JJW v Republic (Criminal Appeal E089 of 2023)
[2024] KEHC 1717 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1717 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E089 OF 2023

DK KEMEI, J

FEBRUARY 22, 2024

BETWEEN

JJW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence of Hon G. Adhiambo (PM) in Kimilili Principal Magistrates' Court Sexual Offence Case No. E029 of 2022 dated 31.10.2022)

JUDGMENT

1. The Appellant, JJW was charged before the Principal Magistrate's Court at Kimilili in Sexual Offences Case No. E029 of 2022 with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that the Appellant, on 4th April 2022 while at [particulars withheld] in Bungoma North Sub-County within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of SNG, a girl child aged Six (6) years whom he knew to be his daughter.

2. The Appellant also faced a second count of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars were that the Appellant, on 4th April 2022 while at [particulars withheld] in Bungoma North Sub-County within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of SNG, a girl child aged Six (6) years.

3. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on 4th day of April,2022 at [particulars withheld] in Bungoma North sub-County within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of SNG a girl child aged Six (6) years.

4. After a full trial, the learned trial Magistrate found the Appellant guilty on the main count in count one and sentenced him to serve fifty (50) years' imprisonment.

5. Being dissatisfied with both conviction and sentence, the Appellant lodged this appeal filed on 3rd September 2022. In his petition of appeal, the Appellant raised six grounds of appeal as follows:

    a. That the trial magistrate erred in law and fact in convicting him without proper inquiry and investigations.

    b. That the trial magistrate erred in law and fact in conducting proceedings that violated the rights of the appellant.

    c. That the trial magistrate erred in law and fact when she considered extraneous factors in her decision making.

    d. That the trial magistrate erred in law and fact by basing his conviction on speculation and contradictions from the prosecution's side.

    e. That the trial magistrate erred in law and fact by convicting the appellant on the weakness of his defence thus rejecting his alibi defence.

6. The appeal was canvassed by way of written submissions. It is only the Appellant who complied.

7. The duty of a first appellate Court was authoritatively stated by the Supreme Court of India in the recent decision in the case of *K. Anbazhagan v. State of Karnataka and Others*, (Criminal Appeal No. 637 of 2015) where a three-Judge Bench addressing the manner of exercise of jurisdiction by the appellate court while deciding an appeal ruled that:-

> " The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely, ...The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test."

8. The prosecution called five witnesses in support of its case.PW1 was VN who told the Court that she is the Complainant's mother. According to her, on 4th April 2022 she left the house with instructions that PW2 was to sit with the baby and ensure that she is not exposed to the cold. On getting back home, she found her other daughter with the baby and that PW2 was nowhere in sight. On enquiring, she was told that PW2 was at her brother-in-law's house and she instructed that she be called. On PW2's arrival she instructed her to serve her with tea only to notice that she had dried up tears on her face. She enquired on what exactly was the problem and it appeared like that she wanted to cry again. PW2 later informed her that she was afraid to tell her as she did not want her to beat her. She beseeched her to confide in her and PW2 briefed her on what the Appellant did to her. According to her, PW2 sated that the Appellant did bad manners to her and on asking again she reiterated the same. This prompted

her to undress PW2's lower body where she noticed blood and mucosal fluid on her inner pant. She reported the matter to the Police Post and later took PW2 to Makutano Health Centre. She was later referred to Kiminini Police station where they recorded their statements and was later referred to Naitiri Sub-County Hospital. She told the Court that PW2 is the biological child of the Appellant.

On cross-examination, she told the Court that the Appellant defiled his own daughter and that he even assaulted her when she confronted him about it.

9. PW2, the Complainant herein, a six (6) year old girl at date of trial was put through a voire dire examination and that the trial Magistrate made a finding that she did not appreciate the nature of an oath and therefore gave unsworn evidence.

It was her evidence that the Appellant herein is her father and that on 4th April 2022, while at home with the small baby, her father removed her panty and dress and inserted his thing in the hole where the faeces come from. She told the Court that the Appellant removed his trouser, biker and vest leaving him naked, and did that to her while the baby was lying next to her. She told the Court that the Appellant held her throat making it impossible for her to scream as he laid on her and inserted his thing inside her. On finishing, he dressed her and left. She told the Court that when she was outside, she noticed blood and mucus coming from the there (pointing between her buttocks). She told her mother about everything and they reported the incident to the police and she was taken to the hospital. She identified the Appellant as the man who defiled her.

On cross-examination, she told the Court that the Appellant laid on her and inserted his thing inside her. According to her, on that day the Appellant stated that he was not going to work and that she never ate any guavas.

10. After a brief voire dire examination, the Court formed the view that PW3- AMS did not appreciate the nature of an oath and therefore gave unsworn evidence.

It was her evidence that the Appellant herein is her father and that PW2 is her sister. She recalled on 4th April 2022, while at home her mother left instructions that PW2 should watch over the baby. She proceeded to fetch milk leaving the Appellant seated on the bench (She points to the Appellant in Court). She told the Court that she left PW2 lying on the bed with the baby and as she left she saw her father entering their house. When she got back home she found PW2 crying and she refused to carry the baby. On enquiring on what exactly the problem was, she refused to tell her. She proceeded to prepare tea and do her morning chores. Later, one mama Anne told her to get PW2's clothes as she was washing PW2, which she found strange. She later heard PW2 screaming as she was being washed and on-going to find the problem she saw PW2's pant had mucus and blood coming from the pant. On the screams becoming more intensive, one mama Anna stopped washing her leaving her to continue and apply oil on PW2. She testified that she later dressed her up, prepared tea and that PW2 did not inform her about what had happened. When PW1 got back home, PW2 informed her that the Appellant did bad manners to her.

On cross-examination, she told the Court that she did not see the Appellant doing the bad manners to PW2 but that PW2 claimed that he did it and that it is not PW1 who told her to say so.

11. PW4 was Erick Murenga who testified that he is a clinical officer working at Makutano Health Centre in Tongaren Sub-County. According to him, on 8th April 2022 at 5pm, PW2 in the company of PW1 walked into the facility with a history of fecal incontinence and that PW2 had been defiled by the father at their home when PW1 was not around. On examination of PW2, he established that her vaginal and anal area were communicating, meaning her vaginal area had been damaged, and that her vaginal canal and hymen had raptured leading to faeces passing through her vaginal area. Further, the incident

occurred on 4th April 2022 and they sought treatment on 8th April 2022. He noted that PW2 also had a viscous vaginal fistula prompting him to refer her to Kitale County Referral Hospital for surgical repair. He formed the opinion that PW2 had been defiled. He produced in Court PW2's P3form filled by him dated 8th April 2022 as PEXH2, treatment notes from Makutano Health Centre as PEXH1 and post rape care form as PEXH3.

On cross-examination, he told the Court that based on his examination of PW2's genital area, he opined that it was severely damaged and that the anal area was gaping. He further testified that when one eats guavas they can get constipation and cannot pass stool and if the rectal area is damaged stool passes uncontrollably and that constipation as a result of eating guava cannot cause such injuries.

12. PW5 was No. 227858 PC Cleophas Makokha Musungu, who testified that he is based at Soysambu Patrol Base and that on 7th April 2022 at 8.30 pm PW1, PW2 and PW3 came to make a report that PW2 had been defiled by her father who is the Appellant herein. As it was late in the night, he advised her to take PW2 to the hospital the next morning. He then proceeded to investigate the report and after the medical officer established PW2 had been defiled, he proceeded to arrest the Appellant. He took PW2 to Kitale County Referral Hospital for an age assessment. He produced in Court PW2's age assessment report as PEXH4. He testified that the inner pant of PW2 worn on the date of the incident had blood stains and that the same is white in colour. He produced the blood-stained white pant in Court as PEXH5.

    On cross-examination, he testified that the Appellant did not run away after the incident as he found him at his home and that the medical officer did confirm that PW2 was defiled.

13. Upon closure of the prosecution's case, it is evident that section 211 of Criminal Procedure Code was complied with. The Appellant stated that he would tender sworn evidence and that he would call one witness.

14. It was his defence that he did not commit the crime and that PW2 only ate guavas. He told the Court that PW1 informed him the previous day that PW2 got inured only for her to change the story and allege that he had defiled PW2. He added that PW1 later disappeared from their home from 4th and she came back on 8th then he was arrested.

15. DW2 was Yvonne Mukasi, who testified that the Appellant herein is her neighbour. According to her, she saw PW2 as she had come to her home and was unable to go for a long call and on enquiring what was the problem, PW2 informed her that she had consumed a lot of guavas. She took her to her grandmother who took two sticks and removed faeces from the anus of the child. She told the Court that PW2 did not go for a long call for three days. After, PW2 left happy and climbed the tree and continued to eat more guavas.

    On cross-examination, she told the Court that she took PW2 to her grandmother on 8th to handle the issue of PW2's inability to pass stool but could not recall the month and that they never touched PW2's vagina but only assisted her to go for a long call.

16. It is upon the above evidence that the trial magistrate based the conviction. She captured the evidence well including that the Complainant who was then aged Six (6) years, is the daughter of the Appellant herein and that the father denied that anything happened on the day of 4th April 2022 when the offence of incest is alleged to have been committed upon the victim by the Appellant.

17. I have reviewed the evidence on record and the relevant law. Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006 provides that: -

20 (1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years.

Provided that, if it is alleged in the information or charge and proved that the female 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. To establish a case under the above section, the prosecution must prove the elements of the offence. There must be an indecent act or an act which causes penetration. Further, the victim must be a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

19. The Appellant is the biological father of the complainant herein. I find no difficulty in believing that the complainant is a female person within the above definition and that the Appellant is her father and that the Appellant knew her to be his daughter. These basic truths which are essential ingredients of the offence of incest were not contested at all.

20. It is also necessary to bear in mind the definition of penetration which is defined in the Act as 'the partial or complete insertion of the genital organs of a person into the genital organs of another person.'

21. It is important at this stage to mention that the evidence adduced established the act of penetration. The trial Court made findings that there was overwhelming evidence vide PW4 as stated in the treatment notes, PRC and P3 form that penetration was committed on the complainant in that the complainant's hymen and vaginal canal was severely raptured, leading to fecal incontinence through the vaginal area. PW4 further testified that even if the complainant consumed guavas, the constipation as a result of the same could not cause the injuries he observed during his examination of the complainant herein. The lapse of time from the date the offence was allegedly committed and the time it was reported did not weaken the evidence since the complainant, PW1 and PW2 explained in a consistent manner how PW2's grandmother took physical custody of PW2 and PW3 locking them up in her house from 4th April 2022 to 7th April 2022. PW3 also confirmed that their grandmother locked them up in her bedroom and PW2 kept complaining of feeling pain in her vagina. This explains why the incident was reported at the Police Station on 7th April 2022 and medical attention sought on 8th April 2022.

22. The learned magistrate who had the benefit of seeing the witnesses testify believed the above evidence. Upon evaluating and analyzing the evidence, i also find it to be consistent, trustworthy and clear. The proviso to Section 124 of the *Evidence Act*, Cap 80 Laws of Kenya provides:-

> " 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"

23. The reasons recorded by the Court while believing the above testimony is that PW2 was left in-charge of the baby while PW3 was directed to go purchase some milk. According to PW3, she left PW2 lying next to the baby in bed and that the Appellant was just at home. PW2 testified that on the morning of 4th April 2022, after PW3 left home to purchase milk, the Appellant came to where she was lying on the bed with the baby fast asleep on the bedside, he directed her to lie on her back or else he will strangle her. The Appellant removed her inner pant, undressed himself and inserted his penis into

her anus from behind causing her injuries and pain. She told the Court that the Appellant left her with dirt on the pant and between her buttocks. She told the Court that as her father defiled her, he squeezed her throat to prevent her from screaming. When the Appellant was done, he told her to dress up and leave. The Appellant also dressed up as he was naked, and went to sit in the house and drink his busaa. The trial magistrate also noted that PW2's evidence is corroborated by the medical evidence which clearly indicated that she was defiled and that the incident occasioned her serious injuries that required corrective surgery. The trial magistrate observed that the treatment notes, P3 form and Post Care Rape form produced by PW4 as PEXH 1, PEXH 2 and PEXH 3 respectively bore contents that were consistent with his testimony and that of PW2.

24. In my view, despite her tender age, the complainant was clear in her testimony. On the contrary, the defence offered by the Appellant did not cast doubts on the prosecution's case. Having subjected the entire record to a fresh scrutiny, i find no contradictions which if resolved in the Appellant's favour would create a doubt in the Prosecution's case. I am satisfied that the prosecution proved the offence of incest and that the necessary ingredients of the offence as enumerated above where proved beyond doubt. I find that the evidence adduced proved the offence of incest, hence the conviction was supported by the evidence on record and i uphold the conviction.

25. On the sentence, it is important to recall that the complainant was aged 6 years at the time of the offence. Age was not contested, but was also proved as required in this case. Commenting on the age of a victim in cases of this nature, the Court of Appeal in Kaingu Elias Kasomo v Republic (Criminal Appeal no. 504 of 2010 cited in Martin Nyongesa Wanyonyi v Republic, Criminal Appeal No. 661 of 2010) had this to say:-

> " Age of the victim of sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim".

26. Sentencing is the discretion of the trial Court but such discretion must be exercised judiciously and not capriciously. The trial Court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and elude all extraneous or irrelevant factors. Certainly, the appellate Court would be entitled to interfere with the sentence imposed by the trial Court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the Court acted upon wrong principle or if the Court exercised its discretion capriciously. See Makhandia J (as he then was) in *Simon Ndungu Murage v Republic*, Criminal appeal No. 275 of 2007, Nyeri.

27. The Supreme Court of India in *State of M.P. v Bablu Natt* {2009}2S.C.C 272 Para 13 stated that 'the principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with.'

28. In *Shadrack Kipchoge Kogo v Republic*,Criminal Appeal No. 253 of 2003(Eldoret), Omolo, Okubasu & Onyango JJA) the Court of Appeal stated:-

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

29. The proviso to Section 20 (1) of the *Sexual Offences Act* provides that:-

Provided that, if it is alleged in the information or charge and proved that the female 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.

30. I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, considering the the age of the victim at the time of the offence, the scar the incidence left in her life, the health and social implications, the relationship of the Appellant and the victim being a father and a person the child looked upon for up bringing, protection, guidance and the position of trust the Appellant had as a parent of the child.

31. I have also considered the purpose of sentencing and the principles of sentencing under the common law (*Regina v MA* {2004}145A) which are:-

    i. To ensure that the offender is adequately punished;

    ii. To prevent crime by deterring the offender and other persons from committing similar offences;

    iii. To protect the community from the offender;

    iv. To promote the rehabilitation of the offender;

    v. To make the offender accountable for his or her actions;

    vi. To denounce the conduct of the offender.

    vii. To recognize the harm done to the victims of the crime and the community.

32. Guided by the above principles and considering the aggravating factors in this case and bearing in mind the sentence prescribed under the law for an offence of this nature, and considering that sentencing is the discretion of the Court and can only be interfered with if is shown that in passing the sentence, the Court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred. The sentence imposed is for protection of society against predators like the Appellant. It is my finding and holding that the sentence imposed was lawful, appropriate and justified in the circumstances. Indeed, the complainant was then aged 6 years at the time of the offence and that as per the proviso to section 20(1) of the *Sexual Offences Act* No.3 of 2006 the sentence could be enhanced to life imprisonment. The sentence imposed is lawful and commensurate with the Appellant's blameworthiness. I find no reason to interfere with the same. I dismiss the appeal herein and uphold the sentence imposed by the learned Magistrate.

33. The up-shot is that this appeal against conviction and sentence lacks merit. The same is dismissed. The conviction and sentence is upheld.

It is ordered.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024.

D. Kemei

Judge

In the presence of:

Jacob Juma Wangamati Appellant

Miss Kibet for Respondent

Kizito Court Assistant