TKW v Republic (Criminal Appeal 112 of 2020)
[2024] KECA 123 (KLR) (9 February 2024) (Judgment)

Neutral citation: [2024] KECA 123 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 112 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

FEBRUARY 9, 2024

BETWEEN

TKW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Machakos (D. K Kemei, J.) dated 11th September, 2018 in HCCRA No. 216 of 2014)

JUDGMENT

1. In this appeal, the appellant, is challenging his conviction and sentence for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars were that the appellant on 19th November 2013 in Machakos District within Machakos County intentionally and unlawfully caused his penis to penetrate the vagina of JK, a child aged 7 years who was to his knowledge his daughter. The appellant also faced an alternative count of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*, particulars being that: the appellant on the same day and place intentionally and unlawfully touched the vagina of JK, a child aged 7 years with his penis.

2. The appellant denied the charges, was tried, found guilty of the main charge and upon conviction was sentenced to life imprisonment. Aggrieved by the conviction and sentence, the appellant preferred a first appeal against both conviction and sentence to the High Court at Machakos. The same was heard by Kemei, J. who upheld both the conviction and sentence.

3. During the trial, the prosecution called a total of four witnesses. PW1, JK, the complainant, after voire dire examination, gave unsworn evidence. She testified that on the material day, she was at home with the appellant who was her father and her three younger siblings. Her mother had gone to work. Her father, the appellant, took her to the house and had sex with her. He did the act on the matrimonial bed.

When the appellant noticed that she was bleeding from her private parts, he told her that if anybody inquired, she should say that a stick pricked her.

4. PW2, the complainant's mother testified that she was married to the appellant and they had four children together, the complainant being one of them. On the material day after leaving work at 4:00pm, she met the appellant who informed her that the complainant was hit by a tree, but he had washed and tied up the wound with diapers. Upon arrival at home, she found the complainant sitting outside in a pool of blood tied in diapers. She rushed her to hospital and the doctor informed her that it was not a stick that had pricked her but penal penetration. Her sexual organs were badly damaged and needed suturing. She was as a result admitted to the hospital for 11 days.

5. PW3, Dr. Abonga Josephine, a medical officer at Machakos Level 5 Hospital testified that the complainant's labia majora and minora were normal, and the hymen was not normal. There was a tear extending to the perineum and there was bleeding from the tear. Her opinion was that there was forceful entry to the vagina. The complainant was taken to the theatre for examination under anaesthesia and the tear was repaired surgically.

6. PW4, Sgt. Lorna Kimuma attached to Machakos Police Station testified that on 22nd November 2013, PW2 reported that her child had been defiled by her father and was admitted at the hospital. She visited the complainant and interrogated her. She took possession of the blood-stained trouser and recorded her statement. On 27th January 2013, PW2 was called by the OCS and informed that the appellant had been arrested by members of the public and she went and re-arrested him.

7. The trial court placed the appellant on his defence who elected to give sworn testimony. He testified that on the material day, he was at work when two of his children came and told him that the complainant had been injured. He went home and found her outside the house. She showed him, her private parts which were bleeding. He cleaned her and dressed her in diapers. He thereafter went to look for money to take her to the hospital. On the way, he met PW2 and told her what had happened. At home, PW2 interrogated the complainant who said that a stick had pricked her. They took her to the hospital and she was admitted. He used to visit her in the hospital until when he was arrested by three young men who claimed that he had defiled the complainant. He was beaten by a mob but police officers rescued him. Thereafter, he was charged with the offence.

8. As already stated, the appellant was convicted of the main offence and duly sentenced. His appeal to the High Court was unsuccessful, hence this second and perhaps last appeal. The appeal is preferred on three grounds to wit: the trial court erred in law by not finding that the appellant was not fully informed of his rights as enshrined in Articles 49(1)(a) and 50(1), (2)(a)(b)(c(g)(h)(i) and (3) of the *Constitution*, thereby occasioning serious dereliction of justice; by not finding that the conviction and sentence was based on contradictory, uncorroborated and unreliable evidence; and failing to observe that the trial court shifted the burden of prove to the appellant.

9. The appeal proceeded by way of written submissions. On proof of the offence, it was the appellant's submission that penetration was not proved. That the version of the complainant being pricked by a stick was not considered by both courts below. He referred to the case of *P.K.W vs. Republic* [2012] eKLR, where it was stated that the rapture of the hymen can be caused by several factors. There was evidence that though the hymen was not intact, there were no injuries, nor the presence of white discharge and red blood cells from the hymen. It therefore stood to reason that there was no penetration.

10. The complainant did not identify the appellant as the person who had sexually assaulted her. That the court relied on the evidence of the complainant without any corroboration to convict the appellant. That though the two courts below also relied on the evidence of PW2, they failed to appreciate that

she had a grudge against the appellant. The evidence was clear that the complainant had been tricked by PW2 to accuse the appellant of incest on condition that if she did so, she would buy her slippers.

11. On sentence, the appellant submitted that he was charged under section 20(1) of the *Sexual Offences Act*. The section gives discretion to the trial court to impose sentences from 10 years up to life sentence. The trial court imposed the maximum sentence and never gave any justification. The sentence was therefore excessive, harsh and not considerate.

12. For the respondent, it was submitted that the ingredients of the offence were all proved beyond reasonable doubt. The appellant was therefore properly convicted and sentenced. That the appeal was a fishing expedition and a gamble with the courts as the prosecution's case was watertight. We were therefore urged to dismiss the appeal.

13. This is a second appeal. Under section 361(1)(a) of the *Criminal Procedure Code* only matters of law may be raised and considered See also *Njoroge vs. Republic* [1982] KLR 388.

14. We have duly considered the record of appeal, rival submissions, the authorities cited and the law. The appellant's main grievance is that the offence for which he was convicted and sentenced was not proved to the required standard. The key ingredients of the offence of incest which the prosecution must prove are: the relationship of the accused to the victim, penetration, and, that the appellant was the perpetrator of the offence. See *GMM vs. Republic* (2019) eKLR.

15. Before we delve into the appellant's main complaint, we wish to deal with the issue of legal representation raised by the appellant. The appellant submitted that the trial court failed to inform him of his right to legal representation under Article 23 (1) of the *Constitution*. In its verdict on the issue, the first appellate court stated thus:

> " Applying the test, it must be established that the appellant must have suffered injustice by lack of representation. From my analysis of the record, I am unable to identify any complex issues that arose. The appellant was able to take plea, request for statements, cross-examine the witnesses and also offer testimony in his defence. In the circumstances, I find that he had an understanding of the case and cannot be said to have been exposed to any injustice or rather suffered any. This limb therefore fails."

16. There is no gainsaying that the right to legal representation is enshrined under Article 50(2)(g) and (h) of the *Constitution* thus:

> " Every accused person has the right to a fair trial, which includes the right:-
>
> ...
>
> g. to choose and be represented by, an advocate, and to be informed of this right promptly;
>
> h. to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly."

17. Of course, it is not in every case that legal representation is granted at State expense. In *Republic vs. Karisa Chengo & 2 Others* [2017] eKLR, the Supreme Court laid down the following prerequisites:

> " ...it is obvious to us that in criminal proceedings legal representation is important. However, a distinction must always be drawn between the right to representation per se and the right

to representation at State expense specifically. Inevitably, there will be instances in which legal representation at the expense of the State will not be accorded in criminal proceedings. Consequently, in view of the principles already expounded above, it is clear that with regard to criminal matters, in determining whether substantial injustice will be suffered, a Court ought to consider, in addition to the relevant provisions of the *Legal Aid Act*, various other factors which include:

i. the seriousness of the offence; (ii)the severity of the sentence;

iii. the ability of the accused person to pay for his own legal representation;

iv. whether the accused is a minor;

v. the literacy of the accused; and

vi. the complexity of the charge against the accused."

18. In addition to the foregoing, there is an elaborate legal framework to operationalize Article 50(2)(h) in the form of the *Legal Aid Act*, 2016. Section 40 of the Act provides that:

"(1) A person who wishes to receive legal aid, shall apply to the Service in writing.

2. Where a person wishes to apply for legal aid the person shall apply before the final determination of the matter by a court.

3. An application under subsection (1) shall be assessed, with respect to the applicant's eligibility for legal aid services in accordance with this Act."

19. Yes, maybe the trial court did not inform the appellant of the right. That said, the question is whether that failure occasioned prejudice to the appellant. From the record, the appellant actively participated in the proceedings after pleading not guilty to the charges. He also undertook robust cross-examination of witnesses. Moreover, he was able to put forward a strong case by way of mitigation, which was taken into consideration by the two courts below. We consequently take the view just like the first appellate court that no substantial injustice was occasioned to the appellant by failure to be accorded legal representation.

20. As regards the relationship between the complainant and the appellant, this was not really in dispute since it was established by the testimonies of the complainant, PW2 and PW3, that he was the father of the complainant. Indeed, even the appellant did not dispute this fact. Further, a birth certificate was tendered in evidence as proof of the relationship between the complainant and the appellant as well as her age. Accordingly, the filial relationship and the age of the complainant were proved to the required standard.

21. With regard to penetration, the complainant testified as to how the appellant called her into the house and proceeded to defile her until when she started bleeding profusely and that is when he stopped, cleaned her and wrapped her in diapers. He even told her that if asked what happened to her, she should lie that she had been pricked by a stick. This was the information that the appellant even passed to PW2. However, when PW2 took the complainant to the hospital, it was confirmed that she had been defiled. Looking at the record, the narration of the complainant and the medical evidence, we are satisfied that the ingredient of penetration was proved to the required standard.

22. With regard to the identity of the perpetrator of the offence, the appellant was a person well-known to the complainant. After all, he was her father. In her evidence, it came out clearly that it was the appellant who had sexually assaulted her. There was no reason for the complainant to frame the appellant with

the offence. In any event, there are concurrent findings by the two courts below on the identity of the perpetrator being the appellant. We have no reason to depart from those concurrent findings.

23. The appellant further complained that there were inconsistencies and contradictions in the evidence of the complainant. We have looked at the record and noted that the complainant was terrified because of the trauma she had suffered and had to be stood down a couple of times during the trial to be counseled. Because of this, there were bound to be contradictions and inconsistencies in her testimony. However, those contradictions and inconsistencies were minor and did not go to the root of the prosecution case. In the case of *Richard Munene vs. Republic* [2018] eKLR it was stated:

> "It is a settled principle of law however, that it is not every trifling contradiction or inconsistency in the evidence of the prosecution witness that will be fatal to its case. It is only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it."

24. All in all, we are satisfied that all the ingredients of the offence for which the appellant was convicted and sentenced were proved to the required standard. We have no basis for interfering with the same.

25. On the propriety of the sentence imposed, the law prescribes the maximum sentence for the offence of incest with a minor to be life imprisonment. The appellant was sentenced to serve a life sentence. He claims that it is harsh and excessive. The appellant as a father, abused the trust bestowed upon him by society, instead of protecting the complainant he turned out to be her tormentor.

    He betrayed her trust and committed a heinous crime which occasioned her severe injuries, trauma and suffering. Indeed, he scared her for the remainder of her life.

26. The nature of the offence, the age of the victim and her relationship with the appellant, all militate against any interference with the sentence meted out by the trial court and confirmed by the first appellate court.

27. The appeal fails and is hereby dismissed in its entirety.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR