellant was complicit in causing the unavailability of the witness. As such, he cannot be permitted to benefit from his own transgressions.

25. We also agree with the respondent that all the elements of the offence of incest were proved beyond reasonable doubt in the present case. To succeed, the prosecution needed to show the following elements: penetration; by a person of prohibited consanguinity; to a child of less than eighteen years old. Our analysis above demonstrates that the first and last elements were clearly proved. As to the second element – the prohibited degree of consanguinity – the appellant himself concedes that he was married to the mother of the complainant. By dint of section 22(1) of the *Sexual Offences Act*, this makes him a step-father to the complainant and to, therefore, fall within the prohibited degree of consanguinity. Section 22(1) of the *Sexual Offences Act* provides for the test of relationships and reads as follows:

> " (1) 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."

26. Finally, the appellant lamented against "the mandatory" sentence of life imprisonment imposed. In doing so, he relied on the recent decisions of this Court and the High Court which impugned the constitutionality of the mandatory minimum sentences in the *Sexual Offences Act*. The respondent conceded to this argument, conceded to the setting aside of the life imprisonment sentence but argued that the offence here was heinous and urged for a stiff custodial sentence to match the objective seriousness of the offence committed.

27. The appellant was sentenced under 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."

28. In sentencing the appellant, the trial court remarked: "Accused sentenced to serve life imprisonment as by law provided." In *M.K. v Republic* (Nrb Crim. Appeal No. 248 of 2014) [2015] eKLR, this Court held that the word "liable" in section 20(1) of the *Sexual Offences Act* means that the sentence is the maximum and not mandatory. The Court held that:

> Guided by the decision in *Opoya -v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James -v- Young* 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) 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.

29. While the learned Magistrate did not explicilty state that the appellant deserved the maximum sentence provided under the law, there is no question that the sentence she imposed is lawful. The learned Judge of the High Court agreed when he stated:

> S.N. the complainant herein was 7 years at the time of the commission of the offence. The sentence cannot be said to be harsh especially factoring the prescribed sentence in section 8(2) of the *Sexual Offences Act*.

30. It would appear that both the learned magistrate and the learned Judge were aware that section 20(1) of the *Sexual Offences Act* did not impose a mandatory life imprisonment sentence but were of the view that the maximum sentence was deserved in this case.

31. We do not disagree. In this case, the complainant was seven years old. She was a step-child. The circumstances also show that the appellant may have attempted to escape the consequences for his actions by arranging for his wife and the complainant to disappear so that they would not give evidence against him. The maximum sentence is called for here since the appellant comes off as a remorseless person who could be a danger to the society. We will, therefore, leave the sentence undisturbed.

32. The result is that this appeal lacks merit and we dismiss it in its entirety.

33. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR