MG v Republic (Criminal Appeal E006 of 2023)
[2024] KECA 1197 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1197 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E006 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

SEPTEMBER 20, 2024

BETWEEN

MG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Voi (J. M. Mativo, J.) delivered on 27th October 2022 in HCCRA No. E051 of 2021)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Voi (J. M. Mativo, J.) dated 19th October 2022 and delivered on 27th October 2022 by O. Sewe, J. in Criminal Appeal No. E051 of 2021. By the impugned judgment, the High Court upheld the appellant's conviction and sentence in Voi Sexual Offence Case No. 2 of 2017 (F. M. Nyakundi, SRM) vide the trial court's judgment dated 7th October 2017 and sentence on 14th October 2017.

2. The genesis of the appeal before us is that the appellant was charged before the Magistrate's Court at Voi in Sexual Offence Case No. 2 of 2017 with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* (the Act). The particulars of the offence were that, on 28th August 2016 at about 9:00pm within Taita Taveta County, the appellant intentionally caused his penis to penetrate the vagina of PM, a child aged 17 years who, to his knowledge, was his daughter. The appellant was alternatively charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He pleaded not guilty to the charges, and the case proceeded to hearing whereupon the prosecution called eight (8) witnesses.

3. The complainant (PW1) stated that, on 28th August 2016, her mother, KGC (PW4), had gone for a funeral in Samburu when, at around 9:00pm, the appellant came into the house which the complainant shared with her brother and demanded food; that the complainant informed the

appellant that his food was in his house; that the appellant suddenly grabbed the complainant by the neck and tripped her to the ground; that the complainant had only wrapped herself with a leso and had nothing underneath; that the appellant pulled off her leso and removed his trouser with one hand, warning her not to scream; that the appellant had sexual intercourse with her; and that it was the first time she ever had sexual intercourse.

4. According to PW1, her younger brother was asleep in his room and did not hear anything; that there was no light at the time, but that there was moonlight; and that she also recognised the appellant's voice. PW1 testified further that she did not inform her mother (PW4) of the incident because of the appellant's threats; and that she later discovered that she was pregnant.

5. PW4, the complainant's mother, stated that, in March 2017, she noticed that the complainant was pregnant and confronted her over it, but that the complainant remained evasive. PW4 stated further that the appellant was arrested when she had taken the complainant for examination at Buguta dispensary; and that the complainant gave birth on 13th May 2017, but that the baby did not survive.

6. JET (PW2), the headmaster of the complainant's school, stated that, on 14th February 2017, he was informed that the complainant appeared disturbed; that he interrogated the complainant on 17th February 2017, and she confirmed that she was 6-months pregnant; and that the appellant was responsible therefor. PW2 reported the matter to the police.

7. PW3, Corporal Douglas Mwakarabo, a police officer attached to Emali Administrative Police Post, received the complainant in the company of PW2 and a clinical officer from Buguta Dispensary on 17th February 2017. PW3 stated that PW2 alleged that the appellant, who was known to him, had impregnated the complainant. PW3 subsequently arrested the appellant on 18th February 2017.

8. PW5, Lucy Nyambura Wangoi, a nurse at Buguta Health Centre, stated that the complainant was brought in on 18th February 2017 by her mother and the police; and that a pregnancy test revealed that the complainant was about 6-7 months pregnant. PW6, Dr. Sumeita Seif, a doctor at Moi Teaching and Referral Hospital at Voi, stated that the complainant gave birth on 13th May 2017, but that the baby died 35 minutes later. According to PW6, DNA samples were taken from the body before it was released for burial.

9. PW8, George Lawrence Oguda, a principal chemist at the government chemist, testified that he was presented with five exhibits under instructions from the court to examine them and determine the paternity of a deceased infant; that all the samples from the infant did not generate any DNA profile, and that he was therefore unable to compare the DNA profile generated from buccal swabs obtained from the appellant with that of the infant. However, PW8 stated that there were 99% chances that the appellant was the complainant's biological father.

10. When found to have a case to answer, the appellant gave a sworn statement in his defence. He stated that, on the material date, he was at a burial with his wife and were away for 3 days before they returned. He denied committing the offence. On cross-examination, the appellant stated that, on the material day, he left home with his wife (PW4) for a ceremony not far from his home at 4:00 pm; that they were away for 3 days; that they left the children, including the complainant, at home; that he did not know why he was arrested; that he had not known that the complainant was pregnant; and that the complainant never disclosed who the father of the child was.

11. After the appellant's testimony, PW4 was recalled and testified in his defence as DW2. She stated that, on 28th September 2016, she and the appellant were away attending a burial where they stayed for 3 days before returning home; and that she did not know why he was arrested.

12. In its judgment dated 7th October 2019, the trial court found that, at the time of defilement, the complainant was 17 years of age as corroborated by the immunization card produced bearing her date of birth; that there was no doubt that the complainant recognized her father through his voice and sound; that the appellant never asked the complainant who was responsible for her pregnancy even though the pregnancy was clearly visible; that the appellant never raised the alibi defence that he was not at home on the material day when he was arrested; that the appellant's defence was an afterthought; that PW4 gave contradictory evidence as to the number of days they were away from home; that, while the appellant was being escorted for DNA testing, he escaped from lawful custody only to be re-arrested; that the appellant's conduct corroborated the evidence that he indeed committed the offence; and that the head teacher (PW2), who reported the matter, bore no grudges against the appellant.

13. The trial court was satisfied that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant and, on 14th October 2019, sentenced him to 30 years' imprisonment.

14. Dissatisfied with the learned Magistrate's decision, the appellant filed an appeal in the High Court of Kenya at Voi in Criminal Appeal No. E051 of 2021 on the grounds that the charge was defective; that the prosecution did not prove its case to the required standard; that he was convicted on the basis of an inconclusive DNA report; and that his alibi defence was not considered.

15. In its judgment dated 19th October 2022, the High Court found that the appellant did not raise an objection to the charge or contend that it was defective. The court concluded that the appellant was not prejudiced as he participated in the trial in a manner to suggest that he understood the charge, cross-examined witnesses and put an appropriate defence.

16. Regarding the issue of the DNA report, the court held that that a DNA test was not mandatory, and that failure to adduce such evidence does not of itself weaken the prosecution case. In addition, the first appellate court observed that the proviso to section 124 of the *Evidence Act* provides that a court can convict an accused person for a sexual offence in a case where the minor is the victim solely on the victim's evidence as long as the court believes that the minor is speaking the truth. The court found it highly improbable that the complainant could have mistakenly identified her father as the perpetrator, and held that there was nothing to suggest that the appellant was not properly identified.

17. Regarding the alibi defence, the court concluded that the dates that the appellant claimed to have been away differed from the date of the alleged offence and that, therefore, the alibi defence failed. The court was satisfied that the learned Magistrate properly applied her mind to the law and the evidence, and that she arrived at the correct finding. Accordingly, the court dismissed the appeal and upheld the appellant's conviction and sentence.

18. Aggrieved by the decision of Mativo, J., the appellant lodged the instant appeal challenging the High Court decision on the grounds set out in his undated memorandum of appeal styled "Amended Grounds of Appeal," namely that the learned Judge erred in law: by failing to find that the DNA report did not indicate that the appellant was the father of the appellant's child after the buccal swab was taken by PW8; by affirming the sentence that was imposed by the trial court, yet it was imposed in mandatory terms without considering the appellant's mitigation or the unique circumstances of the offence; by failing to find that, at the time of the alleged incident, the appellant was not at home but was at a funeral for 3 days together with his wife (PW4/DW2); by upholding the conviction and sentence on reliance on inconclusive medical evidence; in failing to consider the appellant's defence and mitigation; and in failing to find that the sentence imposed by the trial court was harsh and excessive, and that it ought to be reviewed. He urged us to allow his appeal.

19. In support of the appeal, the appellant filed undated written submissions citing the cases of *Nzau v. Republic* [2022] KECA 502 (KLR) for the proposition that proof of parentage of the complainant's child cannot be the basis upon which penetration may be proved; *re Winship* [1970] 397 U.S. 358; and *JOO v. Republic* [2015] eKLR, submitting that the standard of proof in criminal cases is that of beyond any reasonable doubt; and the principle that that it is better to acquit ten guilty persons than to convict one innocent person;

Abanga Alias Otango v. Republic, Criminal Appeal No. 32 of 1990 (UR); and *Joan Chebichii Sawe v. Republic* [2003] eKLR, setting out the conditions to be satisfied to draw an inference on guilt based on circumstantial evidence.

20. The appellant also cited the case of *Joseph Ngumbao Nzaro v. R.* [1982] 2 KAR 212 where this Court held that:

> "It is possible for a witness to believe genuinely that he had been attacked by someone he knows very well and yet be mistaken. So the possibility of error or mistake is always there whether the case be of recognition or identification."

21. In reply, the respondent filed written submissions and a List of Authorities dated 14th November 2023 and prepared by Mr. Keya Ombele, Principal Prosecution Counsel. Counsel cited the cases of *Anjononi & Others v. Republic* (1976-1980) KLR 1566; and *Kevin Ochieng Oguta & 3 others v. Republic* [2021] eKLR, highlighting the principle that recognition of an assailant is more satisfactory, more assuring, and more reliable than identification of a stranger because it depends upon the personal knowledge of the assailant in some form or other; *KMG v. Republic* [2022] eKLR for the proposition that sentencing is a discretionary act of the trial court; and that the appellate court should not intervene in such an exercise of discretion by a lower court, unless it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered, or that it has considered matters it should not have considered, or that looking at the entire decision, it is plainly wrong; and that when the sentence is lawful, the appellate court should not interfere.

22. 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."

23. 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 three main issues of law, namely: whether DNA evidence is a pre-requisite ingredient of the offence of defilement or incest; whether the prosecution had proved the charge against the appellant to the required standard; and whether the sentence meted on the appellant and upheld by the first appellate court was harsh or excessive, or otherwise unlawful.

24. The remaining two grounds of appeal that raise additional issues as to whether the appellant was indeed convicted for incest on the basis of inconclusive evidence; and whether his alibi defence held firm ground to dislodge the prosecution evidence, are purely matters of fact from which this Court is enjoined to steer away on a second appeal. In so far as the two grounds aforesaid raise issues of factual evidence, which we cannot re-open or disturb on 2nd appeal to this Court unless circumstances exist to justify re-consideration and interference therewith. However, we find nothing to suggest that any

special circumstances exist to warrant this Court's interference with the concurrent findings of fact by the two courts below.

25. The same applies to the additional grounds raised in the appellant's submissions on second appeal to this Court, and in respect of which it would be remiss of us not to mention albeit to contextualise the appellant's grievances, namely: that the complainant's age was not proved as no birth certificate was availed; that the evidence of PW1 seemed to be in consonance with the evidence of DW2 during cross-examination to the effect that the complainant's age was above 17 years at the time of commission of the offence; that penetration was not proved beyond reasonable doubt; and that pregnancy is not a test or proof of defilement, and that it was a totally different issue.

26. The foregoing issues of factual evidence raised in the appellant's submissions likewise fall by the wayside on account of the fact that they cannot be re-opened for re-examination on second appeal. As we have already observed, this Court is obligated to pay homage to the concurrent findings of fact reached by the two courts below in the absence of any special circumstances to justify our interference with those findings.

27. Turning to the 1st issue as to whether the prosecution was impelled to adduce DNA evidence in proof of the paternity of the complainant's child in order to sustain the appellant's conviction for incest, the appellant submitted that examination of the DNA Sample did not link the appellant to the complainant's baby; that the DNA from the appellant's buccal swab ought to have been examined to prove that the appellant indeed impregnated the complainant; and that PW8's allegation that samples can fail to generate DNA profiles depending on preservation and handling processes should be disregarded as the police officers and analyst at the Government Chemist were aware of the precautions to take when receiving the samples.

28. The respondent's case was that the DNA report confirmed that the appellant was indeed the complainant's biological father, which is a necessary ingredient of the offence of incest. On the other hand, DNA evidence of the paternity of her child was not necessary to prove the offence of defilement or incest with which the appellant was charged.

29. The perennial question as to whether failure to conduct a DNA profile comparison in similar offences invariably dislodges the prosecution's case has been the subject of numerous judicial pronouncements. In *David Kahura Wangari v. Republic* [2016] eKLR, this Court held that:

> " DNA testing or forensic examination of a perpetrator of any offence is done in the course of investigations, but that is purely the choice of the investigating officers, and failure to do so particularly in this case did not affect the credibility of the evidence that was before the court." [Emphasis added]

30. In the same vein, this Court in *Williamson Sowa Mbwanga v. Republic* [2016] eKLR, had this to say:

> " ... it is patently clear to us that whilst paternity of PM's child may prove that the father of the child had defiled PM, that is not the only evidence by which defilement of PM can be proved. The fact, as happens in many cases, that a pregnancy does not result from conduct that would otherwise constitute a sexual offence does not mean that the sexual offence has not been committed. In this case, there does not have to be a pregnancy to prove defilement. A DNA test of the appellant would at most determine whether he was the father of PM's child, which is a different question from whether the appellant had defiled PM. As the Court of Appeal of Uganda rightly stated, in the sexual offence of defilement, the slightest penetration of the female sex organ by the male sex organ is sufficient to constitute the offence and that it

is not necessary that the hymen be ruptured. (See *Twehangane Alfred v. Uganda*, CR. APP. No. 139 of 2001)."

31. On the authority of the afore-cited cases, we agree with counsel for the respondent that failure to conduct a DNA comparison to establish the paternity of the complainant's child did not of itself affect the credibility of the evidence presented by the prosecution in proof of incest beyond reasonable doubt.

32. We also need to point out right at the outset that the appeal before us was not about the paternity of the complainant's child, but about the offence of incest perpetrated by her biological father with regard to which the DNA evidence proved that the complainant was indeed the appellant's daughter. To our mind, the factual evidence led by the prosecution at the trial, and with which the first appellate court concurred, proved the four (4) ingredients of the offence of incest, namely: the age of the victim (as below 18 years); penetration; identification of the accused; and the biological relationship between the accused and the complainant, beyond reasonable doubt, and as required to establish the offence with which the appellant was charged under section 20 of the *Act*. As this Court has stressed often enough, such concurrent findings of the two courts below cannot be the subject of inquiry on second appeal.

33. For the avoidance of doubt, section 20(1) of the *Sexual Offences Act* provides that:

> 20. Incest by male persons
>
> (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.

34. The appellant's lamentation that the complainant's evidence of incest was not corroborated by other evidence finds answer in section 124 of the *Evidence Act*. The proviso to section 124 dispenses with the need for corroboration of the complainant's evidence in sexual offences and provides:

> 124. Corroboration required in criminal cases. 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.

35. The decision of the High Court of Kenya at Bomet in *Sigei v. Republic* [2022] KEHC 3161 (KLR), citing 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." (Emphasis added)

36. With regard to her age, which the appellant challenges on appeal to this Court, and which guides the Court in determining the propriety of the penalty imposed by the trial court and confirmed on first appeal, suffice it to observe that PW1 testified that she was born on 2nd November 1998. PW7 produced a copy of her immunization card confirming her age and date of birth. The complainant was 17 years at the time of the offence, which was not disputed by the appellant at the trial. In *Kaingu Elias Kasomo v. Republic* Criminal Appeal No. 504 of 2010 (UR), this Court held that:

> " ... the age of the minor is an element of a charge of defilement which ought to be proved by medical evidence. Documents such as baptism cards, school leaving certificates in my view would also be useful in this regard." [Emphasis ours]

37. Turning to the 3rd issue as to the severity and legality of the sentence meted on the appellant, the appellant submitted that, if he was indeed the perpetrator of the offence charged, the appropriate penalty fell under section 3 of the *Sexual Offences Act* (the offence of rape); and that, if the prosecution relied on the evidence, the sentence should be passed under section 8(1) as read with section 8(4) of the *Sexual Offences Act* (defilement of a child between the ages of 16 and 18 years).

38. To the contrary, the appellant was charged with and convicted for incest under section 20(1) of the *Sexual Offences Act*, having defiled his biological daughter of 17 years of age. The proviso to section 20(1) of the Act prescribed a sentence of life imprisonment where the victim is under 18 years of age as was the complainant. To our mind, the term of imprisonment for a term of 30 years can only be described as too lenient to deserve reconsideration or interference therewith.

39. It is not lost to us that sentence is essentially a matter of fact, but to which we find it necessary to pronounce ourselves in so far as it is guided by statute law. For this reason, it may be reconsidered as a matter of mixed law and fact where circumstances exist to require reconsideration on second appeal. We find none, but nonetheless take to mind the principle that the question as to whether the trial court exercised its discretion judiciously in imposing the sentence against the appellant is primarily a question of fact to which this Court's mandate on second appeal is limited by dint of section 361(1)(a) of the *Criminal Procedure Code*.

40. Addressing itself to the issue of sentence on second appeal in *Bernard Kimani Gacheru v. Republic* [2002] eKLR, this Court held that:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist." [Emphasis added]

41. In conclusion, we find it necessary to underscore the circumstances under which this Court may, on second appeal, interfere with concurrent findings of fact by the two courts below. In Adan Muraguri

Mungara v. Republic [2010] eKLR, this Court set out the only 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 often stated, 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]

42. In conclusion, and on the Authority of the afore-cited case of Adan Muraguri Mungara v. Republic, we are bound to pay homage to the concurrent findings of fact made by the two courts below in respect of the sufficiency of the evidence on which the appellant was convicted, including evidence of the complainant's age, recognition of the appellant as the perpetrator of the offence of incest, the father/daughter relationship between the appellant and the complainant as his tenth child, and the evidence of defilement/penetration in all its ingredients; his unfounded defense of alibi; and the severity of the sentence meted on him. In our considered view, we find nothing to suggest that the findings of the two courts below were based on no evidence, or that the decision of the trial court and of the first appellate court were bad in law so as to justify interference therewith.

43. In view of the foregoing, we reach the inescapable conclusion that the appeal has no merit and is hereby dismissed. Consequently, the Judgment of the High Court of Kenya at Voi (Mativo, J.) delivered on 27th October 2014 in HCCRA No. E051 of 2021 is hereby upheld. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C. Arb, FCIArb

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR