SK alias B v Republic (Criminal Appeal E001 of 2022)
[2024] KECA 110 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 110 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E001 OF 2022

MSA MAKHANDIA & AK MURGOR, JJA

FEBRUARY 9, 2024

BETWEEN

SK ALIAS B ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the conviction and sentence of the High Court at Malindi (Chitembwe, J.) delivered on 27th March, 2017 in HC. CRA No 42 of 2015)

JUDGMENT

1. The appellant, SK alias B was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars of the offence were that on 19th October 2012 at Magarini District within Kilifi County, he intentionally caused his penis to penetrate the vagina of SS, PW1 his biological daughter aged 9 years old. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

2. He pleaded not guilty and at the hearing, the prosecution called 4 witnesses. Upon considering the evidence, the trial court found the appellant guilty and convicted him of the offence of incest and sentenced him to serve life imprisonment.

3. Dissatisfied with the trial court's determination, the appellant appealed to the High Court against the conviction and sentence. After considering the appeal, the High Court upheld both the conviction and sentence.

4. The appellant was once again aggrieved by the decision and filed this appeal on the grounds that the learned judge failed to appreciate that the victim was allowed to testify through an intermediary, yet she was not declared a vulnerable witness, and further, by failing to find that the laid down procedure for appointment of PW2 the victim's guardian as an intermediary was not followed; that the learned judge failed to appreciate that the prosecution did not prove its case to the required standard and that

the sentence imposed was harsh and excessive since it was the mandatory sentence imposed by statute without considering the appellant's mitigation or the unique facts and circumstances of the case.

5. The appellant filed written submissions. During the hearing on a virtual platform, he stated that he would rely on his written submissions, in which he submitted that, the record of appeal did not indicate that the intermediary was sworn and made to understand her role; that the trial court failed to declare the victim of the offence as a vulnerable witness prior to the appointment of the intermediary and therefore the appellant could not be convicted on the evidence of an intermediary that was not corroborated. It was further submitted that on this account the prosecution did not prove its case to the required standard, that both penetration and the age of the complainant were not proved which rendered the conviction unsafe.

6. On the sentence, the appellant submitted that it was harsh and excessive and prayed that both the conviction and sentence be set aside.

7. In response, learned prosecution counsel, Mr. Mulamula also filed submissions. During hearing, counsel submitted that the appellant was the father of the minor who was 9 years old at the material time; that he neglected his responsibility to care for the child and instead had defiled her; that both the trial and first appellate courts took into consideration all the evidence adduced so as to arrive at the conviction and sentence; that the life imprisonment imposed under section 20 (1) of the *Sexual Offences Act* was lawful and took into account that the complainant was a minor of 9 years old as determined by the medical examination and age assessment reports produced in court.

8. This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law and not matters of fact. See *Joseph Njoroge v Republic* [1982] KLR 388.

9. In view of the mandate of this Court on a second appeal, the issues that fall for determination are;

    a. Whether the appointment of an intermediary by the trial court and the taking of the complainant's evidence through the intermediary was lawful.

    b. Whether the offence of incest was established beyond reasonable doubt; and

    c. Whether the sentence was harsh and excessive.

10. Briefly, the prosecution case was that PW1 was the complainant. As she was testifying, she became fearful prompting the trial court to allow her to testify through an intermediary, the complainant's guardian. Aided by the intermediary, PW1 informed the court that she used to live at Adu Trading Centre, but was now living at a children's home in Malindi. She was a class one pupil, and the appellant was her father. She stated that on 19th October 2012, the appellant gave her Kshs 20 to go and buy him cigarettes. When she returned with the cigarettes, he took her to a room and then defiled her on top of a brown and blue box that was used as a make shift bed. He did not take long. He told her not to scream and held her mouth with is hand. She felt pain. When he was done, he left her in the room. Before the appellant called her, she had been playing with her friends. She later told her friend's mother what had happened, and was taken to hospital and then to the police station. It was her evidence that the appellant was in a posho mill grinding maize when he called her. He then switched off the posho mill, took her to the room and defiled her.

11. GNK (PW2), is a sister to the appellant. She was 17 years old and a class eight pupil. On 19th October 2012 at about 5.00 pm, she came from school and her grandmother told her to ask PW1 what was wrong with her. Her grandmother told her that she had heard rumours that PW1 had been defiled by her father. PW2 stated that the complainant informed her that the appellant had taken her to a rental

room and then defiled her. There was no bed in the room. The complainant's mother had separated with the appellant. She also informed her other sister. A family meeting was held but she did not attend. She was later called to record her statement at Adu police station.

12. C. Dickson Nyarambee Momanyi, (PW3), attached to Adu police station stated that on 26th October 2012, he heard discussions about a child who had been defiled by her father and that the family had refused to take her to the hospital. He went to the homestead and met the child's grandfather. He asked him about the incident and he confirmed that the child was defiled. He talked to the child. The child was then taken to Adu police dispensary and later to the police station by her uncle. PW3 investigated the case and visited the scene. He recovered the box that was used as make shift bed from room No. 2 on the plot. He saw the posho mill in the compound. He recorded witness statements, but the appellant disappeared from home from October until January 2013 when he was arrested.

13. Ibrahim Abdulahi (PW4), a clinical officer based at the Malindi sub- county hospital testified that on 2nd November 2012, he filled a P3 form for PW1. He saw the initial treatment notes from Adu dispensary. A vaginal examination indicated that her hymen was broken. Her age was assessed to be 9 years old, and he concluded that there was vaginal penetration of the child.

14. In his unsworn evidence, the appellant testified that on 4th September 2012 he was working at Adu area at around 12.00 pm when police officers came, arrested him and took him to Adu police station. He was later taken to Marereni police station, and then charged in court. He denied committing the offence.

15. Returning to the issues identified for determination, we begin by addressing the question of whether intermediary was properly appointed and the evidence of the complainant through an intermediary was properly taken.

16. The record discloses that when the matter came up for hearing on the 27th February 2014, the prosecution applied for an adjournment because PW1 was afraid to testify and had been crying the whole day. The matter came up for hearing again on 18th May 2014, and after the conduct of a voire dire examination, the prosecution counsel applied for PW1 to be declared a vulnerable witness as she remained fearful of testifying. In allowing the application the trial court stated;

"The court hereby invokes section 31 of the *Sexual Offences act* to have a guardian testify on behalf on the minor a child of tender age. The hearing will commence immediately with an intermediary who will give sworn evidence."

17. Thereafter her guardian was sworn in and gave evidence in the manner narrated to her by the complainant.

18. The appellant's complaint is that the trial court did not expressly pronounce that the complainant was a vulnerable witness when appointing the intermediary with the result that the evidence through the intermediary was not proper.

19. Article 50 (7) of the *Constitution* provides;

> "In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court."

Section 31 of the *Sexual Offences Act* stipulates that;

> "(1) A court, in criminal proceedings involving the alleged commission of a sexual offence, may declare a witness, other than the accused, who is to give evidence

in those proceedings a vulnerable witness if such witness is -(a) the alleged victim in the proceedings pending before the court; (b) a child; or (c) a person with mental disabilities.

2. The court may, on its own initiative or on request of the prosecution or any witness other than a witness referred to in subsection (1) who is to give evidence in proceedings referred to in subsection (1), declare any such witness, other than the accused, a vulnerable witness if in the court's opinion he or she is likely to be vulnerable on account of -a. age; b. intellectual, psychological or physical impairment; c. trauma; d. cultural differences; e. the possibility of intimidation; f. race; g. religion; h. language; i. the relationship of the witness to any party to the proceedings; j. the nature of the subject matter of the evidence; or k. any other factor the court considers relevant.

(3) ..."

15. Section 31 (1) of the *Sexual Offences Act* is concerned with trials involving vulnerable witnesses. The provision specifies that a vulnerable witness can arise due to age, race, language or trauma. In the instant case after the prosecution applied for PW1 to be declared a vulnerable witness, the trial magistrate allowed the application having found the complainant to be of tender age. Section 31 (1) clearly specifies that a court may declare a witness "...vulnerable on account of -a. age..." In our view, having appointed the intermediary on the basis that the child was of tender age, we find that the trial magistrate complied with the requirements of section 31(1) (a) of the *Sexual Offences Act*. This was directly pursuant to the prosecution's application for PW1 to be declared a vulnerable witness. Notwithstanding that there was no express pronouncement that she was vulnerable, the court having expressly stated that she was of tender age, we are satisfied that by allowing the application in these terms, the court's appointment of an intermediary was in accordance with the requirements of section 31 (1). In any event, we see no prejudice that was occasioned to the appellant in the circumstances. This ground has no merit and is dismissed.

16. Next is the issue of whether the offence of incest was proved to the required standard.

17. For the prosecution to prove its case to the required standard, three key ingredients for the offence of incest are necessary. These are, the complainant's age, the appellant's identity and relationship to the complainant and whether there was penetration. See *GMM v Republic* [2019] eKLR.

18. Beginning with the complainant's age. PW1 through her intermediary testified that she was 9 years old. During the proceedings the doctor, PW4 produced a P3 form that specified she was 9 years old as at the time of the alleged incident. PW4 also produced an age assessment report that showed that PW1 was 9 years old. Clearly, the evidence was uncontroverted that PW1 was 9 years old.

19. On the act of penetration, the trial court was satisfied that the evidence of PW4, the treatment notes, and the P3 form all showed that there was penetration.

20. The High Court also concluded that;

> Given the evidence on record, I do find that the prosecution proved its case beyond reasonable doubt. It is the appellant who defiled the complainant. It is further established that pw1 is the appellant's daughter. The offence of incest was proved beyond doubt."

Section 2 of the *Sexual Offences Act* defines "penetration" as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

21. Further, section 20 of the *Sexual Offences Act* that is concerned with incest by males provides;

> " 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."

22. With respect of the act of penetration, both the trial and the High Courts relied on the evidence of PW4, the treatment Notes and the P3 form that indicated that PW1's hymen was broken and concluded that there was penetration. Further, PW1 through an intermediary also gave a detailed description of the incident as it transpired. Of how the appellant took her into the room, pushed her onto a box, removed her pants, removed his trousers and boxers, and defiled her, and that she felt pain. And on the final element of the appellant's identity, the evidence pointed undisputedly to the perpetrator being PW1's father.

23. As such, we too are satisfied that the evidence when considered in its totality, proved that PW1 a child of tender age was defiled by the appellant, her father. As a consequence, our re-evaluation of the evidence would lead us to similarly conclude as did the two courts below, that the offence of incest was proved to the required standard.

24. On the sentence, the appellant submitted that the life imprisonment imposed on him was harsh and excessive.

25. In this case, the appellant is the father of the complainant who from the record of proceedings was severely traumatized by the act as evidenced by her conduct during the trial. She was only 9 years old when the offence took place in the absence of her mother. She placed her trust in the appellant to provide her with parental care and protection. The appellant, her father, betrayed that trust by callously defiling her.

26. Section 20 of the Act specifies a sentence of life imprisonment for the offence of incest if the victim is below 18 years. The insidious nature of the offence, the age of the child, and the fact that the appellant was her father all dictate against our interfering with the lawful sentence of life imprisonment meted out by the trial court and upheld by the High Court.

27. In sum, the appeal lacks merit and is dismissed in its entirety.

28. The Judgment has been delivered pursuant to Rule 34(3) of the *Court of Appeal Rules, 2022* since Odunga, JA refused to sign the Judgment.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF FEBRUARY,2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR