SMK v Republic (Criminal Appeal 193 of 2017)
[2024] KECA 776 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KECA 776 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 193 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JULY 5, 2024

BETWEEN

SMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Meru (R. P. V. Wendoh, J.) delivered on 12th June, 2015 in HCCR.A. No. 138 of 2010)

JUDGMENT

1. The appellant, Stanley Mburugu Kamenge was arraigned before the Senior Resident Magistrate's court at Meru on 20th September, 2007. He was charged with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act*.

2. The particulars of the charge were that on the night of 29th and 30th July, 2007 at Iriene village, Meru, the appellant committed an act namely sex which act caused penetration with a female person, namely, MM, who to his knowledge was his daughter. He denied that he had defiled his own daughter, a child aged nine (9) years.

3. In the alternative, the appellant was charged with the offence of committing indecent acts with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge alleged that on the same date and place, the appellant intentionally touched and inserted a finger into MM's private parts.

4. In brief, the evidence upon which the appellant was convicted was that MM (PW1) was a minor. In her sworn evidence, she testified that she was born in 1998 and that her mother had left them in the care of their grandmother. It was her evidence that she and her brother, one Anthony Kirima usually visited their father (the appellant) on Saturdays.

5. It was PW1's evidence that the last time she visited her father, she went by herself and stayed there until Sunday. It was her testimony that on Saturday night after she and the appellant had their supper 'bad things then happened". From the record PW1 was stood down on 7th January, 2008 and refused to answer any further questions.

6. PW1 was recalled on 24th April, 2008 and testified as follows:

> " My father and I were sharing the one bed there was when we slept, my father did bad things to me. He inserted it into my thing for urinating. I did not look to see how his thing looked like. I was dressed in a dress and a pant. I felt pain here (points at her waist generally). It is the place where I use for urinating. My father was lying on top of me. I was lying on my back. My legs were outstretched."

7. It was PW1's further testimony that she did not go to school on Monday and her teacher, one Ms. Gikunda sent PW1's brother, Anthony Kirima (Kirima) to ask her to attend school the next day. When she attended school the next day, Ms. Gikunda called her to the staffroom and questioned her why she did not attend school the previous day. PW1 informed her that her father (the appellant) had done 'bad things' to her. It was her evidence that teacher Gikunda took her to Kibirichia Hospital where she was examined and treated. It was her evidence that the next day, the headmaster and Ms. Gikunda took her to the police station.

8. Dr. Isaac Macharia (PW2) from Meru District Hospital was the doctor who examined and treated PW1. It was his evidence that after examination, the findings were that PW1's hymen was perforated and genitalia had lacerations and that she complained of pain. It was his testimony that there was evidence of penetration.

9. Agatha Muthoni (PW3) was PW1's class teacher at Gakando Primary School. It was her evidence that she was on duty and noted that PW1 was absent from class on 30th July, 2007. It was her further evidence that she enquired from Kirima why PW1 was absent. That Kirima informed her that PW1 had been collected by their father from their grandmother's home and had not returned. It was her evidence that she requested Kirima to request PW1 to attend school the next day.

10. It was PW3's evidence that the next day, PW1 attended school and that upon questioning PW1 about her absence the previous day, PW1 started crying and informed her that her father had inserted a finger in her genitals. PW1 further informed her that her father (the appellant) then inserted 2 fingers and subsequently inserted his private parts into her private parts whereupon she felt pain and did not attend school. It was PW3's evidence that she reported the matter to the Head Teacher and they proceeded to take PW1 for medical examination and treatment.

11. PC Peter Maluki – No. 57669 (PW4) who was stationed at Subuiga Police Station was the Investigating Officer. It was his evidence that PW1 was taken to the police station and reported that she had been defiled by her father. It was his evidence that he arrested the appellant in the presence of PW1 and PW3.

12. The appellant was charged at the Senior Resident Magistrate's court and the Magistrate found as follows:

> " Having said all the above, this court is convinced that the evidence on record confirms that PW1's vagina was penetrated. From her testimony, only the accused did that. That penetration was by the fingers rather than the penis. A sexual offence was thus committed as

envisaged under Section 5(1)(a)(I) of the *Sexual Offences Act* No. 3 of 2006 as sexual assault. The accused is found guilty as such and is hereby convicted accordingly."

13. The appellant was aggrieved by the conviction and sentence and appealed to the High Court (R.P.V. Wendoh, J.) on the grounds that the trial court relied on contradictory evidence to arrive at the conviction; and that no sufficient medical test was provided by the prosecution; and that the prosecution's evidence was insufficient and unreliable and could not sustain a conviction.

14. The learned Judge dismissed the appellant's appeal on conviction and sentence and held as follows:

> " There was indeed evidence of penetration of PW1 but in light of her evidence that she did not part her legs, the court cannot say how the appellant penetrated PW1, was it with his genitalia or the fingers? For that reason, I will agree with the trial Magistrate that the appellant committed an offence of sexual assault on PW1...
>
> I confirm the conviction under Section 5(1)(a)(1) of the *Sexual Offences Act*, 2006 as read with Section 186 of the Criminal Procedure Code – PW1 was a child aged 9 years and, in my view, the court was right in sentencing the appellant to life imprisonment. The sentence is legal and lawful. In the end, I dismiss the appeal both on conviction and sentence."

15. Undeterred, the appellant filed a second appeal to this Court against conviction and sentence. The appellant's grounds of appeal were that the 1st appellate court erred in law: by upholding the conviction in reliance to the evidence of PW1 & PW2 which was riddled with a lot of doubts thus contravening Section 163(1) and 165 of the *Evidence Act*; by failing to evaluate the evidence on record which was not proved beyond any reasonable doubts; that vital witnesses were not called; that no DNA evidence was taken to clear the doubts; that the 1st appellate court failed to consider that Section 72 (3)(b) of the former Constitution was violated when he was kept in police custody for 6 days before taking plea; and that the 1st appellate court erred in law by upholding the conviction without complying with Section 169(1) of the Criminal Procedure Code.

Submissions by counsel

16. At the hearing of the appeal, the appellant was represented by Ms.Nelima while Ms. Fridah Mbae was on record for the State.

17. Ms. Nelima had filed written submissions which she briefly orally highlighted. Counsel submitted that the trial was a nullity and led to a miscarriage of justice as the trial court failed to carry out voire dire examination on PW1 in accordance with Section 125(2) of the *Evidence Act* and Section 19 of the *Oaths and Statutory Declarations Act*; that the 1st appellate court failed to subject the whole of the evidence to a fresh and exhaustive examination; that the 1st appellate court fell into error in finding that the evidence of PW1 was credible and believable yet it was full of contradictions and inconsistencies; that the 1st appellate court failed to properly analyze the prosecution's evidence; and that the sentence meted out on the appellant was illegal and unlawful as the appellant was found guilty of sexual assault under Section 5(1) of the *Sexual Offences Act* and was convicted under Section 20(1) of the *Sexual Offences Act*.

18. Counsel asserted that no voire dire examination was ever carried out to establish whether PW1 understood the nature of an oath or if she was possessed of sufficient intelligence to understand the duty of speaking the truth. Counsel submitted that in the absence of voire dire examination, the Court had no material on which to decide whether PW1 was a competent witness. Counsel submitted that in

the circumstances, PW1's evidence was improperly received and without it, the prosecution's evidence is not sufficient to sustain the appellant's conviction.

19. Counsel further submitted that had the two courts below properly analyzed the prosecution's evidence especially that adduced by PW1, they would have arrived at a conclusion that PW1 was not a credible witness and would not have relied on her evidence to convict the appellant.

20. Counsel asserted that PW1's evidence was contradictory and inconsistent. Counsel asserted that the contradictions and inconsistencies are not minor and go to the root of her credibility as a witness. Counsel submitted that in view of the contradictions and inconsistencies in her evidence, it cannot be said that she was a truthful witness and the trial court ought not to have relied on her evidence to convict the appellant.

21. Ms. Fridah Mbae opposed the appeal and submitted that the evidence on record is consistent and sufficient to prove the offence of sexual assault; that PW1's evidence was corroborated by the testimony of PW2, the medical doctor who examined her and found that there was evidence of penetration as the hymen was perforated and there were lacerations. Counsel submitted that there were no contradictions in the evidence adduced by the prosecution witnesses.

22. Counsel asserted that the evidence relied on was not of a single witness; that the trial court also relied on medical evidence of PW2 which corroborated that of PW1. Counsel relied on the authority of Mohamed Boru Guyo vs R [2022] eKLR for the proposition that the court can convict on the basis of oral or circumstantial evidence and on the basis of the evidence of a single witness if it believed that the evidence was trustworthy.

23. Counsel also relied on the decision of Jacob Odhiambo Omumbo v R [2008] eKLR for the holding that the court can convict on the evidence of a child of tender years by virtue of the proviso to Section 124 of the *Evidence Act*.

24. Counsel submitted that the trial court noted in its judgment that it observed the demeanour of PW1 and found her truthful. Counsel asserted that there was no evidence adduced during trial to allude to any malice on PW1 in accusing the appellant. Counsel pointed out that the appellant in his defence informed the court that PW1 was a truthful girl. Further, the identity of the perpetrator was not disputed as PW1 positively identified the appellant as the person who penetrated her vagina using his fingers. Further, penetration was confirmed by the medical doctor (PW2).

25. On the question whether the prosecution erred in law in not summoning Kirimi as a witness, counsel submitted that the prosecution witnesses adduced evidence that was sufficient to prove the charge of sexual assault against the appellant beyond reasonable doubt. Counsel submitted that failure of calling Kirima as a witness was not fatal to the prosecution's case since the ingredients of sexual assault were proved.

26. Counsel submitted that Section 143 of the *Evidence Act* provides that no particular number of witnesses is required for the proof of any fact. Counsel relied on the case of Bukenya v Uganda [1972] EA 549 which clearly states that the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond any reasonable doubt.

27. Counsel submitted that in the instant case, PW1 firmly testified that the appellant who is her father was the perpetrator who inserted his fingers in her genital organs while her legs were outstretched and the fact that PW1 was penetrated was proved by PW2.

28. On the ground whether the law was observed when convicting and sentencing the appellant, counsel submitted that the appellant had been charged with the offence of incest but on conviction the court

invoked Section 186 of the Criminal Procedure Code and substituted the charge with the offence of sexual assault.

29. Counsel submitted that the trial court followed the law in convicting the appellant with the offence of sexual assault. Counsel submitted that the appellant could not have been convicted of the offence of incest by male person as penetration was by fingers and not genital organ. Counsel relied on the decision of John Irungu vs. R [2016] eKLR where the court was faced with a similar situation and substituted the offence of indecent act with that of sexual assault.

30. On sentencing, counsel submitted that Section 5(2) of the *Sexual Offences Act* provides for a minimum term of ten (10) years which can be enhanced to imprisonment for life. Counsel further asserted that this provision has granted the courts discretion to enhance the sentence if it so deems. Counsel asserted that the sentence of life imprisonment in the circumstances should not be disturbed. Counsel submitted that PW1 was a child of tender years (9 years), the perpetrator was her father and the impact to her is detrimental to her psychological, social, educational and physical health.

31. Counsel asserted that the appellant is deserving of the sentence meted out, taking into account the heinous crime committed against his own flesh and blood. Counsel relied on the case of Athanas Lijodi v R [2012] eKLR in support of the proposition that life sentence imposed by the trial court and affirmed by the High Court is not unconstitutional and can still be meted out in deserving cases.

32. Counsel further relied on the case of Abdinasir Guhad Bore v R [2020] eKLR where this Court affirmed a life sentence imposed under Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* where it took into account the age of the child and the manner in which the appellant committed the barbaric act of defilement.

33. Counsel submitted that the appellant's rights were not breached as alleged under Article 26(1)(3) of *the Constitution*. Counsel further submitted that the said article relates to right to life and the appellant has not been deprived of the same.

34. Counsel concluded by urging this Court to dismiss the appellant's appeal on both conviction and sentence.

Determination

35. This being a second appeal, by dint of Section 361 of the Criminal Procedure Code, we can only deal with matters of law. See M'riungu vs. Republic [1983] KLR 455. The only broad issue before us is

whether the prosecution proved its case to the required standard.

36. The appellant who was PW1's father was charged in the trial court with the offence of incest contrary to Section 20(1) of the *Sexual Offences Act* and in the alternative with the offence of indecent assault of a child contrary to Section 11(1) of the *Sexual Offences Act*. The case was heard and the trial court found the appellant guilty of the disclosed offence of sexual assault and was convicted and sentenced under Section 20(1) of the *Sexual Offences Act*. Dissatisfied with the said conviction and sentence, the appellant appealed to the High Court. His appeal was dismissed prompting this appeal.

37. To secure a conviction, the prosecution was bound to prove the elements of penetration, age of the victim and the identity of the perpetrator.

38. Regarding penetration, PW1 testified that the appellant inserted his finger and subsequently his private parts into her private parts. The evidence of PW2, the medical doctor corroborated this and upon examination of the victim found that there was penetration.

39. Section 2 of the *Sexual Offences Act* states that:

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

40. Further, in John Irungu v R [2016] eKLR, the Court stated as follows:

> " Thus for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

41. In David Odanga Wanyama v R [2022] eKLR, the ingredients of sexual assault were set out in the following terms:

> " The essential elements of the offence of sexual assault are proof of penetration into the genital organs of the victim by any part of the body of the person accused of the offence or any other person or objects manipulated by the accused person for that purpose."

In the circumstances, we find that penetration was proved to the required legal standard of proof.

42. Regarding the age of the victim, it is on record that PW1 testified that she was born in 1998. Further, the P3 form indicated that PW1 was 9 years old. She was therefore 9 years old in 2007 when she was defiled.

43. Regarding the identity of the perpetrator, there is no dispute that the appellant was PW1's father. They were together at his home for an overnight stay and there was sufficient time for her to identify him by way of recognition.

44. In the circumstances, the three essential ingredients of the offence of defilement were proved to the required standard.

45. On the issue that voire dire was not carried out to the required standard, we note that the trial court stated as follows prior to receiving PW1's testimony.

> " MM, the first witness is noted to be a minor and she is interviewed and found old enough to be put on oath as she is found able to appreciate the oath."

46. The question is whether there was proper voire dire examination. If it was not properly done, what is the consequence? This Court in Japheth Mwambire Mbitha V Republic [2019] eKLR stated as follows:

> " Again, it bears repeating that the purpose of voire dire is to ensure that the minor understands the solemnity of oath and if not, at the very least, the importance of telling the truth."

47. The requirement for a voire dire examination is a statutory requirement pprovided under Section 19 of the *Oaths and Statutory Declarations Act*, for any witness who is a child of tender years. The purpose of voire dire was explained by this Court in Johnson Muiruri vs. Republic [1983] KLR 445 as follows:

> " Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child

understands the nature of an oath in which even his sworn evidence may be received. If the court is not so satisfied, his unsworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.

48. Further, in Maripett Loonkomok v Republic [2016] eKLR this Court addressed a situation where the trial court failed to conduct a voire dire examination. In upholding the conviction, the Court stated as follows:

> "It follows from a long line of decisions that voire dire examination of children of tender years must be conducted and that failure to do so does not per se vitiate the entire prosecution case. But the evidence taken without examination of a child of tender years to determine the child's intelligence or understanding of the nature of the oath, cannot be used to convict an accused person. But it is equally true as this court recently found that;
>
> 'in appropriate case where voire dire is not conducted, but there is sufficient independent evidence to support the charge...the court may still be able to uphold the conviction. See Athumani Ali Mwinyi vs R, Criminal Appeal No. 11 of 2015.
>
> On the peculiar facts and circumstances of this case, it is our considered view that the trial was not vitiated by the failure to conduct voire dire examination. The complainant's evidence was cogent; she was cross- examined and medical evidence confirmed penetration. But of utmost significance is the admitted fact that the appellant took the complainant and lived with her as his wife after paying dowry. So that even without the complainant's evidence, the offence of defilement of a child was proved from the totality of both the prosecution and defence evidence which corroborated the fact of defilement." [Emphasis supplied.]

49. Section 124 of the *Evidence Act* provides as follows:

> Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

50. Having satisfied itself that PW1 understood the importance of speaking the truth in court, the trial court admitted her evidence. In the instant case, from the record, counsel for the appellant cross-examined PW1. The testimony rendered by PW1 regarding the identity of the perpetrator was highly consistent. Further, PW1's testimony regarding penetration was corroborated by the medical evidence of PW2.

51. It is notable that in his cross-examination, the appellant stated as follows:

> " MN is a good child. She is very honest and trustworthy."

52. In the circumstances of this case, voire dire was carried out and the trial court was satisfied that PW1 understood the proceedings and the need to be truthful. The trial court found that PW1 was found able to appreciate the oath. PW1's evidence was corroborated by the evidence of PW2 and PW3. We therefore find that there was sufficient evidence for the 1st appellate court to find as it did.

53. On the question whether the prosecution failed to call vital witnesses, counsel for the appellant claimed that the failure to call PW1's brother, Anthony Kirima was fatal to the prosecution case. On the other hand, the prosecution contended that the prosecution witnesses that testified adduced evidence that was sufficient to prove the charge of assault against the appellant beyond reasonable doubt. Counsel asserted that failure to call Anthony as a witness was therefore not fatal to the prosecution's case since the ingredients of sexual assault were proved.

54. Section 143 of the *Evidence Act* provides that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

55. As stated by this Court in the case of JMM Vs R [2020] eKLR:

> "...sexual relations between an adult and a child is perverted and wrong, no matter the circumstance. And if the child is a family member, the psychological consequences are even more damaging. There are some lines that should never be crossed."

56. We therefore find that the prosecution proved the case against the appellant beyond all reasonable doubt and that he was accordingly convicted. The appeal against conviction fails and is dismissed.

57. The appellant has urged us to reduce the life imprisonment imposed by the trial court and upheld by the 1st appellate court. This Court in the recent decision of Evans Nyamari Ayako v R CRA No. 22 of 2018 in part held as follows:

> "On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to 30 years imprisonment."

58. By parity of reasoning, we allow the appeal on sentence to the extentof ordering that the sentence of life imprisonment imposed on theappellant shall translate to 30 years' imprisonment from when he wasconvicted.

DATED AND DELIVERED AT NYERI THIS 5TH DAY OF JULY, 2024.

W. KARANJA

JUDGE OF APPEAL

JAMILA MOHAMMED

JUDGE OF APPEAL

L. KIMARU

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR