PMW v Republic (Criminal Appeal 44 of 2016)
[2024] KECA 759 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 759 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 44 OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

PMW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nakuru (M. Odero J), dated 24th October 2016 in HC. CRA No. 59 of 2013)

JUDGMENT

1. The appellant, PMW was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the 3rd day of June 2012, at (particulars withheld), he unlawfully and intentionally caused his penis to penetrate the vagina of CWM, who to his knowledge was his daughter aged 9 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the same *Act*. The particulars of the offence were that at the same time and place, he intentionally and unlawfully caused his genital organ namely penis to come into contact with the vagina of CWM, a girl aged 9 years.

4. The appellant denied the charge pursuant to which a full trial ensued with the State calling a total of 5 prosecution witnesses while the appellant in his defence elected to give a sworn statement and called no witness,

5. At the conclusion of the trial conducted by D.K Mikoyan, then Ag. Senior Principal Magistrate Nyahururu, the learned trial magistrate found the appellant guilty of the offence, convicted him of the same and sentenced him to life imprisonment.

6. Being aggrieved with the aforesaid conviction and sentence, the appellant moved to the high court on appeal and vide a judgment delivered on 24th October 2016, Odero J, set aside the sentence of life imprisonment and sentenced him to 25 years' imprisonment.

7. Undeterred, the appellant has now filed an appeal to this Court vide a Notice of Appeal dated 8th November 2016 and a Memorandum of Appeal dated the same day raising 4 grounds of appeal.

8. Subsequently thereafter, the appellant filed undated "homemade" supplementary grounds of appeal in which he raised 6 grounds of appeal as follows;

    a. That the first appellate court judge erred in law by upholding my conviction reliance (sic) on the circumstantial evidence which were never proved in a required manner. (Sic).

    b. That the learned judge erred in law by upholding my conviction reliance (sic) on the medical evidence which was not proved beyond any reasonable doubt failing to consider that medical evidence was not done in a fair way thus causing an unfair trial enshrined under Article 50 (2) of the *Constitution*.

    c. That the learned judge erred in law by relying on the evidence that is massive invariance (sic) and contradiction which did not collaborate (sic) with other evidence to warrant conviction thus contravening Section 153 as read with Section 154 of the *CPC*.

    d. That the learned judge erred in law by failing to evaluate the evidence afresh to be submitted as its duty to do so.

    e. That the learned judge erred in law by failing to consider my sworn evidence which was not challenged by the prosecution side. Further grounds to be adduced during the hearing of this appeal.

    f. That I pray to be present during the hearing of this appeal."

        1. The evidence that was before the trial court was as follows: CW a girl aged 9 years testified as PW1. It was her evidence that sometimes in the month June 2012, on a date that she did not state, she had gone on a journey on a motorbike with her dad (the appellant) where she met some people who were known to her. They ate meat and she drank a soda.

        2. That, the appellant then told her that they will get a place to sleep and he showed her where to sleep which was a single room with one bed. It was her further evidence that she slept on the same bed with the appellant and that the appellant did not do anything to her and she did not feel anything. Later on,that night, the police came and woke them up and took them to a vehicle. She was later taken to hospital on a day she could not recall.

11. PW2 was Dr. Frida Odera a medical officer attached to Nyahururu district hospital. She produced a medical report in respect of PW1 prepared on 5th June 2012, which was 2 days after the incident. It was her evidence that PW1 was frightened and hesitant to talk and upon examination, she saw a bruise and hyperemia on the entrance of the vagina and there was no hymen. The treatment notes showed that there was presence of spermatozoa. From the evidence, she concluded that there was forceful penetration of vagina.

12. Corporal Julius Shikuku Kibaya attached to Thompsons Falls prison testified as PW3. It was his evidence that on 3rd June 2012, at 11PM, he was having a drink at Check-Point bar in Nyahururu town when he saw someone (the appellant), who appeared drunk asking workers where his child was.

13. It was his evidence that the appellant was directed to the watchman as it appeared like he had forgotten where his child was and that they eventually got to a room and when the appellant opened the same, they saw a child sleeping.

14. That, he then went back to the club and continued drinking but fearing, he reported the matter at Nyahururu police station. The police later came and arrested the appellant who was told to dress up. The child was woken up. He later recorded his statement with the police.

15. Constable Nahashon Githindu from Nyahururu police station testified as PW4. It was his evidence that on the night of 3rd June 2012, while on patrol with his colleagues, they met Shikuku Kibaya (PW3), who informed them that he had information that a male adult had a young girl at a lodging at Check Point bar.

16. They proceeded to the scene and met the manager who showed them room 26 which was locked and the appellant eventually opened the door and they saw him in bed with a minor aged approximately 9 years. The appellant admitted that the minor was his daughter. They subsequently escorted him to Nyahururu police station.

17. PW5 was Constable Hillary Kiprono attached to Nyahururu police station. It was his evidence that on 4th June 2012, he had been assigned to investigate a case of incest. He interviewed the minor who told him that she had attended a social function with her father at Losogwa then went to Check Point bar to sleep but the minor did not divulge further details and he therefore referred her for examination at Nyahururu District Hospital.

18. He later recorded her statement after she came with treatment notes showing injury to her vagina.

19. The appellant in his defence elected to give a sworn statement and called no witness and denied having committed the offence. He testified that on the material day, he had attended a function at Karunga with his daughter and they reached Nyahururu town at 9:00 p.m.

20. It was his evidence that by then, it was raining and since it was impossible to get a taxi/bodaboda, he booked a room at Check Point bar and went to the club. That, on return to the club, one Simiyu opened for him and shortly thereafter he saw police officers who arrested him.

21. When the matter came up for hearing on 29th November 2023, the appellant who appeared in person and Miss Kisoo, learned counsel for the respondent fully adopted their written submissions dated 15th May 2023 and 28th November 2023 respectively, which they did not highlight.

22. It was submitted by the appellant that circumstantial evidence in this case was not proved as PW1 who was the victim had testified inter alia thus; “dad and I slept with clothes on. I did not feel anything and dad did not do anything to me.” He further submitted that PW5 who was the investigations officer in this case, testified that the minor did not disclose anything. Further, that even after being referred to hospital for examination, PW1 maintained that she had not been defiled by her father. She maintained the same stance in court.

23. It was the appellant’s further submission that the medical evidence on record did not prove the offence to the required standard as the evidence by PW2 (the medical officer), who examined PW1 did not state whether the alleged bruises on PW1’s vagina were long standing or recent; that PW2 failed to address the issue of whether PW1’s hymen was recently broken or not and that no blood or discharge

was found on PW1's clothes. He further submitted that DNA analysis was never conducted and that he was not examined as required.

24. Finally, it was the appellant's submission that his defence was not considered and that the prosecution never challenged his evidence which remained intact.

25. The respondent on the other hand while conceding the appeal submitted that whereas there was great suspicion that the appellant committed the offence, the same was not supported by the testimony of PW1 and the medical evidence adduced.

26. It was submitted that PW1 who was the complainant testified that she slept with her clothes on; that she did not feel anything; that her father (the appellant), did nothing to her and that PW5 who was the investigations officer had testified that when he interviewed the complainant, she did not disclose anything and therefore she referred her for medical examination.

27. Regarding the medical evidence, it was submitted that PW2 who was the medical officer who examined PW1 and filed the P3 Form had stated that on examination she saw a bruise but the treatment notes indicated that no bruises were noted and that as such, there were contradictions in the P3 Form and the treatment notes. For these reasons, the State conceded the appeal.

28. We have carefully considered the record, the rival written submissions by the parties and the law. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the Criminal Procedure Code, we are mandated to consider matters of law only.

29. The above provision has been enunciated in several decisions of this Court. In *David Njoroge Macharia vs. Republic* [2011] eKLR the said mandate was summed up in the following terms;

> "Only matters of law fall for consideration and the court 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 also *Chemagong v Republic* [1984] KLR 213)."

30. Having carefully gone through the record, we have framed 2 main issues for our determination as follows;

    a. Whether the learned judge erred in law in upholding the appellant's conviction based on circumstantial evidence which was not proved to the required standard and:

    b. Whether the medical evidence on record was sufficient to support a charge of incest?"

31. It is indeed not in dispute that nobody witnessed the appellant commit the offence that he is charged with. Additionally, offences of this nature happen in private and normally there are no eye witnesses. In the instant case matters were made worse by PW1 who was the victim of the offence who stated in her examination in chief inter alia that she did not feel anything and that the appellant did not do anything to her. She however admitted that she slept with the appellant in the same bed.

32. She further stated that she was taken to hospital on a date she could not remember and PW2 and PW5 who were the doctor and the investigations officer respectively, stated that PW1 was frightened and hesitant to talk and did not disclose anything.

33. The prosecution's case was therefore entirely hinged on circumstantial evidence. Be that as it may, PW1 testified inter alia thus;

> " Dad told me we were going to get a place so that we sleep. Then dad showed me where to sleep. It was a single room with one bed. The bed had a mattress and blanket. Dad and I slept on the same bed. I slept with clothes on."

34. The appellant confirmed as much when he stated in his defence that that on that fateful night, he had gone to Karunga for a function and he could not leave his child behind, since her mother was nowhere and that when they reached Nyahururu town at about 9;00PM, they could not get a taxi or bodadoda to take them home and he therefore booked a room at Check Point bar.

35. On the other hand, PW2 who was the doctor who examined PW1 on 5th June 2012, which was 2 days after the incident testified that on examining PW1, she saw a bruise and hyperemia on the entrance of the vagina and there was no hymen. There was no bleeding or discharge and the treatment notes showed spermatozoa. She concluded that there was forceful penetration of vagina. She however did not state whether the hymen had recently been broken or not.

36. In *Musili Tulo v Republic* Cr. App. No. 30 of 2013 [2014] eKLR, this Court laid down the test to be applied in considering whether circumstantial evidence can find a conviction by stating as follows:

> " Before circumstantial evidence can form the basis of a conviction however, it must satisfy several conditions, which are designed to ensure that it unerringly points to the accused person, and to no other person, as the perpetrator of the offence. In *Abanga alias Onyango v R* Cr. App. No 32 of 1990, this court set out the conditions as follows:
>
> "It is settled law that when a case rests entirely on circumstantial evidence, such evidence must satisfy three tests: (i) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; (ii) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the Accused; 9iii) the circumstances taken cumulatively, should from a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the Accused and none else."

37. Applying the tests laid out in above case, we have no doubt in our minds that the circumstantial evidence on record does not unerringly point towards the guilt of the appellant and, taken cumulatively, it does not form a chain so complete that there is no escape from the conclusion that within all human probability, PW1 was defiled by the appellant and no one else.

38. By the same breath, there were co-existing circumstances that weakened or destroyed the inference of guilt of the appellant, as PW 3 confirmed in his evidence in chief that the watchman had a key to the room where PW1 and the appellant slept and therefore the appellant was not the only person who had access to the room where he sept with PW1 and more so, PW1 in her evidence in chief denied having been defiled by the appellant and both PW2 and PW5 who were the medical doctor and the investigations officer respectively confirmed that PW1 was hesitant to talk and did not disclose anything.

39. Additionally, the medical evidence on record was marred with contradictions in that whereas PW1 was examined 2 days after the incident, PW2 who was the medical officer who examined her and filed the P3 Form indicated that bruises were noted whereas in the treatment notes it was indicated that there were no bruises and as such, there were contradictions in the P3 Form and the treatment notes. Further

PW2, did not disclose whether the hymen was recently broken and PW1 having denied being defiled by the appellant, we are inclined to resolve these contradictions in his favour.

40. Consequently, we find merit in this ground of appeal and hold and find that the circumstantial evidence on record could not sustain a find a conviction for the offence of incest as was held by the two courts below.

41. Turning to the next issue, and as to whether the medical evidence on record was sufficient to prove a charge of incest, the appellant contended that PW2, the medical officer who examined PW1 failed to prove/give the duration of the alleged bruises and she failed to prove whether the penetration was recent or old and that further no blood or discharge was found on PW1's clothes. We are in agreement with the contention by the appellant and given the above, we may never even know when the alleged defilement happened and who was the perpetrator.

42. Accordingly, we find and hold that the appellant's conviction for the offence of incest was not safe and sound, which conviction we hereby set aside and consequently allow the appellant's appeal on conviction.

43. The totality of our findings therefore is that the appellant's appeal is merited and we hereby allow the same in its entirety and order that the appellant be set at liberty forthwith unless otherwise lawfully held.

44. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL