DM v Republic (Criminal Appeal 79 of 2022) [2023] KECA 629 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 629 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 79 OF 2022

SG KAIRU, JW LESSIT & GV ODUNGA, JJA

MAY 26, 2023

BETWEEN

DM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Voi (J. Kamau, J.) delivered on 17th December 2015 in High Court Criminal Appeal No. 35 of 2015)

JUDGMENT

1. The appellant, DM, is in this second appeal challenging his conviction and sentence. He was convicted for the offence of incest contrary to section 20(1) of the *Sexual Offences Act* by the Senior Principal Magistrate's Court at Voi in a judgment delivered on 31st March 2015 and sentenced to life imprisonment. His first appeal was before the High Court at Voi (J. Kamau, J.) which upheld the conviction but set aside the life imprisonment and substituted the same with a prison term of 25 years from the date of conviction.

2. The appellant appeared before us virtually via video link from Manyani Prison on 14th November 2022 and relied on his supplementary grounds of appeal and written submissions. His complaints are that the High Court failed to appreciate that the charge sheet was defective for duplicity, a violation of his right to fair trial under article 50(2)(b) of the *Constitution*; that voire dire examination on PW1, a minor, was not conducted by the trial court; that his identification was not positive; and that the prosecution case was marred with inconsistencies and contradictions. He also complains that the sentence to imprisonment for 25 years imposed by the High Court is harsh and excessive.

3. The appellant was charged under three counts. The charge under the first count was for the offence of incest by male contrary to section 20(1) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence being that on 17th September 2014 at [Particulars Withheld] Village within Taita Taveta

County, he caused his penis to penetrate the vagina of REM a child aged 14 years having full knowledge that REM was his own daughter.

4. Under the second count, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence being that on 17th September 2014 within Taita Taveta County, he caused his penis to penetrate the vagina of REM a child aged 14 years.

5. Under count three, he was charged with the offence of sexually exploiting a child contrary to section 15 as read with section 20 of the *Children's Act*. The particulars of the offence being that on 17th September 2014 within Taita Taveta County, he coerced REM a child aged 14 years to engage in sexual intercourse with him.

6. There was also an alternative charge 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 17th September 2014 within Taita Taveta County, he committed an indecent act with a child, namely unlawfully and intentionally causing his penis to come into contact with the genital organs of REM a child aged 14 years.

7. The facts as presented through the prosecution witnesses are that the appellant and his wife RMM (PW2), and their five children, amongst them their first-born child, REM (PW1) aged 14 years; a son aged 10 years; and three daughters aged 6, 4 and 2.5 years, were at their home on the night of 16th/17th September 2014. According to PW2, she was sleeping with her husband, the appellant, that night and at 3.00 a.m., the appellant left her and went to the room of PW1. In the words of PW2:

> " On 16/9/14, at night I had slept in the same bed with the accused. At 3.00 pm (sic) he left me and went to the room of PW1. I was sleepy when I heard PW1 shouting that the accused had defiled her. I woke up and put on the lamp. I found the accused having tied a piece of cloth at the waist. I went to the room of PW1 and found her. The pantie had been removed and was below her thighs. I asked PW1 whether it was true she had been defiled by the accused. She confirmed it and started crying."

8. PW2 stated that she asked the appellant why he had done so but the appellant denied; that thereafter, PW2 in the company of PW1 and the appellant went to the appellant's grandmother, (who testified on his behalf as DW2) and reported to her; that DW2 defended the appellant but when DW2 decided to examine PW1, the appellant started pleading for forgiveness; that thereafter PW2 in the company of EMP (PW3), a village elder, took PW1 to Ghazi Dispensary where it was confirmed that PW1 had been defiled. Later she took PW1 to Voi District Hospital where she was treated.

9. At Ghazi Dispensary, Richard Mwandali (PW8) examined PW1 who was distressed and crying. He did vaginal examination and noted a discharge from the vagina. The hymen was broken. He did a vaginal swab which he sent to Voi District Hospital for test for spermatozoa, but none were seen. He prepared a report which he produced before the trial court as an exhibit.

10. At Voi District Hospital where she was seen by Dr. Nashat, PW1 was given antibiotics, analgesic and ARVs. The P3 Form produced at the trial by Dr. Maha Salim (PW7) on behalf of Dr. Nashat indicated that on examination, PW1 had a whitish discharge with foul smell from her vagina and she had no hymen.

11. In her testimony, PW1 stated that she was 14 years old in Standard 5 in a primary school in Ghazi Location and that on the night of 16th September 2014 she was asleep in her room at home when "at 3.00 am" her father, the appellant, went into her room, climbed on her bed and defiled her; that she

called her mother, PW2, and told her that the appellant was having sex with her; that her mother came and lit the lamp and found that the appellant had removed her pantie and it was below her thighs and PW2 started crying. She testified, as PW2 did, that when PW2 enquired from the appellant why he had done so, he denied but when PW2 said she would report the matter to the grandmother, DW2, the appellant begged her not to report; that when DW2 was called she defended the appellant; and that PW2 then called PW3 and together they went to Ghazi Dispensary where PW1 was examined.

12. At 4.00 a.m. on 17th September 2014, JM (PW4), a neighbour of the appellant and PW2, heard someone crying and proceeded to the appellant's home. On getting there, PW1 informed her that the appellant had defiled her. PW2 and the appellant were present. PW4 testified that she got a torch and "checked PW1's private parts" and found "some discharge"; and that the appellant started pleading for forgiveness from PW2 but PW2 said that the matter was to be taken to the police. PW4 then left.

13. On 17th September 2014 at 8.00 a.m., the village elder, EMP (PW3) was at his home in Ghazi sub-location, [Particulars Withheld] village when he received a report of the incident and proceeded to the appellant's home. At the home, the appellant pleaded to have the matter amicably resolved unsuccessfully. He accompanied PW1 and PW2 to hospital where PW1 was examined. He thereafter called the Assistant Chief who called the police. The appellant was arrested "while trying to escape".

14. The Assistant Chief, Ghazi sub-location, Elijah Mwakazi (PW5) stated that he was in his office on 17th September 2014 when he got a report that the appellant was suspected of having defiled PW1. He proceeded to Ghazi trading center where PW3 narrated to him what had transpired. He thereafter arrested the appellant, called the police who re- arrested the appellant.

15. The investigating officer, Corporal Kanyi Charles (PW5) attached to Voi Police Station stated that PW1 accompanied by her mother, PW2, and the area Assistant Chief reported the incident at the police station on 17th September 2014; and that he interrogated the appellant, detained him and thereafter charged him with the offence.

16. In his defence, the appellant stated that he was at home on 16th September 2014 in the evening when two people came and sat at the sitting room one of whom wanted to marry the complainant but later left; that he started interrogating PW2 and a quarrel ensued after which she went to where PW1 was sleeping and started shouting and alleging that he had defiled her; that he was furious and they went to the grandmothers compound who told PW2 to leave the appellant alone; that in the morning a neighbour and a village elder came and ordered that PW1 be taken to the dispensary; that they all went to the Ghazi Dispensary where PW1 was attended to; that he asked to be examined but that did not happen; that the Assistant Chief together with the village elder arrested him while PW1 and PW2 were referred to Voi District Hospital; that the police arrested him at 4.30 p.m. and he was later charged with the offence.

17. The appellant's grandmother, SG (DW2) stated in the appellant's defence that she examined PW1 "and found she was alright, and nothing had been done." FMJ (DW3) stated that the appellant called her while in police custody and she visited him.

18. In convicting the appellant for the offence of incest by male contrary to Section 20(1) of the *Sexual Offences Act*, the trial magistrate found that the appellant was a person well known to PW1 and it was possible for PW1 to recognize him; that there was only one other male in the house at the time, namely, the appellant's 10 year old boy who could not possibly have defiled PW1; that there was sufficient evidence that the appellant defiled PW1; and that there was no dispute that she is his daughter. As already stated, the appellant was then sentenced to life imprisonment.

19. The appellant's first appeal before the High Court on grounds that the charge sheet was defective; that PW1's evidence was not corroborated; that the age of PW1 was not proved by production of an age assessment report; that the age of injuries did not connect to date of alleged offence; and that his alibi was not considered, was dismissed in a judgment delivered on 17th December 2015 hence the present appeal.

20. Before this Court, the appellant, in his written submissions urged that the charge sheet is defective since it has three different counts; that although the charges are distinct, the particulars of the offence in respect of the three charges are similar and the appellant did not know, and lacked clarity as to which particular offence or charge to respond to or to defend himself against as the charges carried different sentences in the event of conviction; that the duplication of the charges violated his right to fair trial; that to the extent that there were three main charges, the charge did not accord with the evidence and was therefore defective under Section 214(1) of the *Criminal Procedure Code*. In that regard, the case of *Jason Akumu Yongo v Republic* [1983] eKLR; *Paul Katana Njuguna v Republic* [2016] eKLR were cited.

21. The appellant also took issue with the trial court for failing to conduct a *voire dire* examination with respect to PW1 to form an opinion whether she understood the nature of an oath or possessed sufficient intelligence and understanding of the duty to speak the truth. That before recording her evidence, the trial court should have done that as PW1 was a minor. The case of *Johnson Muiruri v Republic* [1983] KLR 445 and *Joseph Opando v Republic*, Cr. App. No. 91 of 1999 was cited.

22. On identification, the appellant submitted that the offence took place at night in total darkness and the appellant's identification was not positive; that from her evidence, it is not clear at what point she saw the appellant and from what light source she was able to see him; that neither does the evidence of PW2 give assurance that the appellant was positively identified; and that considering, as held in *Kiarie v Republic* [1984] KLR 739, that it is possible for a witness to be honest but mistaken, the allegation by PW1 that it was the appellant who defiled her is mere speculation.

23. The appellant submitted that the prosecution case was marred by contradictions and inconsistencies and the conviction is therefore not safe; that the High Court failed to evaluate the contradictory evidence; that there was contradiction between the evidence of PW1 and PW2 as to the location of the appellant in that PW1 stated that the appellant was found at the door to the room of PW1 while PW2 stated that she found the appellant seated on their matrimonial bed; and that in the circumstances the offence was not proved beyond reasonable doubt.

24. As regards sentence, the appellant submitted that Section 8(3) of the *Sexual Offences Act* under which he was convicted provides for mandatory minimum sentence of 20 years, with the result that the sentence was predetermined by the legislature in violation of the doctrine of separation of powers; that even though the sentence meted out by the trial court was reduced, it remains harsh and unreasonable.

25. In his brief oral arguments, learned Prosecution Counsel Mr. Alex Gituma holding brief for Mr. Ngiri, learned counsel for the respondent submitted that a second appeal must be confined to matters of law under Section 361 of the *Criminal Procedure Code* and on the strength of the case of *Karani v Republic*; that the issues raised by the appellant in this appeal are matters of fact with the possible exception of the claim that the charge sheet is defective; that in that regard it is clear the charge was incest and the particulars of the offence were provided; that the High Court properly evaluated the evidence and rightly upheld the conviction; that there are concurrent findings by the two courts below and there is no basis for this Court to interfere; that the sentence imposed by the trial court was reviewed by the High Court and there is no basis for a further review.

26. The issues for consideration are whether the charge sheet was defective for duplicity; whether the trial court erred in failing to conduct voire dire examination in respect of PW1; whether the appellant was positively identified; and whether the prosecution case was marred by contradictions and inconsistencies and whether the High Court erred in failing to properly evaluate the evidence in that regard.

27. As regards the complaint of a defective charge sheet, whereas before the High Court, the appellant had alluded to a defective charge sheet, there was no mention of the nature of defect. Indeed, in the submissions of the appellant's counsel before the High Court, the matter was not addressed at all prompting the learned Judge of the High Court to state in the impugned judgment that "the appellant did not submit on the same or demonstrate how the charge sheet was defective". The issue of duplicity of the charge, the question of charging of the same offence in more than one count of an indictment, was therefore not raised before the High Court and has been taken up for the first time before this Court.

28. That said, in *Mwaniki v Republic* [2001], EA 158 (CAK), this Court that:

> " Where two or more offences were charged in the alternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he had been convicted."

29. In *Paul Katana Njuguna v Republic* [2016] eKLR, this Court considered the question of duplex charges at length. The Court expressed that the rule against duplicity is to enable an accused person to know the case he has to meet. The Court stated:

> " As we have already noted the rule against duplicity is to enable an accused know the case has to meet. We accept as the correct position in law that uncertainty in the mind of the accused is the vice at which the rule against duplicity is aimed. If there is no risk of confusion in the mind of the accused as to the charge framed and evidence presented, a charge which may be duplex will not be found to be fatally defective."

30. Guided by those principles, we have set out above, the distinct charges, with which the appellant was charged, namely, incest by male contrary to Section 20(1) of the *Sexual Offences Act*; defilement of a child contrary to Section 8(3) of that *Act*; sexually exploiting a child contrary to Section 15 as read with Section 20 of the *Children's Act*; and an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. Ultimately, the offence for which he was convicted was the offence of incest by male contrary to Section 20(1). In that regard, the trial court pronounced:

> " The accused is the father of PW1 and that fact has never been in dispute. Consequently, the court finds that the prosecution has proved its case to the required standard and the accused is convicted as charged with incest by male contrary to section 20(1) of the *Sexual Offences Act*. I make no finding in respect of the other offences the accused is charged with."

31. The Court in *Paul Katana Njuguna v Republic* endorsed the pronouncement by the predecessor of the Court of Appeal in *Cherere s/o Gakuli v R.* [1955] 622 EACA, that:

> " ...the test still remains as to whether or not a failure of justice has occurred. In our opinion, the result of the application of this test must depend to some extent upon the circumstances of the case and the nature of the duplicity."

32. In the present case, the record shows that the appellant suffered no confusion when the charge, as framed, was read to him and when the witnesses testified, he fully cross- examined them. He raised no complaint before both the trial court and before the High Court. Assuming the charge sheet to have been defective for duplicity, there is no demonstration that a failure of justice occurred. We find no merit in this complaint.

33. The complaint that the trial court erred in failing to conduct *voire dire* examination in respect of PW1 was also not raised before the High Court. Nonetheless, the record does not show that a *voire dire* examination was conducted by the trial court prior to the testimony of PW1 when she testified before the trial court on 25th September 2014. But was it necessary to do so in this case? In *Odhiambo v Republic* (Criminal Appeal 85 of 2016) [2022] KECA 1082 (KLR) (7 October 2022) (Judgment) this Court dispelled the notion that *voire dire* examination is required for witnesses under the age of 18. The Court stated:

> " ...the trial magistrate decided to conduct a voir dire examination of the complainant "because she appeared to be below 18 years old." This was a misapprehension of the law, as voir dire is required only when the proposed witness is a child of tender years so as to establish the competence of the witness' to testify intelligibly and to establish whether she understands the nature of an oath and the obligation to tell the truth. A child of tender years is, in the absence of special circumstances, one of an age or apparent age of 14 years and below."

34. In *Maripett Loonkomok v Republic* [2016] eKLR this Court cited the case of *Kibageny Arap Kolil v Republic* 1959 EA 92 in upholding the position that "a child of tender years" meant a child "under the age of 14 years".

35. In the present case, the age of the complainant (PW1) was indicated in the charge sheet as 14 years. In her testimony, the complainant stated, "I am 14 years old and go to school at...Primary School...I am in Std.5". Her mother PW2 stated that "PW1 is our firstborn aged 14 years. She was born 2000". The P3 Form that was produced also indicate the age of PW1 as 14 years. The precise date of PW1's birth in 2000 was not given. However, there is nothing on record that suggests that there would have been a basis for the trial court to conclude that PW1's age or apparent age to have been below 14 years at the time of trial. We find that her evidence was properly taken and there is no merit in this complaint.

36. As to identification of the appellant, apart from this being a matter of fact outside the ambit of our jurisdiction on a second appeal, there are concurrent findings of fact by the trial court and the first appellate court that the appellant was the perpetrator of the offence. We can only interfere with those findings if the same are not based on evidence at all or are based on a perversion of the evidence, or unless on the totality of the evidence, no reasonable court properly directing itself would arrive at such findings. See *Adan Muraguri Mungara v Republic* [2010] eKLR.

37. Next is the complaint that the prosecution evidence was marred by contradictions and inconsistencies. In that regard the appellant has taken issue with the statement by PW1 that her mother, PW2, found

the appellant at the door of PW1's room while PW2 stated that the appellant sat on the bed. We are not persuaded that this was a material discrepancy. Some discrepancies in testimony are expected as no two witnesses are expected to perceive the same phenomenon in exactly the same way or to recall exactly the same thing to the minutest detail. This Court in *Erick Onyango Odeng' v Republic* [2014] eKLR citing with approval the Uganda Court of Appeal case of *Twehangane Alfred v. Uganda* Criminal Appeal No. 139 of 2001, [2003] UGCA, 6 in which it was held that:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution case."

38. In this case, the contradictions and inconsistencies alluded to, be they such, are in our view minor and do not warrant the rejection of the prosecution evidence.

39. The sentence, as submitted by counsel for the respondent, was reviewed by the High Court on first appeal, the life sentence set aside and substituted with a custodial sentence of 25 years. The same is legal and there is no basis for us to again interfere with it.

40. In the end, the appeal fails and is dismissed in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF MAY 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

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J. LESIIT

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