EC v Republic (Criminal Appeal 12 of 2023)
[2024] KEHC 492 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEHC 492 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL APPEAL 12 OF 2023

RB NGETICH, J

JANUARY 25, 2024

BETWEEN

EC ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement by Hon. Nthuku J.N-SRM delivered on the 30th August, 2018__ in Eldama Ravine Magistrates Court S/O No. 24 of 2018)

JUDGMENT

Background

1. The appellant EC was charge with the offence of Incest by a male person contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the night of 18th and 19th May, 2018 at [particulars withhheld] village in Mogotio Sub-County within Baringo County, the accused intentionally and unlawfully caused his penis to penetrate the vagina of SJC, a child aged 10 years whom he knew to be his biological daughter.

2. In the alternative, the Appellant was charged of the offence of Indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006. Particulars were that on the night of 18th and 19th May, 2018 at [Particulars Withhheld] village in Mogotio Sub-County within Baringo County, the accused intentionally and unlawfully caused his penis to come in contact with the vagina of SJC. The Appellant pleaded not guilty on both counts and after full trial, he was convicted and sentenced to life imprisonment.

3. Being aggrieved by the decision of the trial court, the appellant has lodged a petition of Appeal citing the following grounds of appeal:-

i. That the learned trial Magistrate erred both in law and fact by failing to appreciate that the medical evidence adduced was not sufficient to corroborate the charge.

ii. That the learned trial Magistrate erred both in law and fact by failing to appreciate that the trial was marred with contradictions.

iii. That the learned trial Magistrate erred both in law and in fact by failing to find that there were crucial witnesses who were never called upon to testify.

iv. That the learned trial Magistrate erred both in law and fact by failing to consider, ignoring and dismissing the appellant defence without advancing any reasons as to why.

v. That the learned trial Magistrate erred both in law and fact in failing to properly establish whether or not the appellant was fit to stand trial and relying on an inconclusive psychiatric report as a pre-sentence matter despite the accused having raised it in his defence.

vi. That the learned trial Magistrate erred in law and fact in failing to make the necessary orders/ directions and ensure that the appellant is informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

vii. That the learned trial Magistrate erred in law and fact in falling to give the appellant adequate time and facilities to prepare a defence.

viii. That the learned trial Magistrate erred in law and fact in failing to promptly inform the appellant of his right to choose and be represented by an advocate and afford him an opportunity to make a choice.

ix. That further grounds shall be adduced at the hearing of this appeal.

4. The appellant humbly prays that this Honourable Court do quash the conviction, set aside the sentence and set him free forthwith.

5. The Appeal proceeded by way of written submissions. Both parties filed written submissions.

Appellant's Submissions

6. On ground that the medical evidence adduced was not sufficient, the Appellant argues that the Clinical Officer, one Winrose Kigen filled and signed the P3 form on 20th May, 2018 that basically provided unsupported, unjustified and/or inconclusive information on the victim's medical examinations. That the said clinical officer did not comply with Regulation 6 (c) of the Sexual Offences (Medical Treatment) Regulations, 2012, by failing to complete the Prescribed Post Rape Care form which would have provided the methodologies and procedure used besides the same being a guide in the filling of the P3 form and in the absence of a duly filled Post Rape Care (PRC) form, the information on the P3 form is rendered inconclusive, wild import, purport and unjustified.

7. Further that the said Clinical Officer sought to rely on and in fact produce the Laboratory Request and Report Form Marked Exhibit 1(b) but in the said exhibit, it is well captured that Urinalysis, HIV, VDRL and pregnancy tests had been requested and upon the analysis of the results being done, entries indicating Negative were entered; she testified that there was no discharge but urinalysis showed pus cells and traces of leucocytes meaning that she had an infection and had an inflamed labia minora and partially broken hymen without giving appropriate details as to whether it was freshly or old broken hymen nor giving proper description of the physical appearance of the inflamed labia minora etc;that the Clinical Officer failed to clarify the possible cause of the infection and or the inflammation of labia

minora and the partially broken hymen. That there is a possibility that the cause of the inflammation of the labia minora and the partially broken hymen is different from defilement.

8. The Appellant further submit that the witness who accompanied PW5 and arrested the appellant at 3pm should have been given an opportunity to testify to give the right picture of the circumstances of the arrest; that the assertion that the Appellant was arrested at 3pm at his home while sleeping on his bed after committing incest the previous night casts doubt as to his alleged guilty conscience.

9. Further that doubts emerge as to why PW5 decided to seek the assistance of the IP Kihara of Mogotio Ap camp and not the Officer Commanding Mogotio Police Station and the essential facts about the place, time and how the appellant was arrested did not feature in the proceedings.

10. The Appellant cited the case of *Shadrack Karanja Nyambura vs R* Criminal Appeal No. 119 of 2005 where, the Court of Appeal stated as follows: -

> " As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

11. The Appellant submit that there is a conflict between him and his family over land and assert that this matter was a frame up and there is no reason why the arresting officer who visited the scene, collected firsthand information, knew the place, time, state of the appellant at the time and how the appellant was arrested yet he is available.

12. The appellant further submits that his defence was not considered by the trial magistrate. That he said was of unsound mind but the trial magistrate did not send him for mental assessment and cite the case of *Republic -vs- Msuya Ngolo Lewis*; Criminal Case No. E077 of 2021, Nzioka J stated that;

> " It is the duty of the prosecution to establish the mental, state of the accused as it is of the defence. In this regard, it suffices to note that, in order, to prove that, a suspect is guilty of a criminal offence, a prosecutor must often also prove that, the suspect had a particular mens rea when committing the offence."

13. The Appellant submits that the mental assessment report dated 18th October, 2018 by Dr. Njau indicated that he was stable at the time and could stand trial but he wished a relative could have been interviewed to explain his mental condition as he had informed the Psychiatrist that he had been suffering from mental illness since 1993 and was still on medication; that even if the appellant appeared stable at the time of the examination, it was equally important to establish whether the appellant enjoyed his lucid intervals at the time of the commission of the alleged offence

14. Further that the trial magistrate did not give Dr. Njau an opportunity to conclude on his inquiries and or further mental assessment but relied on an inconclusive report to pass her sentence.

15. The appellant submit that he was not afforded a fair trial in that he first appeared before the trial magistrate for plea on 21st May, 2018 and the matter was fixed for hearing on 24th May, 2018; that he was not informed in advance of the evidence the prosecution intended to rely on and the prosecution did not supply the witness statements or any other documentary evidence to the appellant. That the record is clear that the Court never made any orders/directions to that effect and the appellant was immensely prejudiced to the extent that he could hardly put any questions to the witnesses during cross examination; that he did not have reasonable access to evidence. That it is without doubt that the prosecution under the watch of the learned magistrate took advantage of the appellant's

unpreparedness to overrun his obvious limited knowledge of law and violate his constitutional rights; that the appellant's constitutional right to fair hearing was blatantly violated and undermined.

16. The Appellant submits that the learned trial Magistrate erred in law and fact in failing to promptly inform the appellant of his right to choose, and be represented by an advocate and afford him an opportunity to make a choice and the failure occasioned a serious miscarriage of justice and the resultant conviction and sentence arising from the trial is a nullity and available for quashing and or setting aside.

Respondents Submissions

17. The state counsel Ms.Ratemo submits that Section 20 (1) of the *Sexual Offences Act* defines the offence of incest an indecent act or an act by a male person 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 and if it is alleged in the information or charge and proved 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.

18. That ingredients as stated in the case of *JMM v Republic* (2022] eKLR are: -

    a. An intentional indecent act or an act which causes penetration with a female.

    b. The identification of the male perpetrator.

    c. Consanguinity between the victim and the perpetrator who must be a relative and Age of the victim.

19. And submit that all the above ingredients were proved beyond reasonable doubt and they pray that this honorable court should so find. In respect to act causing penetration, the respondent submits that PW6's confirmed penetration; that the appellant did not question the contents of the medical reports; the doctor testified that there was penetration into the vagina of the victim, the labia minora was inflamed and hymen partially broken ascertaining the aspect of penetration. That it is imperative to state that, although proven, for the offence of incest, penetration is not a necessary ingredient but an indecent act as defined under the Act must be proved. That this was also the position held in the case of Criminal Appeal No.80 of 2017 at Kisii *GMB -vs- Republic* (2018) eKLR.

20. Further the respondent submits that from the evidence of PW1, the fact that the appellant had no clothes (even a shirt- as described by PW1) on when he went to the bed of his 10-year-old biological daughter, removed her clothes and lay in her bed till morning would count as an indecent act therefore even without the medical reports being produced; that the evidence adduced in court was simple and straightforward with no contradictions whatsoever.

21. That PW1 testified that she was sleeping with her sister PW7 aged six years on their bed when the appellant went to their bedroom flashed a torch, then got on the bed and defiled her. The appellant had no clothes. His bed was in the sitting room. PW7 confirmed that indeed the appellant herein got onto their bed on the material night and that she got afraid and hid under the bed where she slept till morning.

22. They submit further that PW2 and PW3 brothers of the victim (PW1) aged 12 years and 14 years respectively gave evidence that they used to sleep in the same bedroom with the complainant but on different beds. That both PW2 and PW3 testified that they heard the victim (PWl) screaming on the material night. In the morning when they woke up, they found their father (the appellant herein)

sleeping in their sisters' bed. They proceed to state that they found PW1 in the kitchen and asked her why she was screaming. That despite the appellant's efforts to try and deceive them that PW1 did not scream the night before, PW1 told her brothers that the appellant herein who was their father had done bad manners to her. They informed their cousin K who then informed their mother leading to the arrest of the appellant.

23. That the evidence of PW6 confirmed medically that the victim (PW1) had been defiled, whereas the evidence of the investigating officer ascertained the age of PW1 by production of her birth certificate into evidence as PEXH 3.

24. They submit that the evidence against the appellant was compelling to the extent that the other elements of the offence were proven without reasonable doubt.

The Identification of the Male Perpetrator.

25. They submit that PW1, PW2 and PW3 identified the appellant herein as their biological father. That PW1 identified the appellant as the person who did bad manners to her. Her evidence was not rebutted. PW2 and PW3 identified the appellant herein as the person they found in their sisters' bed when they woke up in the morning despite him having a separate bed in the sitting room. That PW2 and PW3 also confirmed they heard their sister screaming at night. They indicated that upon inquiry, PW1 told them she had been defiled by the appellant. They argue that their evidence was not rebutted in any way.

Consanguinity Between The Victim And The Perpetrator Who Must Be A Relative

26. They submit that both PWl, PW2 and PW3 identified the appellant herein as their biological father who lived with them. That the birth certificate produced as pexh3 also confirmed that indeed the appellant is the biological father to the victim (PWl) and the appellant himself confirmed this during the hearing of his defence.

Age of The Victim.

27. The Respondent submits that the age of the victim (PWl) was ascertained to be 10 years from her birth certificate (pexh-3).

28. On contradictions, the Respondent submit that if there were any contradictions, then they were so minor that they did not shake the prosecution's case; that there was proof of the victim being a child, evidence of penetrative intercourse and the Appellant was identified as the perpetrator and alleged contradictions did not affect the probative value of the case; that the prosecution's case was unshaken and well corroborated and therefore this ground of appeal fails.

29. On issue of availing witnesses, the respondent submit that the prosecution has discretion to choose which witness to call in support of its case and cited the case of Julius Kalewa Mutunga v Republic [2006] eKLR, where the Court of Appeal stated as follows:-

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive - see *Oloro s/o Daitayi & others v R.* (1950) 23 EACA 493.

30. They submit that there was no oblique motive, and none was shown, for failure to call the person who made the arrest. That they are also of the view that the omission did not cause a failure of justice in the

circumstances of this case.That Similarly, the Court of Appeal in *Benjamin Mbugua Gitau v Republic* [2011] eKLR held that:

> " This Court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires - see section 143 of the *Evidence Act* Cap 80 laws of Kenya. In the circumstances therefore, we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys."

31. The respondent further submit that it is not clear from this appeal which witness the appellant wanted to tender evidence in court and what prejudice he may have suffered as a result of failure by the witness to testify and the appellant has not demonstrated any ill motive by failing to call any witness.

32. That further, the provisions of section 124 of the *Evidence Act* allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful. The position was held in the case *Joseph Mwangi Kariuki v Republic* [2018] eKLR, where the court stated as follows: -

> " The proviso to Section 124 of the *Evidence Act* therefore allows the court to convict on the sole evidence of a victim of a sexual offence if it is satisfied that the victim is being truthful."

33. On whether the appellant's defence was considered, the respondent drew the court's attention to Page 7 paragraph 2 to 8 of the judgement where the trial Magistrate clearly points out the reasons for dismissing appellant's defence. That the trial magistrate noted that the appellant's defence that his family had framed him in order to disinherit him was merely an afterthought and even more wild was his claim that he had mental illness that was disapproved by medical evidence.

34. In respect to sentence, the respondent submits that the trial court imposed sentence provided by statute being life imprisonment for offence of incest of a child under 18 years.

Analysis And Determination

35. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind that I never had the opportunity to hear the witnesses and observe their demeanor. The principles that apply in the first appellate court are set out in the case of *Okeno vs Republic* [1972] EA 32 where it was stated as follows: -

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (*Shantilal M. Ruwala v. Republic* [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See *Peters v. Sunday Post*, [1958] EA 424.)"

36. In view of the above, I have perused and considered proceedings before the trial court together with submissions filed herein and wish to consider the following issues: -

    i. Whether ingredients for the offence of incest were proved beyond reasonable doubt

    ii. Whether sentence imposed was harsh and excessive

37. The offence of incest is provided for under Section 20(1)f the *Sexual Offences Act* which provides as follows: -

> " 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 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."

38. From the foregoing ingredients for the offence of defilement are as hereunder: -

a) Knowledge that the person is a relative;

b) Penetration or indecent act.

c) Age of the victim.

39. Section 22 of the *Sexual Offences Act* defines relative in respect to offence of incest as hereunder: -

> " In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not."

40. As to whether the appellant and the complainant being relatives, record show that PW1 the complainant, PW 2 and PW 3 referred to the appellant as dad. The relationship between appellant and complainant is not disputed by the appellant and their relationship is therefore that of father and daughter.

41. In respect to penetration, Section 2 of the *Sexual Offences Act* defines penetration as partial or complete insertion of the genital organs of a person into the genital organ of another person and indecent act means an unlawful intentional act which causes any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration or any exposure or display of any pornographic material to any person against his or her will.

42. PW 1 the complainant testified that her father who had not worn any clothes went into her room, uncovered her then lifted her dress and removed her panty and inserted his penis where she uses to urinates. She further said the appellant did bad manners to her and slept on her bed until morning. She cried but he did not stop. she woke up and went to the kitchen leaving the accused on the bed. She said her brothers L and B were on their bed in the same room and F was under the bed.

43. PW 6 the Medical Officer testified that urinalysis done showed pus cells and traces of leucocytes meaning that she had an infection and that the complainant had an inflamed labia minora and partially broken hymen. She concluded that the complainant had been defiled.

44. From the foregoing, evidence adduced show that the complainant was defiled by her father and her evidence was corroborated by the doctor's evidence and the evidence of her siblings who were in the same room with the complainant.

45. In respect to age, the complainant's birth certificate produced in court showed that she was born on the 24.02.2008. This evidence was not challenged. She was therefore 10 years old at the time of the offence.

46. As to whether the complainant's evidence was corroborated, Section 124 of the *Evidence Act* as follows: -

> " Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

47. The law is clear that PW1's evidence does not require corroboration in light of Section 124 of the *Evidence Act*. PW1 was concise in her evidence; Further, the medical evidence produced by PW6 shows that there was forceful penetration caused by a male organ.

48. In respect to the appellant's argument that the prosecution case was marred with contradictions, the issue was dealt with by the court of appeal in the case of *Philip Nzaka Watu v. Republic* [2016] eKLR, where the court stated as follows:-

> " However, it must be remembered that when it comes to human recollection, no two witnesses recall exactly the same thing to the minutest detail. Some discrepancies must be expected because human recollection is not infallible and no two people perceive the same phenomenon exactly the same way. Indeed, as has been recognized in many decisions of this Court, some inconsistency in evidence may signify veracity and honesty, just as unusual uniformity may signal fabrication and coaching of witnesses.
>
> Ultimately, whether discrepancies in evidence render it believable or otherwise must turn on the circumstances of each case and the nature and extent of the discrepancies and inconsistencies in question".

49. From the foregoing, minor or trivial contradictions do not affect the credibility of a witness and cannot vitiate a trial. It is not every trifling inconsistency in the evidence of the prosecution witness that is fatal to its case. Its only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question before the court and therefore necessarily create some doubt in the mind of the trial court that an accused is entitled to benefit there from.

50. Upon perusal of evidence adduced by the trial court herein, there is no material contradiction which can would have cast doubt on the prosecution evidence.

51. The Appellant argues that crucial witnesses including the witness who accompanied PW5 and arrested the appellant at 3pm effect arrest on the appellant were not availed to testify; the court of appeal dealt with the issue of failure to call witnesses in the case of *Julius Kalewa Mutunga vs Republic* Criminal Appeal No. 31 of 2005 where the court held as follows: -

> " ...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

52. The complainant narrated what her father did to her and her evidence was corroborated by the evidence of PW2, PW 3, PW 4 who were her siblings and so did the investigating officer. The prosecution

having availed the above witnesses, failure to avail witnesses who were not specifically identified by the appellant did not in any way water down evidence adduced by the prosecution; and no miscarriage of justice was occasioned on the part of the respondent by failure to call the said witnesses.

53. The appellant alleged in his ground of appeal that the magistrate did not consider his defence but record show that the trial magistrate compared his defence with the evidence adduced by the appellant's children including the complainant and believed them. The trial magistrate dismissed the appellant's argument of being framed up by the children.

54. On the issue of the appellant being of unsound mind, the trial magistrate referred him for mental assessment after conviction before sentence but the mental assessment report dated 18th October, 2018 by Dr. Njau indicated that he was stable at the time and could stand trial. His wish to have a relative interviewed concerning his mental state in my view would only be necessary if the doctor recommended such interview before his final conclusion concerning his mental state.

55. Further Section 11 of the *Penal Code* provides that every person is presumed to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved. It was therefore upon the appellant to prove that he was of unsound mind but he never adduced any evidence to prove his allegation.

56. However, section 162 (1) of the *Penal Code* provide that When in the course of a trial or committal proceedings, the court has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, it shall inquire into the fact of unsoundness. The court took the initiative of calling for mental assessment which confirmed that appellant was of sound mind.

Whether Sentence Imposed Was Harsh And Excessive

57. The Appellant was sentenced to serve life imprisonment. Sentence provided under Section 8 (2) of the *Sexual Offences Act* is a mandatory life imprisonment. The trial court imposed the mandatory life imprisonment on the appellant. However, Court of Appeal in Malindi Criminal Appeal No.12 of 2021 between *Julius Kitsao Manyeso vs Republic* declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.

58. In view of the above, I take note of the fact that life imprisonment has been declared unconstitutional by superior court but I am however minded of the fact that the appellant took advantage of his young daughter aged 10 years then. The child looked up to him for care and protection but the appellant abused the trust bestowed on him as a parent and engaged in barbaric act against his child which will is likely to leave his daughter traumatized for the rest of her life time. The superior court in their decision have saved him from life imprisonment. I will therefore impose deterrent determinate sentence to serve as lesson to would be offenders to desist from such barbaric acts. I am inclined to set aside life sentence and impose 30 years imprisonment.

59. Final Orders: -

    1. Appeal on conviction is hereby dismissed.

    2. Sentence of life imprisonment is hereby set aside and replace with sentence of 30 years imprisonment.

    3. Period served in remand to remand to be reduced from sentence herein.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 25TH DAY OF JANUARY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

Elvis - Court Assistant.

Ms. Ratemo - Counsel for State.

Appellant present.