DKN v Republic (Criminal Appeal 141 of 2018)
[2024] KECA 1356 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KECA 1356 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 141 OF 2018

W KARANJA, J MOHAMMED & LK KIMARU, JJA

OCTOBER 4, 2024

BETWEEN

DKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Nyeri (Ong'udi, J.) dated 30th November, 2018 in Criminal Appeal No. 75 of 2016)

JUDGMENT

1. The appellant, DKN, was arraigned before the Chief Magistrate's Court at Nyeri on 12th January 2015, and charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act*. The particulars of the charge alleged that on diverse dates between June 2013 and 7th January 2015, in Nyeri County, within the Republic of Kenya, the appellant, being a male person, unlawfully and intentionally caused his penis to penetrate the vagina of MWK, a female person aged 12 years, who was to his knowledge his daughter. 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 *Sexual Offences Act*. The particulars of the charge were that during the same period, and at the same place, the appellant unlawfully and intentionally touched the vagina of MWK, a child aged 12 years, with his penis.

2. The prosecution called a total of five witnesses to establish its case. In summary, it was the prosecution's case that the appellant is the complainant's father, and that on several occasions, the appellant had sexual intercourse with the complainant, and eventually impregnated her. The complainant, in her sworn testimony, told the Court that sometime in June 2013, she was at home with the appellant when he held her and led her to his bed. He undressed her and had sexual intercourse with her. He warned her against telling anyone about the incident. The complainant stated that she did not tell anyone what had happened. It was her testimony that thereafter, over a span of approximately one year, the appellant had sex with her on several occasions, for approximately ten times. The complainant told the Court

that sometime in October 2014, she started experiencing heart burns and headaches. She informed her mother who took her to the hospital. At the hospital, she was informed that she was pregnant. It was at this point that she informed her mother that she had been having sexual intercourse with the appellant.

3. The complainant's mother, MN, who testified as PW2, told the Court that the appellant was her husband, and that they, together, had four children. She narrated how, at the material time, the complainant complained of experiencing headaches and heart burns. When she took her to hospital, they were informed that the complainant was pregnant. PW2 testified that the complainant then informed her that the appellant was responsible for the pregnancy.

4. She stated that she reported the matter to the area chief, and that the appellant was thereafter arrested and escorted to Ndugamano Police Station. PW2 informed the Court that she used to leave the complainant at home with the appellant when she went to work. PW2 stated that the complainant was born on 28th July 2002.

5. PW4, Dr. Consolata Kinuthia, of Provincial General Hospital Nyeri, gave evidence on behalf of Dr. Karanja, who examined the complainant on 19th November 2015, and filled out a P3 Form.

   PW4 stated that upon examination, it was discovered that the complainant was 20 weeks pregnant. The Investigating Officer, PC Otieno Fredrick (PW3) testified that he was assigned the case on 10th January 2015. By that time, the appellant was already in custody. He stated that he interrogated the complainant who informed him that the appellant started defiling her sometime in June 2013, and that she only informed her mother after it was discovered that she was pregnant. PW3 stated that after concluding his investigations, the appellant was charged with the charges, one of which he was convicted.

6. During the course of the hearing, the complainant gave birth. A DNA test was conducted at the government chemist to determine whether the appellant was the biological father of the complainant's child. PW5, Lawrence Kinyua Muthuri, a Government Analyst, told the trial court that he received blood samples belonging to the appellant, the complainant, and the complainant's newborn child from the investigating officer, on 9th July 2015. After conducting a DNA test, the results confirmed that the appellant indeed sired the complainant's child. The DNA report dated 16th May 2016, was produced in evidence by the prosecution.

7. After the close of the prosecution's case, the trial magistrate determined that the appellant had a case to answer. The appellant was placed on his defence. He gave a sworn statement in his defence. It was the appellant's testimony that he came home late one day, and that during that night, his wife (PW2) did not sleep on their bed, but rather went to sleep with the complainant. The following morning, when the appellant woke up, he found PW2 and the complainant on his bed. A quarrel ensued between him and PW2, since he was incensed that the complainant was on their bed. The appellant stated that PW2 reported the incident to the head man, who urged them to settle the issue. The appellant testified that the complainant informed him that it was PW2 who told her to come to his bed, and that since he was drunk, he ended up having sex with the complainant.

8. At the conclusion of the trial, the trial court found the appellant guilty as charged in the main charge, and sentenced him to serve life imprisonment. The appellant, aggrieved by this decision, filed an appeal before the High Court at Nyeri.

9. In his petition of appeal, the appellant faulted the trial court for failing to warn itself of the dangers of relying on the evidence of a single identifying witness, which evidence, in his view, was riddled with doubt. The appellant faulted the trial court for failing to comply with the provisions of Sections 33 and 77 of the *Evidence Act*, before relying on the evidence of PW4, and that the evidence of PW3 and PW4 was not translated to a language the appellant understood. He was aggrieved that the trial court rejected

his defence, and failed to acknowledge that the delay occasioned during the trial process contravened his right to a fair trial as provided under Article 50(2)(e) of the *Constitution*.

10. The learned Judge (Ong'udi, J.) after re-evaluating the record of the trial court and the evidence tendered before it, saw no reason to disturb the conviction and sentence of the appellant by the trial court.

11. The appellant is now before this Court, seeking to overturn the decision of the High Court, on the basis of similar grounds, as those proffered before the first appellate court. In summary, the appellant averred that the learned Judge erred in law: in upholding his conviction on the basis of the DNA test results which were riddled in doubt, and further on the basis of the evidence of a single identifying witness; by failing to acknowledge that the evidence of PW3 and PW4 was not translated to a language that the appellant understood, and that the provisions of Sections 33 and 77 of the *Evidence Act* were violated; by failing to find that his constitutional right to a fair trial was violated; and lastly, for rejecting his defence without any cogent reasons.

12. The appeal was canvassed by way of written submissions. The appellant appeared in person. It was his submission that the report produced by PW5 with respect to the DNA test results was unreliable, as the report was availed one year after the blood samples had been submitted to the Government Chemist. He submitted that he was not able to cross-examine PW5 as the witness testified in English, a language which he did not understand. He was aggrieved that the doctor who examined the complainant was not the one who testified before the trial court, and that the provisions of Sections 33 and 77 of the *Evidence Act* were not complied with, prior to PW5 testifying on behalf of his colleague. He contended that the age of the complainant was not sufficiently proved, and that his identification, as the perpetrator, was not watertight. It was the appellant's further submission that his defence was not challenged by the prosecution, and that PW2 fabricated the charges against him after they had a quarrel. The appellant urged that the sentence meted by the trial court, and affirmed by the first appellate court, was harsh, excessive and unconstitutional. He invited us to overturn his conviction, on the basis that the prosecution had failed to establish its case against him beyond any reasonable doubt.

13. In rebuttal, learned prosecution counsel, Mr. Naulikha, maintained that the DNA test results established that the appellant was the biological father of the complainant's child. It was his submission that the report was accurate and conclusive, and that it was not challenged by the appellant. He asserted that the prosecution laid the basis for PW4 to produce the P3 form on behalf of Dr. Karanja, who examined the complainant, in line with the provisions of Section 77 of the *Evidence Act*. Mr. Naulikha urged that the appellant failed to demonstrate how his right to a fair trial was violated, as there was no proof of any such violation. He reiterated that the evidence against the appellant was direct, overwhelming, consistent and corroborative. With respect to the sentence, learned prosecution counsel, while citing the decision of the Supreme Court in Petition No E018 of 2023, submitted that the appellant's sentence was legal, and commensurate with the offence committed.

14. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. In the case of *Kaingo v Republic* [1982] KLR 213, this Court stated thus:

> " 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. The test to be applied on second appeal is whether there was any evidence on which the trial court found as it did (*Reuben Karoti S/O Karanja v Republic* [1956 17 EACA 146]."

15. We have carefully considered the record of appeal, and the rival submissions set out above, in light of this Court's mandate. In our opinion, the issues that arise for our determination can be summed up as follows:

    i. Whether the prosecution established its case against the appellant, to the required standard of proof beyond any reasonable doubt;

    ii. whether the P3 Form was properly admitted into evidence, in accordance with the provisions of Sections 33 and 77 of the *Evidence Act*;

    iii. whether the appellant's constitutional right to a fair trial was violated; and

    iv. whether the appellant's defence was properly considered.

16. On the first issue, it was the appellant's submission that the age of the complainant, the element of penetration, as well as identification, were not sufficiently established by the prosecution. He faulted the trial court for relying on the DNA test results which he termed unreliable.

17. For the prosecution to establish the charge of incest against the appellant, it was required to establish the following: that the appellant was related to the complainant, that there was penetration, and in the case where the complainant is a minor, the age of the complainant. Section 20(1) of the *Sexual Offences Act* stipulates as follows:

> " 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."

18. The fact that the appellant is the complainant's biological father was not contested. The appellant admitted as much in his defence. As was correctly observed by the learned trial magistrate, the age of the complainant was established by the prosecution beyond any reasonable doubt. The complainant testified that she was twelve (12) years at the material time. Her testimony was corroborated by that of her mother (PW2), who told the court that the complainant was born on 28th July 2002. Her birth notification, which was availed before the trial court, confirmed that she was indeed born on the said date. There was no doubt that the complainant was a minor at the time of the sexual assault.

19. With respect to penetration, it was the complainant's testimony that the appellant defiled her on several occasions, from June 2013. She told the Court that when it first happened, she was at home with the appellant, when he took her to his bed, undressed her, and had sexual intercourse with her. He warned her against telling anyone about the incident. From then on, the complainant stated that the appellant had sexual intercourse with her on multiple occasions, until when it was discovered that she was pregnant.

20. It was PW2's evidence that she used to leave the complainant at home with the appellant, as she worked as a casual labourer. The complainant's evidence of penetration was corroborated by the medical evidence adduced by the prosecution. The Post Rape Care Form and the P3 Form established that

the complainant's hymen was broken, and that her injuries were longstanding. Further, the reports confirmed that the complainant was at the time twenty (20) weeks pregnant.

21. A DNA test was carried out. It established that the appellant is the father of the complainant's child. The DNA results were conclusive, and there was no reason to doubt them. The complaint by the appellant that the DNA report was unreliable as it was produced a year after the blood samples were taken is unfounded. The appellant was well known to the complainant, as he is her father, and therefore there was no chance of their being a case of mistaken identity. The DNA results confirmed that the appellant penetrated the complainant and impregnated her. We agree with the finding of the learned Judge that the medical evidence, considered together with the evidence of the complainant, established beyond any reasonable doubt that the complainant was sexually assaulted by the appellant.

22. The appellant further contended that the P3 Form was not properly admitted into evidence, as PW4, who produced it before the trial court, was not the author of the same. The provisions of Section 77 of the *Evidence Act* provides as follows:

> Reports by Government analysts and geologists.
>
> 1. "In criminal proceedings any document purporting to be a report under the hand of a Government analyst, medical practitioner or of any ballistics expert, document examiner or geologist upon any person, matter or thing submitted to him for examination or analysis may be used in evidence.
>
> 2. The court may presume that the signature to any such document is genuine and that the person signing it held the office and qualifications which he professed to hold at the time when he signed it."

23. This Court in *Joseph Mahende v Republic* [2019] eKLR held thus: -

> "Our interpretation of section 33 (d) of the *Evidence Act* as read with section 77(1) & (2) of the *Evidence Act*, is that evidence touching on expert opinion should be tendered by experts themselves as provided for under Section 48 of the *Evidence Act*. However, in instances where the evidence of such experts cannot be procured without unreasonable delay or expense, other experts working in similar fields of expertise and who are familiar with the handwritings of the unavailable expert can be called upon to tender such evidence as provided for under Section 33(d)of the *Evidence Act* and which evidence by dint of Section 77 (1) & (2) of the *Evidence Act*, is admissible and presumed as genuine and authentic."

24. In the instant case, the prosecution tried to procure the attendance of Dr. Karanja, who examined the complainant and filled the P3 Form, as a witness before the trial court. A look at the trial court's record indicates that summons were issued for Dr. Karanja to attend court. The prosecution produced a letter from the hospital's management, where the management indicated that they were unsure whether Dr. Karanja would be resuming his duties at the hospital. The provisions of Section 33 of the *Evidence Act* gives leeway for the production of expert evidence in cases where the author's attendance cannot be procured without unreasonable delay or undue expense. When the trial resumed on 2nd July 2015, PW4 was brought in to testify on behalf of Dr. Karanja. He stated that he worked with Dr. Karanja and was conversant with his handwriting. Further, the appellant cross-examined PW4 on the contents of the medical reports. The prosecution laid proper basis for PW4 to produce the medical reports. Accordingly, we hold that there was no sufficient reason advanced by the appellant for this Court or the courts below to reject the said evidence. The medical evidence was properly admitted into evidence.

25. The appellant was aggrieved that his right to a fair trial as guaranteed by Article 50(2)(m) of the *Constitution* was violated. It was his submission that PW3 and PW4 gave evidence in a language (English) that he did not understand. He alleged that the proceedings were not translated to him in a language that he understood. According to the trial court's record, and as was rightly observed by the learned appellate Judge, the trial court observed that the hearing would be conducted in English and Kikuyu languages, and directed that a kikuyu interpreter be availed. When PW3 testified, the learned magistrate noted that the translation was done by a court clerk known as Wachira. Further, the appellant cross-examined both witnesses using the Kikuyu language.

26. From the proceedings of the trial magistrate's court, it was clear that the appellant followed and understood what was being said in court. Indeed, he fully participated in the trial and asked relevant and insightful questions during cross-examination and when he adduced evidence in his defence. This ground of appeal lacks merit and must therefore fail.

27. The other issue relates to the appellant's defence. It was the appellant's submission that his defence was improperly rejected. The appellant, in his defence, admitted that the complainant was his daughter, and that he indeed did have sexual intercourse with her. He however told the court that he was drunk on the material night, and that since it was dark, he was not aware that he had slept with his daughter, and not his wife. The appellant claimed to have been framed by PW2, who he accused of sending the complainant to sleep on his bed.

28. Section 13 of the *Penal Code* provides for the defense of intoxication as follows:

    1. "Save as provided in this section, intoxication shall not constitute a defence to any criminal charge.

    2. Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—

        a. the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

        b. the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

    3. Where the defence under subsection (2) is established, then in a case falling under paragraph (a) thereof the accused shall be discharged, and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code (Cap. 75) relating to insanity shall apply.

    4. Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

    5. For the purpose of this section, "intoxication" includes a state produced by narcotics or drugs."

29. Other than the appellant's assertion that he was drunk, there was no additional proof availed to establish that he was intoxicated. The appellant admitted that he took alcohol out of his own free will. Further, the appellant failed to show that he was too intoxicated so as to fail to know what he was doing at the time. The evidence on record further established that the appellant defiled the complainant on multiple occasions.

30. The appellant's defence was properly dismissed as an afterthought, as the appellant failed to cross-examine PW1 and PW2, with respect to his assertion that he was drunk, and in respect of the allegation that PW2 forced the complainant to sleep on his bed, which led to him unwittingly having sexual intercourse with the complainant. The appellant, during cross- examination conceded that he was mentally stable at the material time.

31. The appellant's defence did not dent the otherwise strong and cogent evidence adduced by the prosecution that established his guilt to the required standard of proof. We find no reason to depart from the concurrent findings of fact by the two courts below. It is our considered view that the appellant's guilt was established by the prosecution to the required standard of proof, beyond any reasonable doubt.

32. The appellant, in his written submissions, challenged the sentence imposed by the trial court, and affirmed by the first appellate court, for being unconstitutional, harsh and excessive in the circumstances. The appellant cited a decision of this Court in *Julius Kitsao Manyeso v Republic*, Malindi (Court of Appeal) Criminal Appeal No 12 of 2021, and urged us to remit the case back to the trial court for resentencing.

33. The learned prosecution counsel, on his part, maintained that the sentence was commensurate with the offence committed, given that the appellant is the complainant's father. He referred us to the decision of the Supreme Court in Petition No E018 of 2023 *Republic v Joshua Gichuki Mwangi and 4 others*, and submitted that the Supreme Court determined that mandatory sentences prescribed by the *Sexual Offences Act* were not unconstitutional.

34. We note that the appellant did not challenge his sentence in his grounds of appeal before the first appellate court, as well as in his memorandum of appeal before this Court. The question of whether the sentence was unconstitutional, harsh and excessive was raised by the appellant in his written submissions before us. The learned appellate Judge however noted that the sentence meted by the trial court was legal, and in line with the proviso to Section 20(1) of the *Sexual Offences Act*.

35. Section 20 (1) of the *Sexual Offences Act*, reproduced earlier in this judgment, provides that if the charge of incest is proved, and the victim is found to be under the age of eighteen years, the accused person shall be liable to imprisonment for life.

36. In the instant appeal, the complainant was twelve (12) years old when the offence was committed, and therefore the appellant was liable to serve a term of a life imprisonment upon conviction. The Supreme Court in *Republic v Joshua Gichuki Mwangi* (*supra*) noted that the sentences imposed under the *Sexual Offences Act* are lawful, and remained lawful, as long as the penalty sections remained valid.

37. We hold that the sentence meted upon the appellant was not harsh or excessive, looking at the entire circumstances of the case. The appellant is an adult, and is also the complainant's father. He had a duty to protect his daughter. Instead, he chose to violate her, and take advantage of her innocence, continuously, for a period of over a year. Had the complainant not conceived, and thereby forced to tell on the appellant, who knows for how long the appellant would have continued to sexually abuse her. We find and hold that the sentence imposed was lawful, appropriate and justified in the circumstances.

38. In the circumstances, we are satisfied that the superior court addressed itself correctly on the law and properly carried out its duty of review and re-evaluation of evidence. The appeal before us has no merit. We hereby dismiss the appeal, on both conviction and sentence.

DATED AND DELIVERED AT NYERI THIS 4TH DAY OF OCTOBER, 2024.

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.