MKN v Republic (Criminal Appeal 15 of 2018)
[2024] KECA 1846 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1846 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 15 OF 2018

MA WARSAME, A ALI-ARONI & WK KORIR, JJA

DECEMBER 20, 2024

BETWEEN

MKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court at Naivasha (C. Meoli, J.) delivered on 13th May, 2016 in H.C.CR.A No. 40 0F 2015)

JUDGMENT

1. The appellant has filed this appeal challenging his conviction and sentence for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. Our jurisdiction is limited to dealing only with matters of law but not issues of fact that the two courts below may have made findings upon unless it is demonstrated to our satisfaction that there has been a misdirection in the evaluation of facts or findings of fact are not based on evidence at all by the said courts. See Njoroge vs. Republic [1982] KLR and Chemagong vs. Republic [1984] KLR 661.

2. The particulars of the offence were that on 27th September, 2011 and 2nd October, 2011, in(particulars withheld) area within (particulars withheld) within Nakuru County, the appellant caused his penis to penetrate the vagina of GWK, a child aged 9 years who was to his knowledge his daughter. The appellant also faced an alternative count of indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. The complainant, GWK, testified that the appellant defiled her on two occasions. On the first occasion, at around 5 p.m. He came home from work drunk while her older siblings had gone to fetch water and while her mother, who left for work on Monday and came back on Saturday, was also absent. The appellant defiled her on a seat and left her hungry.

4. On the second occasion, at around the same time, the appellant defiled PW1 on the same seat after giving her food. She testified that on the third occasion, the appellant tried to defile her and when she refused his advances, he beat her and threatened her with an axe. She then decided to escape while the father was at work, and went to her elder sister's house, who lived in the same area.

5. PW2, PM, a good samaritan, found GWK sitting dejected by the roadside near a trench on 6th October 2011 at around 2 p.m. She greeted her and questioned her on why she was there, PW1 broke down and told her that she was running away from home and was looking for her sister because her father had beaten her. She further revealed that she had not eaten since the previous night. PW2 bought her a meal and escorted her to Mai-Mahiu Police Station.

6. PW3, Police Constable Susan Mutua,who was on duty on the material day, received a report of incest concerning the appellant and PW1. She also confirmed that PW1 informed her that she had previously been defiled by their landlord, one Peter Njoroge. She recorded statements from PW1 and PW2 and issued PW1 with a P3 form.

7. Later, PW3 went to the appellant's home with PW1 but they did not find him. She however recovered the axe that the appellant allegedly used to threaten the complainant.

8. The complainant was thereafter treated at Naivasha District Hospital. PW4, Doctor Denis Wamalwa confirmed that he examined PW1 and noted that her hymen was broken and there were epithelial cells in her urine, which was indicative of trauma. He concluded that penetration could not be ruled out

9. According to PW3, the appellant was later arrested from the chief's office, where he had gone to make a follow-up on his lost ID. He was then taken to the police station and charged with aforementioned offences.

10. The appellant denied both counts and his trial ensued. When placed on his defence, he elected to give unsworn evidence and denied the charges though he conceded that PW1 was his daughter. He maintained that on 7th October 2011, he went to the police station to report that his daughter was missing. He was asked to identify himself and when he did, he claims he was chastised for leaving his children to roam the streets, arrested and charged with an offence he had not committed.

11. DW2, MMM- the appellant's wife and PW1's mother, testified that she did casual jobs and that on 27th September, 2011, and 2nd October 2011, her daughter was in school. She further stated that on 7th October 2011, she made breakfast for the appellant before he went to report to the police that the child had not slept at home. She admitted that she knew Peter Kang'the as their former landlord and that PW1 had not informed her that Peter or the appellant had defiled her.

12. Upon considering the evidence, the trial Magistrate convicted the appellant for the offence of incest and sentenced him to life imprisonment. Aggrieved by the conviction and sentence, the appellant preferred an appeal in the High Court of Kenya at Naivasha. The first appellate Judge (Meoli, J.), upon considering the appeal, rendered a Judgment upholding the conviction and sentence meted by the trial court.

13. The appellant was aggrieved and filed an appeal on grounds that; the learned judge in upholding his conviction and sentence, failed to appreciate that the ingredients of incest were not proved, the learned judge failed to note the sentence that was meted out was in a mandatory form and was therefore an error given the recent developments in the law and that the learned Judge erred in dismissing his defence.

14. The appeal was canvassed by way of written submissions by the appellant and respondent. It was the appellant's submission that the mandatory minimum sentence of life imprisonment imposed was illegal. He faulted the learned Judge of the High Court for failing to comment on the illegality of

the sentence. Reliance was placed on the cases of Phillip Mueke Maingi & Others vs. A.G., Petition No. E017 of 2021 at Machakos and Edwin Wachira & 9 Others vs. Republic, Petition No. 97 of 2021 at Mombasa High Court wherein it was held that minimum mandatory life sentences were unconstitutional and further, that the first appellate court failed to consider this fact in reaching its determination.

15. The appellant also stated that the complainant did not identify him as the person who had sexually assaulted her and that the court relied on the evidence of the complainant without any corroboration to convict him. Further, the two courts below failed to appreciate that the complainant stated that she had been previously defiled by one Peter Kang'the. Thus, it was impossible to allege that it was the appellant who defiled her given that at the time of the alleged defilement her hymen was already torn. Further, the doctor's conclusion that 'penetration could not be ruled out' was not conclusive proof of penetration, especially since the complainant's genitalia was found to be normal.

16. Lastly, it was submitted that both courts failed to consider the appellant's defence, that he was being framed by his daughter and that he was arrested when he was on his way to report her disappearance.

17. Opposing the appeal, Mr. Omutelema, learned prosecution counsel through his written submissions, took the view that the prosecution had proved all the ingredients of incest beyond a reasonable doubt, that the trial court on relying on the evidence of PW1 pointed out that she was a reliable witness who was categorical that it was the appellant who defiled her and therefore, the appellant was properly convicted and sentenced. We were therefore urged to dismiss the appeal.

18. We have duly considered the record of appeal, rival submissions, the authorities cited and the law. The appellant's main grievances are that the offence for which he was convicted and sentenced was not proved to the required standard and that the sentence meted out was unconstitutional

19. The key ingredients of the offence of incest which the prosecution must prove are: the relationship of the accused to the victim, penetration, and, that the appellant was the perpetrator of the offence. See GMM vs. Republic (2019) eKLR.

20. As regards the filial relationship between the complainant and the appellant, this was not really in dispute since it was established by the testimonies of the complainant, DW2 and the appellant, that he was the father of the complainant who was 10 years old.

21. With regard to penetration, the complainant testified as to how the appellant defiled her on two occasions on the sofa set in their house after he came home from work at about 5 p.m. while her siblings had gone to fetch water. He even threatened her with an axe, (which was recovered by PW3), when she refused his sexual advances.

22. The appellant has suggested that it was Peter Kang'ethe and not him who defiled the child. To support this proposition, he relied on the testimony of the doctor who could not attribute the complainant's lack of hymen to the appellant. The doctor was categorical that the complainant's genitalia appeared normal. In a nutshell, there was no evidence of penetration by the appellant.

23. Looking at the record, we do not find this line of defence by the appellant plausible. Even thoughthe medical report found that the complainant's genitalia was normal and could not establish the recency of the absence of the complainant's hymen, the report clearly showed that epithelial cells, which are an indication of trauma, were present in the complainant's urine. This indicated that penetration had most likely recently occurred. Furthermore, the appellant's wife testified that Peter Kang'ethe was their previous landlord and that they had moved from his plot because the house was defective. This clearly points to the appellant and not Peter Kang'the being the culprit.

24. In addition, the trial court believed the testimony of the complainant and noted that she was steadfast in her narration and remained composed even when being cross-examined by the appellant. We are satisfied that the ingredient of penetration was proved to the required standard, and with regard to the identity of the perpetrator of the offence, we are convinced by the complainant's evidence that it was the appellant-her father, who had sexually assaulted her. We find no reason for the complainant to frame the appellant with the offence. In any event, there are concurrent findings by the two courts below on the identity of the perpetrator as being the appellant. We have no reason to depart from those concurrent findings.

25. We also find the appellant's defence full of inconsistencies and incredulous. For instance, he does not bother to explain why his daughter might have run away from home or why he and his wife waited almost a day before reporting the defilement. Further, the credibility of his wife's testimony, that the child was in school when the incidents allegedly happened holds no water because as was rightly established by the prosecution, 2nd October 2011, was a Sunday and not a school day. DW2's testimony paints a picture of a mother who is desperate to shield her husband at all costs, even if it means subjecting her child to food deprivation and horrific sexual abuse by strangers and even the child's own father.

26. Lastly, the appellant has challenged the legality of the sentence imposed, specifically that the minimum mandatory sentence, as was meted out in this case was unconstitutional. The learned Judge was faulted for failing to comment on the illegality of the sentence.

27. We have reviewed the grounds of appeal raised in the High Court and they are as follows:

    a. That the learned trial Magistrate erred in law and in fact in basing the conviction on an erroneous theory of defilement.

    b. That the learned trial Magistrate erred in law and in fact by ignoring overwhelming evidence someone else defiled the child

    c. That the learned trial Magistrate erred in law and in fact in failing to consider evidence of a conflict between the appellant and his daughter over her unbecoming behaviour

    d. That the learned trial Magistrate erred in law and in fact in not finding that PW4,the investigating officer was stage managing the prosecution to defeat the ends of justice

    e. That the learned trial Magistrate erred in law and in fact in not finding that the appellant's property namely his phone and money was not returned to him.

28. It is clear that the appellant did not appeal the sentence meted out against him before the High Court, and consequently, the learned Judge of the High Court was precluded from addressing the issue, as we are. The record clearly shows that the appellant only raised the issue as an afterthought in his submissions before us. Nonetheless, we affirm that the sentence imposed on the appellant was lawful.

29. In the result, we find no merit in the appellant's appeal. The same is dismissed in its entirety.

DATED AT NAKURU THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR