FMM v Republic (Criminal Appeal 58 of 2020)
[2023] KECA 673 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 673 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 58 OF 2020

MSA MAKHANDIA, AK MURGOR & GWN MACHARIA, JJA

JUNE 9, 2023

BETWEEN

FMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court at Kiambu (Majanja, J.) delivered on 7th January 2020 in Criminal Appeal No. 62 of 2019)

JUDGMENT

1. The appellant, FMM 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 March 8, 2016 and March 10, 2016 in Limuru Location within Kiambu County, he intentionally touched the vagina of the complainant, PW1 (EOK) with his penis who was to his knowledge 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 and during the trial, the prosecution called eight witnesses, while the appellant gave an unsworn statement of defence and called no witnesses. He was convicted and sentenced to 25 years' imprisonment.

3. He was aggrieved by the conviction and sentence, and appealed to the High Court which dismissed the appeal and upheld the conviction and sentence.

4. The appellant was dissatisfied with the decision and appealed to this court on the amended grounds that, the learned judge was wrong in failing to find that the medical evidence that was produced in the court did not conclusively prove that there was penile penetration; that the complainant's evidence was contradictory and inconsistent, and her testimony was involuntary; that the case against him was fabricated due to the existence of a grudge with the witnesses; that the prosecution did not prove

beyond doubt that the appellant committed the offence and that the learned judge was in error in failing to find that voir dire examination was badly conducted by the trial court.

5. Both the appellant and the respondent filed written submissions.

6. When the appeal came up for hearing on a virtual platform, the appellant appeared in person from Kamiti Maximum Prison and informed us that he would rely on his submissions in their entirety. He contended that the High Court failed to appreciate that penetration was not proved since the complainant's evidence was not supported by the medical evidence which found that there were no bruises or lacerations on her genitalia. Though her hymen was broken, there was no discharge, and no blood, and she was HIV negative; that this evidence did not demonstrate that there was penetration.

7. It was further submitted that the witness evidence was contradictory and inconsistent because the complainant PW1 alleged that the incident occurred on the March 8, 2016, which contradicted the evidence of PW2, who testified that it occurred on March 10, 2016; further contradictions were to be found in the charge sheet that stated that the offence took place between March 8, 2016 and March 10, 2016. It was submitted that the contradictions and inconsistencies should be resolved in the appellant's favour.

8. With respect to issues that the complainant was coerced to give evidence and there was a grudge between the appellant and some of the witnesses, it was submitted that, the record showed that a grudge existed between the appellant and PW2, and that the charges were orchestrated to implicate the appellant with the alleged offence.

9. The next issue was that the prosecution failed to prove its case beyond reasonable doubt, as the evidence fell short of the standard required.

10. Finally, it was submitted that *voir dire* examination was not properly conducted as PW 1 was asked very elementary questions, and nothing was asked about whether she knew the importance of telling the truth and whether she understood the meaning of an oath, that for this reason, court could not satisfy itself that she understood the importance of giving evidence on oath.

11. Ms Matiru, learned prosecution counsel for the respondent also stated that she would rely on the respondent's submissions in entirety.

12. It was submitted that the trial magistrate properly conducted the *voir dire* examination and rightly concluded that PW1 could give an unsworn testimony; that penetration was proved by the medical evidence that showed that her hymen was broken and that her pants were stained with discharge, but not with blood. It was further submitted that, the appellant was identified as her father, and that PW1 and her siblings had continued to live with him even after their mother had left; that her evidence confirmed that the appellant was the perpetrator.

13. The role of this court as the second appellate court and its jurisdiction has been variously specified as being limited to consideration of matters of law only as defined in section 361 of the *Criminal Procedure Code*, and affirmed by this Court in the case of *David Njoroge Macharia v Republic* [2011] eKLR in the following terms;

> " 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."

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

    i. whether the voir dire examination was properly conducted;

    ii. whether the prosecution proved its case to the required standard;

    iii. whether the offence was fabricated and whether a grudge existed between the appellant and PW2;

    iv whether there were contradictions and inconsistencies in the prosecution's case; and

    v whether the courts below properly evaluated the evidence.

15. So as to determine the issues raised, it is necessary to outline the evidence that was before the trial court. EOK, a girl age 12 years was the daughter of the appellant. After the conduct of a voir dire examination, she gave unsworn evidence where she stated that on March 8, 2016, her father pulled her onto her mother's bed, removed her pants, removed his trousers and his boxers and inserted his penis into her private parts; that the ordeal took 10 minutes. She felt pain, and when she tried to scream, he covered her mouth with his hand. When he was finished, he dressed himself and went off to work. She was left bleeding and in pain. Thereafter, she went to the house of Joyce, PW2, a neighbour of the appellant, to call her siblings. She did not tell anyone about the incident. On March 10, 2016 at 4 pm, she went and told PW2 what had happened to her; that she was then taken to hospital, examined and P3 form filled. She also identified her father as the person who had defiled her; that she was living with her father and did not know where her mother was.

16. PW2 stated that on March 8, 2016, she was with the appellant's children in her house, but EOK had stayed at home with her father. On March 10, 2016, the children came to her house, and again EOK did not go to her house. Thereafter, she noticed that EOK passed urine many times. On enquiring from her as to what was happening, EOK started to cry and then disclosed to her that her father had been sleeping with her; that he would remove her clothes and defile her. PW 2 reported the incident to the Assistant Chief who decided to call the Children's Officer, PW3 Hannah Wangari Mbugua. EOK informed them that she had again been sexually assaulted that day.

17. PW 3 called PW4, Jane Wairimu, a human rights activist who rescues children. PW4 stated that EOK had told her that her father had been sleeping with her, and when she checked her vagina, she found it was dirty and had a white discharge. PW3 and PW4 took EOK to hospital where she was examined and a P3 form was filled. PW3 then called the appellant to the Assistant Chief's office. He was arrested and taken to the police station accompanied by EOK, PW3 and PW4.

18. PW7, Dr Arthur Mugo Karanja, a medical doctor at Tigoni Hospital produced the P3 medical form on behalf of Dr Opanga who was on annual leave. The report indicated that EOK's pants were stained with no blood. Her genitalia did not have any bruises or lacerations, but the hymen was broken. The vaginal swab did not reveal any spermatozoa. The injuries were found to be hours old. He also produced the Post Care Rape form that comprised similar findings.

19. PW 8, PC Rose Lwambi was the investigating officer who took over the investigations from another police officer. She narrated the events that led to the charges preferred against the appellant.

20. In an unsworn statement, the appellant denied the offence. He admitted that EOK was his daughter, and that his wife had left him. He stated that in March 2016, his children were chased from school and told to bring their parents; that when he went to the school, he was told that EOK had not attended

school for two weeks which annoyed him and he almost slapped her. He further stated that on March 10, 2016 as he was coming home from work, he met a police officer, PW2 and other ladies whom he thought had come to assist him take care of his children, but was shocked when he was informed that he was being accused of sexually assaulting EOK. He claimed that the case against him was fabricated and that he was being framed.

21. Returning to the issues raised, we begin with whether the prosecution proved its case against the appellant to the required standard. To ascertain this, of necessity, it requires to be demonstrated that the key ingredients for the offence of incest are proved. They are, the complainant's age, the appellant's identity and relationship with the victim and whether an indecent act or penetration was proved.

Section 20 (1) of the *Sexual Offences Act* 2006 provides that;

> " 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 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. Beginning with the complainant's age. This was not challenged by the appellant, though as the trial court observed, the Charge Sheet did not specify her age. This notwithstanding since the complainant herself testified that she was 12 years old and the doctor produced a P3 form and Post Rape Care form that specified she was12 years old as of March 11, 2016, we have no reason to doubt that the complainant was 12 years old.

23. With respect to the question of indecent act or penetration, the trial court relied on the evidence of PW1, PW 2, PW3 and PW4, who examined her and found her vagina to be dirty with white discharge, which indicated that she had been abused on that very day. Similarly, the doctor testified that her hymen was broken, and that the injuries on her private parts were hours old.

For its part, the High Court stated;

> " As to whether the appellant committed an act of penetration or an indecent act, the key testimony implicating the appellant was that of PW 1 who testified how the accused had subjected her to an act of penetration. When she narrated her ordeal to PW2, PW3 and PW4, she told the court that she had been subjected to an act of penetration on 10th March 2018, the same day she reported the incident. When cross examined, she told the court that the appellant had made sexual advances at her in the past".

24. It was the High Court's further finding, that though the medical evidence was not decisive of the fact that there was penetration, in light of PW 1's evidence and the finding in the medical report that her hymen was broken, this was confirmation that an act of penetration had occurred.

25. As indicated above, section 20 (1) specifies that, "...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..."

> An, "indecent act" is defined under section 2 (1) of the *Act* as "(a) any unlawful intentional, which causes a) any contact between any part of the body of a person with genital organs breasts or buttocks of another, but does not include an act that causes penetration".
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> While "penetration" is defined as "the partial or complete insertion of the genital organs of a person into the genital organs of another person".

26. This would mean that either an indecent act or penetration would give rise to the offence of incest. In this case, the appellant was charged with touching EOK's vagina with his penis. Our re-analysis of the record leads us to conclude, as did the courts below, that penetration occurred. EOK's detailed description of the assault as it transpired, how she was pulled onto her mother's bed, the removal of her pants by the appellant, his removal of his trousers and boxers, the fact of the painful ordeal to which she was subjected, when considered together with the findings of the medical report, all prove the act of penetration by the appellant.

27. Concerning the third requirement in respect of the appellant's identity, the fact of the appellant's identity as her step father was not disputed, and was in fact, admitted by the appellant. This in effect, pointed towards the commission of incest by the appellant as specified by section 20 (1) above.

28. Consequently, in view of the concurrent findings by the court's below that all the ingredients for the offence of incest were proved to the required standard, we can find no reason to differ or distance ourselves from those findings of fact and law and are satisfied that the prosecution proved its case to the required standard.

Having so found as we have above, we turn to consider the other issues the appellant has raised.

29. On whether the offence the appellant faced was fabricated, and a grudge existed with PW2. In addressing the appellant's allegations of fabrication and the existence of a grudge with PW2, on interrogation of the evidence, the trial court stated thus;

> ...the reasons are not given and especially against PW2, who seem to be loving and caring to his children from the evidence what is it that they may have had against him that is a question on the accused is able to answer his defence is a pure lamentation of abandonment by his wife..."

30. We too have carefully considered the evidence and can find nothing that would point towards the existence of a grudge with PW2 or that she had fabricated this case against him. The evidence is clear that at all times EOK initiated the complaint against the appellant with PW2, and it was only out of the goodness of her heart and concern for EOK and her siblings that PW2 brought to light the appellant's beastly acts against his daughter, yet as her father, he had been charged with the parental responsibility of guarding, guiding and taking care of her, but had failed her. For this reason, this ground fails.

31. As pertains to the alleged contradictions and inconsistencies in the dates and timings of the surrounding events, we find that they were immaterial and could be resolved under section 382 of the *Criminal Procedure Code*. This ground is therefore devoid of merit and fails.

32. Finally, as to whether the trial court and the High Court properly evaluated the evidence and came to the right conclusion, from the aforegoing we find that, both courts below interrogated the evidence of the prosecution witnesses, which they found to be cogent and consistent. We are also satisfied that

both courts took into account the appellant's defence, and found that it did not in any way displace the prosecution's case. We further find that, the High Court as a first appellate court properly re-evaluated and re-analyze the evidence before the trial court, and after weighing out the prosecution's case against the defence, it arrived at its own independent conclusion that the offence of incest was proved to the required standard, which rendered the conviction safe. This ground is therefore without basis.

33. As concerns the conduct of the voir dire examination of EOK, the appellant's complaint is that the trial court asked very elementary questions which did not place the court in a position to satisfy itself that she understood the importance of giving evidence on oath.

34. A consideration of the proceedings discloses that after putting questions to the EOK, such as whether she is a Christian, whether she goes to church, whether she understood what it meant to tell the truth and the meaning of taking an oath, the trial court concluded that;

35. Subject is not of tender years. She is however a minor and is a witness in a case against her father. I find that she is intelligent enough to testify. She does not understand the essence of an oath. She will thus give a sworn statement, but will be cross examined."

36. The above makes it evident that contrary to the appellant's assertions, the questions asked enabled the court to appreciate that EOK did not understand what was meant by testifying on oath and it therefore ordered that EOK give unsworn evidence. Further, even if the voir dire examination was not properly conducted, that would be sufficient to vitiate the entire prosecution case. See *Maripett Loonkomok v Republic* (2016) eKLR. This ground lacks merit and equally fails.

37. In sum, the appeal lacks merit and is accordingly dismissed in its entirety.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

G. W. NGENYE–MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR