KKM v Republic (Criminal Appeal 56 of 2022)
[2024] KECA 560 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 560 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 56 OF 2022

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

KKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (J. M. Mativo, J.) delivered on 3rd March 2020 in HCCRA No. 33 of 2018)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Mombasa (Mativo, J.) (as he then was) dated 2nd March 2020 in Mombasa HC Criminal Appeal No. 33 of 2018 rendered in determination of the 1st appeal against the judgment of the lower court in Kaloleni CMC Criminal Case No. 249 of 2014 in which the appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*, 2006 (the Act.) In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Act*, whereupon he was convicted of the offence of incest and sentenced to life imprisonment.

2. The particulars of the offence were that on diverse dates between 1st June 2014 and 12th November 2014 at [paticulars withheld] Village, Kaloleni Location in Kaloleni Sub-county within Kilifi County, the appellant intentionally and unlawfully touched, with his penis, the vagina of LSK who, to his knowledge, was his daughter aged 14 years.

3. The particulars of the alternative charge were that on the diverse dates and at the place aforesaid, the appellant intentionally and unlawfully touched the vagina of LSK, a child aged 14 years contrary to section 11(1) of the *Act*.

4. The appellant denied the charges whereupon the trial proceeded with the prosecution calling five (5) witnesses, including the complainant. However, the appellant did not call any witnesses in his defence.

5. The prosecution case was that the appellant defiled the complainant (PW1) on diverse dates between the months of June and November 2014 in the presence of her younger sister named CS (PW2). The complainant testified that sometime in June 2014 at 2:00pm while she was at home with the appellant (her father) and younger sister (CS), the appellant told her to come into the house and then asked her to lie on him; that the appellant then defiled her and warned her not to disclose the incident to anybody; that, in September 2014, the appellant chased her mother away and started defiling her almost every day; that her sister, CS, saw the appellant having sex with her; that CS told A and H (PW5), who eventually reported the matter to her school and to the police; that, on 2nd November 2014, the police came and found her and the appellant having sex; that the appellant opened the door whereupon he was arrested; and that she was taken to St. Luke's hospital where she was treated.

6. PW2 testified that she saw the appellant play sex with the complainant on 8th November 2014 at about 8:00pm; that, on an earlier date, she also found the appellant playing sex with the complainant whereupon he gave her money, which she took to school; that she did not disclose the incidents to her mother or any close relatives because she feared that the appellant would beat her up; that she reported the incident to Hamsa and Zawadi; and that she later learnt that the appellant and the complainant were arrested and taken to Kaloleni Police Station on 12th November 2014.

7. Patrick Bashishi (PW3), the Clinical Officer who examined the complainant, produced a medical examination report confirming penetration, and an Age Assessment Report confirming the complainant's age as 14 years.

8. The arresting and investigation officer, PC Rukia Jalani (PW4) received a report of the incidents of the appellant's defilement of his daughter (the complainant) leading to his arrest and charge. During her father's arrest, the complainant reported to PW4 that her father had been defiling her

> " ... for a long time".

This was also confirmed by CS, who told PW4 that

> " ...the accused [their father] has had sex with the complainant for a long time".

In her testimony, PW4 stated that, when they went to the appellant's home, they knocked, but no-one responded; that, five minutes later, the appellant came out of the house sweating; that, shortly thereafter, the complainant also came out sweating and frightened; and that, when she (PW4) took the complainant aside, she reported that the appellant had been defiling her over a long time.

9. According to PW5, Hamsa Benjamin, a volunteer Health Community Officer, the incidents complained of were reported to him by one Zawadi on 12th November 2014. On receiving the report, PW5 visited the complainant's school only to be told that she had not attended school for a period of over one month. On further inquiry from the complainant and her younger sister (CS), the two confirmed that the appellant had been defiling LSK.

10. In his defence, the appellant gave an unsworn statement and stated that the complainant did not attend school because she was ailing; that, sometime in October 2014, his wife had told him that the complainant was pregnant, and that they had agreed to discuss the matter later; that, on the day of his arrest, the complainant was unwell and in bed while he (the appellant) lay on a mat on the veranda.

11. In its judgment, the trial court was satisfied that the prosecution had proved its case beyond reasonable doubt and convicted the appellant with the offence of incest and sentenced him to life imprisonment in accordance with section 20(1) of the *Act*.

12. Aggrieved by the conviction and sentence meted by the trial court, the appellant lodged an appeal in the High Court on the grounds that the learned trial Magistrate erred by failing to consider that the charge sheet was defective as it did not accord with the offence of incest; that the prosecution's case was governed by material contradictions and discrepancies; that witnesses were not called to testify and clear the doubt as to the arrest of the appellant; and by convicting and sentencing the appellant without considering the evidence adduced in his defence.

13. In its judgment dated 2nd March 2020, the High Court (J. Mativo, J.) (as he then was) found and held: that the error in the charge sheet was curable and declined to uphold the objection on the ground that it was defective; that the charge sheet as drawn was not incurably defective or prejudicial to the appellant, and that it disclosed the offence of defilement under section 20(1) of the *Act*; that the appellant knew from the onset the charge facing him; and that the appellant did not show any prejudice suffered as he fully participated in the trial and cross- examined witnesses; that the complainant's age was proved vide an age assessment report; that the complainant's narration of several instances on which she was defiled by the appellant was corroborated by her sister and the medical examination report produced by the prosecution in evidence; and that the explanation given by the appellant in defence was improbable and did not cast doubts on the prosecution case. As for the sentence, the court found that section 20(1) was not mandatory, but that it prescribed the maximum sentence. The court upheld the conviction but tempered the sentence by substituting therefor a term of 30 years' imprisonment.

14. Dissatisfied, the appellant moved to this Court on 3 grounds set out in his undated "Memorandum of Grounds of Appeal," namely that the learned Judge erred in law: by upholding the appellant's conviction and in failing to consider that the prosecution did not prove the case to the required standard; by not considering that Section 20(1) of the *Act* fetters the court's discretion with regards to sentencing; and by not considering the appellant's defence evidence.

15. In addition to the grounds aforesaid, the appellant filed an undated "Supplementary Grounds of Appeal" containing 2 grounds, the 1st of which is a repetition of one of the grounds advanced on appeal. The only additional ground is that the learned Judge erred in failing to consider that the sentence on him was manifestly harsh and unjust in the circumstances.

16. In support of his 2nd appeal, the appellant filed undated written submissions citing 6 judicial authorities, namely: *Julius Kioko Kivuva v R*. [2015] eKLR; *Jacob Odhiambo Omumbo v R*. [2008] eKLR; and *Rose Ouma Otawa v R.* 2011[eKLR, arguing that, when the prosecution does not prove all the ingredients of an offence, it follows that they have not proved the charge against the appellant.

17. In addition to the foregoing, the appellant also cited the cases of *Paul Kanja Gitari v R.* [2016] eKLR, contending that there were gaps on the doctor's findings, which fell short of connecting the appellant to the offence charged; *Bernard Kimani Gacheru v. R.* [2002] eKLR for the proposition that sentence is a matter that rests in the discretion of the trial court, and must depend on the facts of each case. Notably, the authenticity of the purported 6th authority of *Mohamed v R* cited for the principle that the prosecution must prove its case beyond reasonable doubt was unascertainable. On the basis of his submissions, the appellant urges us to allow the appeal.

18. Opposing the appeal, Senior Principal Prosecution Counsel, Ms. Ngina Mutua, filed undated written submissions and list of authorities citing 5 judicial authorities, namely: *Adan Muraguri Mungara v R*. [2010] eKLR where this Court set out the circumstances under which it would disturb the concurrent

findings of fact by the trial court; *Anjononi & Others v R.* [1980] KLR 59 for the principle that recognition of an assailant is more satisfactory than identification of a stranger; *GMM v R*. [2018] eKLR where the High Court set out the ingredients of the offence of incest; *May v. R.* [1981] KLR 129, submitting that an unsworn evidence is, strictly speaking, evidence since the prosecution is denied the opportunity to test it, and that the rules of evidence cannot be applied thereto; and *John Matiko v R.* Criminal Appeal No. 218 of 2012 (Unreported), submitting that the two courts below discharged their obligations and adequately considered the defence evidence against the evidence adduced in support of the charges, and rightfully dismissed it. Counsel urged us to dismiss the appeal.

19. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In *Karingo v Republic* [1982] KLR 213, the Court stated:

> "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 based on no evidence."

20. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on only 2 main issues of law raised in his Memorandum of Grounds of Appeal and the Supplementary Grounds of Appeal, namely:

whether the prosecution had proved the charges against him to the required standard; and whether the sentence meted on him was manifestly harsh and unjust in the circumstances. The remaining grounds raise issues of evidence, which we cannot re-open on 2nd appeal to this Court.

21. In *Adan Muraguri Mungara v Republic* [2010] eKLR this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court, in the following terms:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." [Emphasis added]

22. We hasten to point out right at the outset that the evidence led by the prosecution proved the charge of incest beyond reasonable doubt. Indeed, we find nothing, as did the High Court, to justify interference with the trial court's decision to convict the appellant.

23. That said, it would be remiss of us, for the avoidance of doubt, not to pronounce ourselves on the ingredients of incest for which the appellant was convicted. In this regard, section 20(1) of the Act reads:

20.

(1) 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.

24. Addressing itself to the ingredients of the offence of incest, this Court at Nakuru in *MGK v Republic* [2020] eKLR held that:

> " 11. the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the categories stated under section 20(1) of the *Sexual Offences Act*. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply."

25. To our mind, all the ingredients of the offence were established at the trial and affirmed on 1st appeal to the High Court. Firstly, it was common ground that the complainant was the appellant's biological daughter, and we need not say more on this score. Secondly, the medical report confirmed the complainant's and her younger sister's testimonies that the appellant defiled the complainant over a long period of time. In effect, the appellant committed an act which caused penetration to the complainant.

26. The term "penetration" is defined in section 2 of the *Act* as

> " partial or complete insertion of the genital organs of a person into the genital organs of another person."

That is precisely what the appellant did to his daughter day after day, the evidence of which we need not re-evaluate. Suffice it to observe that the concurrent findings of the two lower courts that she was not a virgin; that her hymen was long broken; that she was likely defiled as a result of which she contracted an infection; that she had become pregnant; and that, although she was not on her periods, she had blood clots in her private parts.

27. The decision of the High Court of Kenya at Bomet in *Sigei v Republic* [2022] KEHC 3161 (KLR), quoting the Supreme Court of Uganda in *Bassita v Uganda* S.C. Criminal Appeal Number 35 of 1995, cannot escape our attention. As the High Court correctly observed:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence."

28. In view of the foregoing, the mixed issue of law and fact as to whether the prosecution proved its case on the required standard stands settled. That leaves us with the 2nd issue as to whether the reduced sentence of 30 years imprisonment on appeal to the High Court was "manifestly harsh and unjust" as lamented by the appellant. We call to mind the proviso to section 20(1) of the *Act*, which would have rendered the appellant "liable to imprisonment for life" as would be the case for any accused person against whom the charge of incest is proved in relation to a victim below the age of 18 years. The complainant was 14 years of age.

29. Having carefully considered the record of appeal, the impugned judgment of the two courts below, the rival submissions of the appellant and of the State Counsel, the cited authorities and the law, we can only conclude that the reduced sentence of 30 years meted on the appellant was lenient and by no means harsh or unjust. Consequently, we hereby order and direct that:

a. the appellant's appeal be and is hereby dismissed; and

b. the judgment of the High Court (Mativo, J.) (as he then was) dated 2nd March 2020 in High Court Criminal Appeal No. 33 of 2018 be and is hereby upheld.

Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

JUDGE OF APPEAL

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DR. K. I. LAIBUTA

JUDGE OF APPEAL

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G. V. ODUNGA

JUDGE OF APPEAL

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I certify that this is a true copy of the original

signed

DEPUTY REGISTRAR