AK v Republic (Criminal Appeal E029 of 2020)
[2024] KECA 152 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KECA 152 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E029 OF 2020

F SICHALE, FA OCHIENG & WK KORIR, JJA

FEBRUARY 16, 2024

BETWEEN

AK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Eldoret (Olga Sewe, J.) delivered on 12th February, 2019 in H.C.CR.A. No. 58 of 2017)

JUDGMENT

1. The appellant, Alex Kibet was convicted for the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the offence were that on 13th May 2012 in Uasin Gishu District within the then Rift Valley Province, being a male person caused his penis to penetrate the vagina of S. J., a female person who was to his knowledge, his daughter aged 14 years.

2. In the alternative, he faced a charge of committing an indecent act with the said daughter, contrary to Section 11(i) of the *Sexual Offences Act*. The particulars of the alternative charge were similar to those of the main charge.

3. After the learned trial Magistrate had received all the evidence and the submissions, he convicted the appellant on the main count.

4. When given an opportunity for mitigation, the appellant told the trial court that he was asking for leniency.

5. Meanwhile, the prosecutor informed the trial court that the appellant was a first offender.

6. After giving consideration to the mitigation, the learned trial Magistrate sentenced the appellant to life imprisonment.

7. Being dissatisfied with both the conviction and the sentence, the appellant lodged an appeal at the High Court.

8. On 12th February 2019 the High Court dismissed the appeal in its entirety. It is that decision that prompted the appeal herein.

9. In the grounds of appeal, the appellant asserted that his defence and the evidence of his witnesses were disregarded; the sentence was harsh and violated his rights; there was no medical evidence connecting the appellant to the offence; the case was not proved beyond any reasonable doubt; the victim should have been taken for medical examination within 72 hours of the events which gave rise to the charges; key witnesses were not called by the prosecution; it was not proved that the hymen was perforated within the period when the offence was allegedly committed; and the Birth Certificate was not genuine.

10. The appeal was heard on 7th November 2023. Mr. Kamau advocate represented the appellant and relied on his written submissions, together with the oral highlights made on that day.

11. Ms. Sakari, learned State counsel represented the respondent.

    She placed reliance upon her written submissions, which she also highlighted.

12. When canvassing the appeal, the appellant emphasised that the complainant was not a credible witness. In his view, the complainant testified about the alleged incident happening in two separate places; which was not possible. The two places were either the bedroom which the complainant shared with her siblings, or the kitchen where the complainant slept alone. If the incident took place in the room which the complainant shared with her siblings, the appellant believes that the complainant's younger brother (DW2) would have witnessed the defilement.

13. However, as DW2 testified that nothing happened to the complainant, it was the appellant's submission that the defence had disproved the evidence tendered by the prosecution.

14. The other issue raised by the appellant was that although the complainant ran away, and spent the night at the house of a neighbour, that was not because she had been defiled. The appellant attributed the complainant's flight from home, to nothing more than an escape to avoid being beaten by the appellant. He wanted to beat up the complainant because she was allegedly "tough headed" and therefore she never listened to him.

15. The disagreement between the appellant and his daughter was said to have arisen after the complainant's siblings complained that they had not had enough food to eat on the material night.

16. The third issue that was raised by the appellant was that the prosecution failed to call essential witnesses. It was the appellant's case that the neighbour, Eva's mother, whose house the complainant ran to, was an essential witness. He was of the view that when the complainant sought refuge at the house of Eva's mother, the latter would ordinarily have been expected to inquire from the complainant, the reason why she had run away from home.

17. The failure to have Eva's mother testify is therefore said to have deprived the trial court of evidence which could have provided the reason for the complainant's flight from home.

18. The other two persons whom the appellant described as essential witnesses were "Mark Tarus" and Simeon, who are the persons who informed the complainant's mother (PW2) about the incident of defilement. The appellant considered those two to be essential witnesses because their evidence could have enabled the court to understand how they learnt about the alleged defilement.

19. In answer to the appeal the respondent reminded the Court about its mandate in a second appeal, as was espoused by the court in Karingo & 2 Others vs Republic [1982] eKLR, wherein the court expressed itself thus;

> " A second appeal must be confined to points of law, and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless the said findings were based on no evidence.
>
> The test to be applied on the second appeal is whether there was any evidence on which the trial court could find as it did ..."

20. We agree with the respondent on the scope of our mandate on a second appeal. The respondent submitted that the trial court did not disregard the appellant's defence. The respondent pointed out that the trial court had summarised the evidence and then analysed the same, before arriving at its decision.

21. The respondent pointed out that the evidence proved that the complainant had been defiled; and that it was the appellant who committed the said offence.

22. The attention of the Court was drawn to the medical evidence, which showed that the complainant had healed hymenal tears at positions 3 and 9 o'clock.

23. The respondent further pointed out that the identity of the assailant was clear, as both the appellant and the complainant knew one another. The appellant was a father to the complainant, as was conceded by the appellant.

24. In the circumstances, it was the opinion of the respondent that DNA profiling was not necessary. In support of that submission, the respondent cited the case of AML vs Republic [2012] eKLR, in which the court held as follows;

> " The fact of rape or defilement is not proved by way of a DNA test, but by way of evidence."

25. In this instance, the respondent pointed out that the complainant's evidence was corroborated by the medical evidence which was tendered by the medical doctor.

26. On the issue of essential witnesses who were not called by the prosecution, the respondent submitted that none of the persons cited by the appellant had witnessed the commission of the offence. We understand the respondent to have been saying that those persons were therefore not essential witnesses.

27. As regards the sentence of life imprisonment, the respondent submitted that the same was reasonable in the circumstance.

28. We have given due consideration to the grounds of appeal; the respective submissions; the record of the proceedings; the impugned judgment and the authorities cited. In our considered opinion, we are required to determine whether or not the conviction was based on sufficient evidence; as well as whether or not the life sentence was reasonable in the circumstances.

29. An accused person is guilty of the offence of incest if he, being a male person, caused his penis to penetrate the vagina of a female person, who to his knowledge, is his mother, sibling, child or grandchild. In this case the complainant testified that she was the appellant's daughter.

30. The appellant testified that the complainant was his biological daughter. Therefore, if the appellant had sexual intercourse with the complainant, that would mean that he had committed the offence of incest.

31. Both the complainant and the appellant testified that on the material date, the appellant arrived back home, where he lived with his children. He was drunk.

32. As the appellant had separated from his wife, (who is the complainant's mother), it is the complainant who made food for her father and her siblings. It is common ground that upon his arrival at home, the appellant told the complainant to warm his food.

33. According to the appellant;

> "Some of my children had slept. They woke up when they heard me; seemingly they were not full.
>
> My eldest daughter Sharon was not amused by this, and I wanted to beat her. I asked her why she was getting frustrated. She ran to the neighbours and slept there."

34. The complainant testified that her siblings told the appellant that they were not full. At that stage;

> " They ate and my father told them to go and sleep.
>
> I then went back to the kitchen to sleep. My father came to the kitchen and he wanted to beat me. He pushed the kitchen door and it opened. He removed his trouser, then penis and put it into my vagina. I then managed to sneak and I ran away."

35. Clearly, the complainant's reasons for running away from home was that the appellant had defiled her. On the other hand, the appellant's explanation for the complainant's action of running off to the neighbours, was that she was avoiding being beaten by the appellant.

36. Did the complainant tell the neighbour (Eva's mother) that her father had defiled her? The answer is to be found when the appellant was cross-examining the complainant. She said;

> "He removed my clothes and had sex with me. It is at this time I ran away. I carried my clothes to Eva's place, running. My father was also running after me. I managed to put my clothes and Eva opened for me her door. I went into her bedroom. I told her my father had chased me away."

37. In effect, the complainant did not volunteer information concerning her defilement. She simply spoke about being chased away by the appellant.

38. In the circumstances, we find that even if Eva or her mother had been called as witnesses for the prosecution, they or either of them could not have added any value to the prosecution case.

39. What about Mark Tarus and Simeon; were they essential witnesses, considering that it is from them that the complainant's mother learnt about the offence?

40. PW2 testified that Mark Tarus was the best man at her wedding.

    It is the said Mark who phoned PW2 to inform her that the complainant had been defiled. PW2 also testified that Simeon is the person who told her about what had happened.

41. During cross-examination, PW2 reiterated that Simeon reported to her about the mishap. However, the appellant's counsel did not probe any further, to try and ascertain how Simeon or Mark Tarus had obtained information concerning the incident.

42. Having given due consideration to the issue, we find that there is no basis in law, upon which we could hold that either Mark Tarus or Simeon were essential witnesses. The two men were not at the scene of crime at the material time. The appellant has not persuaded us that the two men had evidence which could have assisted the court in determining the guilt or the innocence of the said appellant.

43. To our minds, a person would be deemed as an essential witness if his evidence was relevant to the matters in issue, and if the said evidence would, (if adduced), have assisted the trial court in making an informed decision on matters of fact. The evidence of the essential witness is that without which there would be a gap in the case which the prosecution was seeking to prove. Evidence that is required to prove any of the ingredients of an offence is deemed to be essential.

44. In this case, the identity of the person who informed Mark Tarus or Simeon about the incident which gave rise to the charges for which the appellant was tried, would not help the court to determine the guilt or otherwise of the appellant.

45. We note that upon receipt of the information, the complainant's mother first informed her own mother about the incident. The next step taken by PW2 was to pay a visit to the complainant's school.

46. DW2 corroborated the evidence about the visit by his mother to the school.

47. Whilst at the school PW2 interrogated her daughter, in the presence of Madam Lucy, who was the complainant's teacher.

48. When the complainant confirmed that she had been defiled by her father (who is the appellant herein), PW2 made a report at the Chief's Camp. She also made a report at the police station, and then took the complainant to the hospital, for medical examination.

49. The actions of PW2 cannot, in our considered opinion, be construed as those of a person who had a grudge against the appellant. If anything, as the appellant stated, PW2 investigated the incident.

50. But what exactly constituted the incident? Did the appellant sexually molest the complainant? The complainant stated categorically that the appellant inserted his penis in her vagina. However, the appellant completely denied the complainant's said assertion. He said that he only threatened to beat up the complainant.

51. On his part, DW2 said that nothing happened between the appellant and the complainant.

52. We note that when the appellant returned home, two of his children were already asleep. They only woke up when they heard the appellant arriving.

53. It is common ground that the two children ate, again, with their father. Although the complainant had given them their food earlier, her brother (DW2) and her sister were not satisfied.

54. When the two siblings said that they were "not full", the complainant, beat up the younger brother.

55. It was the testimony of DW2 that the complainant ran away to the neighbour's house, because the appellant told her to let her siblings eat with him.

56. However, we also note the following testimony of DW2;

> "When we were sleeping we heard noise in the night. My sister was trying to hit my dad with a bucket."

57. On her part, the complainant said the appellant told her siblings to go and sleep, after they had eaten with him.

58. In our understanding, the incident in question took place after DW2 had gone back to sleep. We say so because DW2 woke up to find the complainant trying to hit the appellant with a bucket.

59. Prior to DW2 going back to sleep, it was the appellant who wanted to beat the complainant. On her part, the complainant wanted to beat up the younger brother. Until that stage, the complainant displayed no intention of confronting her father.

60. But when DW2 was later awoken from sleep, due to noise, he noted that the complainant was trying to hit the appellant with a bucket. There is therefore no doubt at all, in our minds that the complainant confronted the appellant, when DW2 was asleep; and that was after the appellant had molested her sexually.

61. The appellant faulted the first appellate court for failing to make a firm finding as to who, between PW1 and DW2 was a truthful witness.

62. In that regard the High Court upheld the finding of the learned trial Magistrate, who had held as follows;

> " In the case of FOD vs Republic [2014] eKLR the High Court held that the court can still proceed to convict, based on the evidence of a minor, if it believes the child is telling the truth. It is noted that Sharon is aged ten years. Her evidence is superior mental evidence, and her brother testified hearing a commotion between the accused and Sharon that night.
>
> The Court finds the testimony of Sharon credible."

The High Court held that the evidence adduced by DW2;

> " had mentioned that the complainant had a struggle with the appellant and had hit him with a bucket, therefore offering corroboration to the evidence of the complainant."

63. In a nutshell, the first appellate court upheld the findings on matters of fact. On our part, we find no basis, in law, to warrant

an interference with the concurrent findings the two courts below.

64. We also note that there is absolutely no indication from the record, that the kitchen where the complainant had allegedly slept, was not within the same house where the other children slept. DW2 testified that;

> " We all slept in the main house, even my elder sister."

65. The appellant's submissions appear to suggest that the kitchen was in a separate building, from the main house. But we find no such evidence on the record. Therefore, there is no inconsistency in evidence of PW1 and DW2, regarding the exact place where the complainant slept.

66. The appellant attributed his tribulations to the bad blood between him and his estranged wife.

67. He submitted thus;

> " The extent of the bad blood can be witnessed from the Birth Certificate at page 50 of the record of appeal. PW2 even went ahead to indicate the father of the complainant to be a 3rd party, specifically one George Makero, but the appellant was candid enough to admit that this was his own biological daughter."

68. Pursuant to Section 20(1) of the *Sexual Offences Act*, a male person commits the offence of incest where:

> "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."

69. It is presumed under Section 22(3) of the *Sexual Offences Act* that:

> " An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest."

70. The appellant insisted that he was the father of the complainant.

In the circumstances, the appellant committed the offence with the knowledge that the complainant was his daughter.

71. In conclusion, we find no merits in the appeal against conviction.

72. Meanwhile as regards the sentence, the trial court handed down the life sentence because of the prevalent nature of the offence of incest; and because the victim was a minor.

73. On her part, Olga Sewe J. noted that pursuant to Section 20 of the *Sexual Offences Act*, life imprisonment was not mandatory for an offence of incest. Nonetheless, the learned Judge upheld the sentence because it was lawful.

74. We note that the appellant was a first offender. Therefore, pursuant to the Sentencing Guidelines published as Gazette Notice No. 2970 of 29th April 2016, the fact that the appellant was a first offender should have been taken into account, as a mitigating factor.

75. Secondly, the prosecution did not give evidence of any aggravating factors, which could then have been a proper foundation for the imposition of a sentence tending towards the prescribed maximum sentence.

76. Having taken into account all the relevant factors and circumstances, we find that the sentence of life imprisonment was excessive in this instance. Accordingly, we hereby set aside the said sentence; and we substitute it with a sentence of 30 years' imprisonment. The sentence shall run from the date when the appellant was first sentenced by the trial court.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF FEBRUARY, 2024.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR