BHE v Republic (Criminal Appeal E045 of 2023)
[2024] KECA 1761 (KLR) (6 December 2024) (Judgment)

Neutral citation: [2024] KECA 1761 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL E045 OF 2023

MSA MAKHANDIA, AK MURGOR & GV ODUNGA, JJA

DECEMBER 6, 2024

BETWEEN

BHE .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Garsen (S.M Githinji, J.) delivered on the 1{{^st}} of August 2023 in Criminal Appeal No. E050 of 2019)

JUDGMENT

1. The appellant, BHE was charged in the Magistrates' court with a main count of Incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars of offence being that on the 24th June, 2018 at around 00:30hours in [Particulars Withheld] within Tana River County, the appellant intentionally touched the vagina of AH, PW1 the complainant with his penis, who to his knowledge is his daughter, a child aged seven years.

2. In the alternative he 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 offence being that on the same day and location within Tana River County, the appellant intentionally touched the vagina of AH, PW1 a child aged seven years with his penis.

3. The prosecution's case was that the appellant was married to PW2. They had three children and had been married for 7 years. On 24th June 2018 at about p.m, PW 2 went to sleep in the room she was sharing with PW1, and left the appellant with his brother on the verandah. That night, when everyone had slept, the appellant woke up, removed PW1 from the bed she shared with her sibling, and took her to a mat on the verandah. He removed her panty and drew out his penis, and placed it in her vagina.

4. PW2, her mother woke up soon thereafter as she needed to go outside to relieve herself. Using her phone's torch to light her way, she noted that the appellant and PW1 were not in the room. When she went to the verandah she found PW1 lying naked as her pants had been removed and placed on the mat. Her dress had been pulled up, and she was covered with a sheet. In view of the compromising position in which she found the appellant, she quarreled with him.

5. Jillo Rophin Manassah PW3, a neighbour heard the commotion, and went to the appellant's house to find out what was happening. He knocked on the door as the two argued and when it was opened, he entered the house and enquired as to what had happened. PW2 asked the child to tell him. She hesitated at first, but then stated that her dad had done bad manners to her (Dadi amenifanya tabia mbaya). When she stood up, PW3 saw that her pants were at her ankles. When PW3 asked the appellant what he was doing, he said he was fitting a panty on PW1. PW3 then called Suleiman Nkubfa, PW4 over to the appellant's house, and when asked by PW4 what had transpired, PW2 told him to ask PW1. Once again, PW1 narrated to PW4 that her father had done obscene things to her (Baba amenifanya mambo machafu). When he asked her how she came to be on the verandah, PW1 answered that the appellant had taken her from the bed. The appellant repeated that he had only tried to fit on a new panty on PW1. PW4 then asked him, "...at 1.00am?".

6. Thereafter, they all went to the hospital at Ngao, where PW1 was examined by Daniel Innocent Mabombe, PW5, the clinical officer and a P3 form was filled. The clinical officer observed that the hymen was broken and one finger could easily penetrate. There was no visible cut or discharge, but a high vaginal swab revealed the presence of epithelial cells and pus. HIV and pregnancy tests were negative. The girl was traumatized.

7. The witnesses then proceeded to Tarasaa Police Station and on reaching the gate, the appellant escaped. They proceeded to report the incident and recorded statements. The appellant was arrested and charged with the offence of incest two days after he had escaped, and Cpl. Maurice Nzambo Ruwa PW6 of Tarassaa Police Post investigated the case.

8. According to her birth certificate, PW1 was born on 6th July 2011. On 24th June 2018, the date of the offence she was aged 6 years old, and she would turn 7 years old on 6th July 2018.

9. The appellant's defence was that after his mother died, he started quarrelling with his wife. On 14th April 2018, as they were mourning his mother's death, his wife was noticeably absent. When he asked her where she was, she accused him of being more concerned about his brothers, of having other lovers and ignoring her, and as a consequence, she vowed to fix him.

10. He stated that on 28th April 2018, he returned to Marereni, and, on 23rd June 2018 he went back home to address the domestic problems which had escalated. There was no food for him, and when he decided to visit his friends, she had said that she would also visit her friends. He was later served with food, and in the evening, he escorted his brother. He returned home to find the door open, and when he asked PW2 why it was open, she told him she would teach him a lesson. PW3 was attracted by the quarrel and called PW4. They were told to ask PW1 what the problem was and she said, "amenifanya tabia mbaya..." (He has done bad manners to me). The appellant could not believe it, and suggested that they go to the hospital. While there, PW1 stated that her mother had coached her to say that her father had done bad things to her. They went to the police station where PW3 together with other people attacked him, and so he decided to escape. He was arrested thereafter and taken to the police station.

11. The trial court upon considering the evidence found that the offence of incest was proved beyond reasonable doubt. The appellant was convicted and sentenced to serve 15 years imprisonment.

12. Aggrieved, the appellant filed an appeal to the High Court on the grounds that the prosecution did not prove its case beyond reasonable doubt; that the age of pw 1 was not proved; that there were massive contradictions in the prosecution case and his defence was not considered.

13. Upon concluding that the prosecution had proved its case to the required standards, the High Court dismissed the appeal and upheld both conviction and sentence.

14. Dissatisfied, the appellant filed an appeal to this Court on the grounds that the learned Judge was in error both law and fact in failing to: find that the investigations were shoddy; evaluate the evidence; in failing to appreciate that some witnesses whom he did not cross examine were not recalled or summoned to appear which violated his rights; in failing to appreciate that the circumstantial evidence relied on by the prosecution could not sustain a conviction; that crucial witnesses were not called to testify and that the sentence was harsh and excessive since it was imposed in the mandatory terms prescribed by the statute and his mitigation was not considered.

15. In his supplementary memorandum of appeal, the appellant further contended that the High Court was in error in law in failing to consider that the circumstances were not conducive for positive identification by recognition of the appellant, and in failing to hold that the voir dire examination of PW1 was not conducted in accordance with the requirements of section 19(1) of the Oaths and Statutory Declaration Act.

16. When the appeal came up for hearing on a virtual platform, the appellant who appeared in person, relied on his written submissions in entirety. It was submitted that the evidence of identification was far below the standard required by section 107 (1) of the *Evidence Act*; that the person whose name was not indicated in the trial proceedings was in their house and left without being noticed when PW2 and her children retired to bed; that the unnamed person should be held responsible for committing the alleged offence; that furthermore, the appellant was not caught red handed sexually assaulting PW1, and therefore his arrest was purely based on the suspicions of PW2.

17. The appellant further submitted that PW2's testimony on visual identification should not be relied upon as she was not an honest and credible witness; that her evidence that he committed the offence of incest was unproved and fabricated and based on speculation and suspicion which rendered the appellant's conviction unsafe. Regarding the voir dire examination of PW1, it was submitted the trial magistrate failed to adopt the correct procedure and finally, that the learned judge did not to re-analyze and re-evaluate the evidence as by law required.

18. On his part learned prosecution counsel, Mr. Kamanu for the State submitted that the issues raised in the appeal were matters of fact and therefore, this Court had no jurisdiction to determine them; that the only issue for determination by this Court was the sentence which the High Court found to be lenient. Counsel urged that we refrain from disturbing the sentence.

19. This being a second appeal, under section 361(1)(a) of the Criminal Procedure Code, the mandate of this Court is limited to matters of law only. Further, this Court will not interfere with concurrent findings of facts by the two courts below, unless such findings were based on no evidence, or on misapprehension of the evidence, or that the courts below acted on wrong principles to arrive at the findings. See Chemogong vs Republic [1984] KLR 611, Ogeto vs. Republic [2004] KLR 14, and Karingo vs Republic [1982] KLR 213 where this Court stated that:

> 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 it is based on no evidence. The test to be applied on a second appeal is whether there was any evidence

on which the trial court could find as it did (Reuben Karasi s/o Karanja V. R. [1956] 17 E.A.C.A 146)"

20. Having considered the record and the parties' submissions, we find that the issues of law for determination are; i) whether the offence of incest was proved; ii) whether the voir dire examination was properly conducted; and iii) whether the High Court properly re-evaluated the evidence.

There having been no submissions on the other grounds of appeal, we have no basis on which to address them.

21. As to whether the prosecution proved its case to the required standard, under section 20(1) of the *Sexual Offences Act* the offence of incest is defined as:

(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 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."

22. Therefore, for the offence of incest to be established, the prosecution must prove;

(i) that the offender is a relative of the victim;

ii) penetration or indecent Act;

(iii) that the perpetrator was identified; and

(iv) the age of the victim.

23. In the case of LOA vs Republic [2020] KECA 927 (KLR) this Court held:

> We have no doubt at all that for an offence of incest to be proved, pursuant to section 20 of the *Sexual Offences Act*, the prosecution need to prove the sex of the victim, the relationship of the victim to the perpetrator, penetration and the age of the victim. The latter requirement is for purposes of sentencing."

24. In other words, the prosecution must prove that there was penetration or an indecent act, and that the victim was a female person who to the accused's knowledge was his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

25. PW1 stated that she was 7 years old at the time of the incident. Her evidence was corroborated by PW2 and PW5, a clinical officer who produced in evidence a medical report indicating that she was 7 years old. In addition, all the prosecution witnesses confirmed that PW1 was the appellant's daughter, a fact that the appellant himself conceded. Consequently, as were the courts below, we are satisfied that PW1's age and her relationship to the appellant were sufficiently established. See JH vs Republic (Criminal Appeal 18 of 2019) [2024] KECA 228 (KLR).

26. There is no question that the appellant was also properly identified through recognition by the witnesses. PW1 was categorical that it was her dad who had sexual relations with her. PW2's evidence was that with the aid of light from her phone, as she was making her way outside to relieve herself, she came across the appellant and PW1 on the verandah. She was, therefore, able to see the appellant, who is her husband and therefore a person well-known to her.

27. PW3 and PW4, their neighbours also found the appellant, a person known to them on the verandah where the child was standing with her pants at her ankles. This evidence is unequivocal that, the appellant and no other was identified through recognition, as the perpetrator. So contrary to the appellant's intimations, this was not a case of mistaken identity.

28. Turning to whether penetration was proved, the complainant recounted how the appellant carried her from her bed to the verandah outside the house, removed her panty and did tabia mbaya to her by inserting his penis in her vagina. She gave a detailed description of the incident to PW2 who had woken up in the middle of the night and found the appellant with PW1 naked child lying on a mat on the verandah. A quarrel ensued between them that attracted the attention of PW3 and PW4 who came to find out what was happening. PW1 similarly narrated to PW3 and PW4 what the appellant had done to her. The clinical officer, PW5's evidence and the medical report, that corroborated the complainant's evidence indicated that epithelial cells and pus were present in her vagina, which was consistent with penetration. In the result, all the evidence when considered proved the act of penetration by the appellant and no other. See FMM vs Republic (Criminal Appeal 58 of 2020) [2023] KECA 673 (KLR).

29. Having re-evaluated the evidence that was before the trial court, as did the two courts below, we are satisfied that the prosecution proved the offence to the required standard, that the appellant committed the offence of incest with PW1, his daughter. Given that his conviction is on the basis of the concurrent findings of fact of the trial court and upheld by the High Court, we have no reason on which to interfere with the conviction.

30. Regarding the contention that the High Court failed to reevaluate the evidence, we have re-analysed the judgment and are satisfied that the first appellate court carried out its duty of reevaluating the evidence so as to reach its own independent conclusion. See Kamau vs Mungai [2006] 1KLR 150. The learned Judge took into account the prosecution witnesses' evidence, and after subjecting it to a fresh examination, weighed it against the appellant's defence which it found to be implausible, and came to the conclusion that the appellant committed the offence. As such, the complaint that the High Court did not re- evaluate the evidence is unfounded.

31. As concerns the appellant's assertion that the voir dire examination was not properly conducted on PW1, this Court in the case of JMM vs Republic [2020] KECA 620 (KLR) whilst addressing similar circumstances held:

> The procedural prerequisite before reception of evidence of a child of tender years under section 19 of the *Oaths and Statutory Declarations Act* is that if, after the voire dire examination, the trial court is satisfied that the child understands the nature of the oath, the court proceeds to swear the child and receives the evidence on oath. However, if the court is not so satisfied, the unsworn evidence of the child may nonetheless be received if, in the opinion of the court, the child is possessed of sufficient intelligence and understands the duty of speaking the truth. See: Johnson Muiruri vs. Republic (1983) KLR 445."

32. The proceedings in the record are clear that on 26th September 2018, the trial magistrate conducted a voir dire examination on PW1. As the court was not satisfied that PW1 understood the meaning of an oath, it directed that she gives unsworn evidence. Following her testimony, the appellant was provided an opportunity to cross examine her, which he did. The appellant did not specify in what way the voir dire examination fell short of the requirements of the law. As a consequence, this ground is also without merit and as such fails.

33. Finally, the appellant has complained that the sentence imposed was harsh or excessive. The record discloses that the trial court sentenced him to 15 years imprisonment, which sentence was upheld by the High Court. When cognizance is taken that a life sentence is prescribed for the offence of incest, we consider that the sentence imposed on the appellant was lenient, and far from being commensurate with the offence of incest committed against the child of tender years, who was his own daughter. Needless to say, as set out above, section 361(1) of the Criminal Procedure Code, specifies that where appeals lie from the subordinate courts, as in the case before us, this Court is expressly barred from determining matters of fact. The appellant's appeal on the severity of the sentence being a matter of fact, falls outside the purview of this Court's jurisdiction. See Republic vs Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR).

34. In sum, the prosecution having proved its case to the required standards, we uphold the conviction and sentence of the trial court as confirmed by the High Court.

The appeal is without merit and is accordingly dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

ASIKE- MAKHANDIA

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

G.V. ODUNGA

I certify that this is a true copy of the original

Signed

Deputy Registrar