SKM v Republic (Criminal Appeal 62 of 2020)
[2023] KECA 758 (KLR) (22 June 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 62 OF 2020

MSA MAKHANDIA, AK MURGOR & S OLE KANTAI, JJA

JUNE 22, 2023

BETWEEN

SKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court at Nairobi (Kimaru, J.) delivered on 27th March 2019 in Criminal Appeal No. 75 of 2018)

JUDGMENT

1. By an amended charge sheet, the appellant, SKM was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars were that on diverse dates between 7th February 2016 and 28th February 2016 within Nairobi County, he intentionally caused his penis to penetrate the vagina of the complainant, SM a girl aged 9 years who to his knowledge was his daughter.

2. He also faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. He pleaded not guilty to both counts and during the trial, the prosecution called five witnesses, while the appellant gave an unsworn statement of defence and called no witnesses. He was nonetheless convicted and sentenced to life imprisonment.

3. He was aggrieved by the trial court's decision, and appealed to the High Court which dismissed the appeal in its entirety.

4. The appellant was dissatisfied with the High Court's decision and appealed to this Court on grounds; that the voir dire examination was not properly conducted by the trial court; that penetration was not proved; that the trial court relied on insufficient and uncorroborated evidence to conclude that SM was defiled; that the prosecution failed to prove its case to the required standard which rendered the conviction unsafe.

5. Both the appellant and the respondent filed written submissions and when the appeal came up for hearing on a virtual platform, the appellant who appeared in person from Kamiti Maximum Prison informed us that he would rely on his submissions entirely. In the submissions, he stated that the *voir dire* examination was not properly conducted, as from the nature of the questions put to SM, it was not possible for the trial court to appreciate whether she understood the importance of telling the truth and the nature of the oath that she was about to take.

6. He further submitted that penetration was not proved because the medical reports of Medicins sans frontiers and the P3 Form were contradictory and that neither report confirmed that there was penetration, either partial or complete; that further, neither of the medical reports specified that her hymen was broken, but that it was imperforated; that the trial magistrate omitted to specify that the vaginal walls were hyperemic; and that as a consequence, it was not proved beyond doubt that there was penetration.

7. The appellant also complained that the trial commenced without him having been prepared; that he had indicated to the court that he had a bullet in his chest after he was shot in 2014, and could not talk; that he had requested to go to Kenyatta National Hospital where he was being treated for the bullet injury; that since he was feeling unwell, the trial ought not to have commenced.

8. Finally, the appellant submitted that the prosecution failed to prove its case beyond reasonable doubt; that all the ingredients for the offence were not proved to the required standard, and therefore the conviction was unsafe.

9. Ms. Ngalyuka, learned prosecution counsel for the State also relied on her written submissions, where it was submitted that penetration was proved from the testimony of SM, and the medical evidence adduced by Dr. Kezzie Shako, PW5 that revealed that the labia minora was hyperemic and showed signs of injury and there were healing bruises along the entry point of the vaginal canal caused by a blunt object at the genitals; that whereas the medical evidence also disclosed that the hymen was imperforated and that nothing could enter or get outside, this did not rule out penetration.

10. Regarding the voir dire examination, it was submitted that it was properly conducted and the trial court concluded that the child was intelligent and understood the nature of telling the truth. The case of *Maripett Loonkomok vs Republic* (2016) eKLR was relied on to support the argument that even where the *voir dire* is not properly conducted, this cannot vitiate an entire trial.

11. It was also submitted that the appellant's defence was considered; that the differences he had with his wife were not borne out by the facts of the case.

12. We have considered the record of appeal, the submissions and the applicable law. This being a second appeal, the mandate of this Court is limited to consideration of matters of law as provided in section 361 of the *Criminal Procedure Code*. The law also enjoins this Court to defer to concurrent findings of fact by the two courts below as was succinctly expressed in *David Njoroge Macharia vs Republic* [2011] eKLR thus;

> " That being so only matters of law fall for consideration – see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings – see *Chemagong v. R* [1984] KLR 611."

13. Having regard to the aforestated guidance, the issues that fall for consideration are;

i. whether the voir dire examination of SM was properly conducted;

ii. whether the trial court could be faulted for proceeding with the trial;

iii. whether the offence of defilement was proved to the required standard; and

iv. whether a grudge existed with the appellant's wife.

14. Turning to the complaint against the conduct of the voir dire examination by the trial court, the appellant complained that the trial magistrate failed to ask the complainant whether she understood the meaning and nature of the oath before allowing her to give sworn evidence. In considering this complaint, the High Court analysed the record and confirmed that the trial magistrate asked the complainant if she understood the social duty of telling the truth to which the complainant affirmed that she understood what it meant to tell the truth because she went to church and knew what the Bible was. The High Court also observed that the trial court did not specifically ask SM what was meant by giving evidence on oath, but the judge was nevertheless satisfied that there was substantial compliance in the conduct of the voir dire examination, and that the trial magistrate ensured that SM understood the importance of telling the truth in court under oath.

15 We have carefully considered the record together with the questions that were put to the SM by the trial magistrate in the *voir dire* examination. The questions included *inter alia*;

> Question: Do you know why people tell the truth?
>
> Answer: Yes, I was told by my mum. Or beaten. I will tell the truth.
>
> Question You go to Church?
>
> Answer. Yes
>
> Question: Do you know the bible?
>
> Answer: It is for Church?
>
> Question: Will you tell the truth?
>
> Answer: I will tell the truth."

As a consequence of which the trial magistrate recorded;

> " The child is intelligent, and understand the nature of telling truth and oath. Will give sworn evidence."

16. Section 19 (1) of the *Oaths and Statutory Declarations Act*, specifies the procedure of receiving evidence of a child of tender years. It provides that;

> " Where in any proceedings before any court or person having by law or consent of parties authority to receive evidence, any child of tender years called as a witness does not, in the opinion of the court or such person, understand the nature of an oath, his evidence may be received, though not given upon oath, if, in the opinion of the court or such person, he is possessed of sufficient intelligence to justify the reception of the evidence, and is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth".

17. In other words, it is the court's sole prerogative to determine whether a child of tender years will testify under oath or not.

18. In the instant case, following the voir dire examination, the trial court having had the opportunity to see SM and hear her answers, concluded that SM understood the solemnity of the proceedings and the importance of telling the truth in court under oath, the court under its sole prerogative ordered SM to give sworn testimony. In the circumstances, we are satisfied that the *voir dire* examination was properly conducted, and dismiss this complaint.

19. Turning to the complaint that the trial court proceeded with the trial despite the appellant being unwell. We have considered the record, and it is true that on the date of the hearing on 24th August 2016, the appellant complained that he was unwell. In ordering that the hearing to proceed, the trial magistrate had this to say;

> " The Accused says he is sick since he has a bullet lodged in his chest. He looks healthy as I do not have any medical document to show that it is their (sic). He has been living with the bullet since 2014. Clearly it did not stop him from doing his duties, and it (sic) incapacitate him from prosecuting the case today. The minor travelled from Mwingi he (sic) is a child and the Accused has read the witness statements to the child and mother. There is no prejudice if the case to not proceed and the evidence of the child. Case to proceed".

20. We have gone through the record of proceedings, and as indicated by the trial magistrate, there was no medical evidence that showed that the appellant suffered from an ailment that impaired his ability to proceed with the trial. When the trial proceeded, he cross examined SM. After the charge sheet was amended, he was provided with another opportunity to cross examine, SM, which he declined to do. Thereafter, he actively participated in the proceedings and cross examined all the witnesses. We are therefore satisfied that he was not in any way prejudiced with the commencement of the proceedings. This ground is without merit.

21. The next issue is whether the offence was proved to the required standard. So as to determine this issue, we consider it essential to briefly outline the prosecution's case. The complainant, SM a child aged 9 years at the time stated that, the appellant would defile her on Sundays while her mother was at work. He would call her to his bed, remove her clothes, spread her legs and sexually assault her and that she felt pain. He would cover her mouth to prevent her from screaming, and after he was done, he would instruct her to wipe herself with a piece of tissue paper. Thereafter, he bought her yoghurt and ordered her not to tell anyone about what he had done to her. SM informed her teacher in school that her father had sexually assaulted her and in turn, her teacher informed her mother.

22. PW2 was SM's teacher. She stated that on 25th February 2016 whilst teaching students about the HIV virus transmission, she asked the students if any of them had been touched inappropriately on their private parts, to which two students, including SM responded. SM narrated to her, how her father had intercourse with her, after which he would buy her yoghurt, and warn her against telling anyone about the incidents.

23. SM was subsequently examined by Barbara Sarano Kere PW3 a clinical officer with Medicins Sans Frontiers who stated that her vaginal walls were hyperemic. She had no visible injuries on her vagina; that her hymen had a congenital abnormality and was imperforated. She produced a medical Post Rape Care form.

24. Dr. Kezzie Shako PW5, of Police Surgery, Nairobi Area also examined SM on 8th March 2016. She noted that her labia minora was hyperemic and showed signs of injury. She had bruises on the entry point of her vaginal canal that was healing. The hymen was pink, centered and normal. She explained that SM's hymen was imperforated, as nothing could go in or come out, and it could only be opened if a surgery was conducted. She however noted injuries on her external genitalia. On cross examination,

she stated that the injury on the genitals was common with sexual assault and that sperms could be found, but it was not mandatory to find sperms, blood or an injury to determine that sexual assault had occurred.

25. The case was investigated by Cpl Leah Muthoni, PW4, who narrated the findings of her investigation and arrested the appellant for the offence of incest.

26. The appellant was placed on his defence and stated that on 9th March 2016 he left his place of work and proceeded home. He found his wife with a strange man in the house; that the man hit him and left; that his wife and daughter followed the man. The next morning 4 policemen came to his house, arrested him and took him to the police station. He claimed that it was as a result of a land dispute between himself and his wife that he had been framed for the offence.

27. In determining whether the prosecution proved its case to the required standard, it is necessary that three key ingredients for the offence of incest be proved. These are, the complainant's age, the appellant's identity and relationship to the complainant and whether there was penetration.

28. Our assessment of the record does not disclose that either SM's age or the appellant's identity were in any way challenged. The birth certificate that was produced showed that SM was aged 9 years at the time. Nor was it controverted that the appellant was her father. The birth certificate referred to him as her father, and during the proceedings he also referred to her as his daughter.

29. What was in heavy contestation was whether penetration was proved. The appellant's case is that though SM claimed to have been defiled on several occasions, her evidence was not corroborated by the two medical reports which were contradictory and reached different conclusions. The appellant contended that PW3 was better placed to have established whether there was penetration, either partial or complete. He asserted that the courts below should have resolved the contradictions in his favour.

30.. In so far as the medical evidence is concerned, the medical report of PW3, stated that SM's genitalia was normal; the vaginal walls were mildly hyperemic with no injuries seen, and the hymen was imperforated.

31. On the other hand, Dr. Shako who conducted the second medical examination also testified that SM's external genitalia was normal. But the labia minora was found to be hyperemic and showed signs of injury. There were healing bruises along the entry point of the vaginal canal. The hymen was pink and central hena normal. The injuries were caused by blunt object at the genitals. On cross examination, she stated that the injuries on the genital were common with sexual assault.

32 The doctor observed that the MSF medical report had similarly found that the hymen was imperforated, and it could only be opened by a surgery.

33. Upon considering this evidence, the trial court concluded that;

> " ... the prosecution has proved beyond reasonable doubt that the accused indeed penetrated the victim. The evidence of the minor is consistent and is well corroborated with the medical evidence of PW3 and PW5. I have considered the submissions of the defence and do find that the submission that there was no defilement, since the hymen is intact to be misplaced. It is clear the child (sic) hymen had a deformity and cannot be penetrated until a surgical operation is done."

34. Addressing the same question of penetration, the High Court observed;

> " This court notes that the complainant was examined about a week after the last alleged sexual assault occurred. The Post Rape Care form presented into evidence by PW3 indicated that the complainant showed signs of peri-labial penetration. The hyperemic vulva as well as the healing injuries along the entry point of her vagina point to the fact that there was partial penetration.
>
> The fact that the hymen was intact does not itself imply that there was no penetration. As stated earlier in this judgement penetration, encompasses partial or complete insertion of the genital organs of a person into the genital organs of another person".

35. The High Court continued;

> " The complainant narrated to the court how the Appellant, her father sexually assaulted her. She stated that he inserted his penis into her vagina. After he ejaculated, he instructed her to wipe herself using a piece of tissue. This court is of the view that the evidence given by the complainant was sufficiently corroborated by the reddening of the vulva area and healing injuries on her, inner labial walls and at the entry point of the vagina. This is further guided by the post-rape care form which indicated upon examination of the complainant that there was peri-labial penetration. It is therefore clear that the evidence adduced clearly showed that the prosecution did indeed prove penetration."

36. The above clearly shows that the two courts below were satisfied that penetration was proved to the required standard. Similarly, we have reassessed the evidence and adopt the concurrent findings that penetration indeed occurred.

37.. In so far as the appellant's argument that the MSF medical report and the P3 form were contradictory was concerned, we have carefully assessed the reports on record, and find that they both indicated that the vaginal wall was hyperemic, but her hymen was intact due to a congenital condition. The P3 form went further to indicate that there were healing injuries on her inner labial walls, and at the entry point of her vagina.

38. Section 2 of the *Sexual Offences Act* specifies that penetration can be partial or complete. And in the case of *George Owiti Raya vs Republic* [2013] eKLR; it was held that:

> " There was superficial penetration because there was injury on the vaginal opening as the medical evidence has indicated and further there was a whitish-yellow foul smelling discharge seen on the genitalia...it remains therefore that there can be penetration without going past the hymen membrane...It matters not whether the complainant's hymen was found to be intact, suffice it that there was evidence of partial penetration. (emphasis ours)"

39. In effect, it is evident that the establishment of penetration does not require that it be demonstrated that the hymen was ruptured. Bruises, abrasions and injuries in the internal or external area of the vagina are in our view, sufficient proof of penetration either partial or complete. The fact that her hymen was intact due to a congenital deformity did not in any way negate the act of penetration.

40. In addition, to the medical evidence, SM graphically testified how the appellant placed her on his bed, sexually assaulted her and thereafter told her to wipe herself with tissue paper. The ordeal was painful to her, and she immediately told her teacher what she had endured. The trial court having found her

evidence to be cogent and reliable, and satisfied that SM had been truthful, was entitled to convict the appellant on the basis of her evidence in accordance with section 124 of the *Evidence Act*.

41. Given the foregoing, and in view of the concurrent findings of the trial court and the High Court, we have no plausible reason upon which to differ. We too are satisfied that penetration was proved without any doubt, and as such this ground is without basis.

42. In his defence, the appellant alleged that a grudge that existed between himself and SM's mother was the reason for the charges he faced. However, from the record, it is apparent that it was SM, as the victim of the sexual assault, and her teacher, PW2, and not his wife, that finally lodged the report of incest to the police. On this basis, his assertions of the existence of a grudge with his wife leading to the charge is implausible, and the courts below were right in disregarding it. This ground therefore fails.

43. In view of our findings above, we are satisfied that the courts below came to the correct conclusion that the prosecution proved its case to the required standard, and likewise we uphold the conviction and sentence.

44. Accordingly, the appeal is without merit and is dismissed in its entirety.

45. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTYREGISTRAR