JM v Republic (Criminal Appeal 13 of 2022) [2024] KEHC 2165 (KLR) (22 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2165 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KWALE

CRIMINAL APPEAL 13 OF 2022

DKN MAGARE, J

FEBRUARY 22, 2024

BETWEEN

JM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. This is an Appeal from conviction and sentence in Msambweni SRMCSO No E008 of 2021 given on 9/11/2022 by the Honourable S.A Golo – SRM.
2. The Appellant was charged with incest contrary to Section 20(1) of the *Sexual Offences Act* No 3 of 2006.
3. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
4. The Appellant denied the charges.

Evidence

5. At Trial, PW1, the minor testified that she knew the Appellant as her father.
6. That the Appellant had sexual intercourse with her as a result of which she conceived.
7. It was her case that the Appellant committed the unlawful act various days and not a single day.
8. PW2, was the Medical Doctor. It was his case that the Complainant tested positive with pregnancy of 22 weeks.
9. PW3 was the Complainant's mother. She testified that she could not remember the Complainant's age. That the Appellant was not the biological father of the Complainant.

10. PW4 testified on behalf of the investigating officer. He stated that DNA Test had revealed that the Appellant was the biological father of the Complainant's child as a consequence of the unlawful act.

11. PW 5 was the Government Analyst. It was his case that DNA test conformed that the Appellant was the biological father of the child.

12. The Appellant also testified. It was his case that he woke up and was surprised that he did not have his boxer and his penis was paining with some discharge. He testified that the Complainant and her mother framed him and he was not responsible for the pregnancy.

13. Further, that the Complainant was forced to say that he raped her.

14. The Trial Court considered the case and rendered it Judgement on 19th October 2022. The court found the Appellant guilty and convicted him of the offence,

15. The Appellant, aggrieved, lodged this Appeal substantially on the ground that the Trial Court erred in law and fact .in finding that the prosecution had proved its case beyond reasonable doubt. Also, that the Trial Court did not consider mitigation by the Appellant before meting out the sentence that was excessive.

The Appellants' Submissions.

16. Directions were given for parties to file submissions. I have not seen the submissions of the Appellant.

17. The Respondent filed submissions on 27th November 2023.

18. It was the Prosecution's case that the Trial Court correctly found the Appellant guilty and convicted him as charged.

19. It was submitted that as was held in *GMM v R* (2018) eKLR, the ingredients of incest are knowledge that the person is a relative and penetration.

20. It was submitted that the Appellant though not biological father was half father to the Complainant. Reliance was placed on the case of *BNM v R* (2011) eKLR where the court stated as doth:

> " My own understanding is that half father is a term which exactly means step father. It means one who is not a biological father. Therefore, by Section 22(1) of the Sexual Offences Act, the Appellant being a stepfather of the Complainant was in loquo parentis can legally be charged and indeed convicted of the crime of incest

21. The Respondent therefore submitted that the ingredients of the offence were all proved.

22. It was further submitted that the Trial Court correctly considered the mitigation by the Appellant in arriving at the conviction.

23. Reliance was placed on the case of *Muruatetu & another v Republic* (2021) eKLR to support that submission that mandatory sentences were constitutional.

24. I was urged to dismiss the Appeal.

Analysis

25. I have perused the record of proceedings and evidence in the Trial Court as well as the filed submissions. The issue is whether the Trial Court erred in convicting and sentencing the Convict as he did.

26. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in *Pandya v Republic* [1957] EA 336 is as follows: -

> “ On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court’s own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different.

27. In the case of *Mbogo and another v Shah* [1968] EA 93 where the Court stated:

> “ …that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

28. The Appellant was charged that on diverse dates between July 2020 and 29th May 2021 at Godo area Kasemu Location of Kwale County being a male, unlawfully and intentionally caused his penis to penetrate NNJM a female knowing that she was his daughter. The court ordered DNA test. The complainant told the clinical officer that she had relationships with a young man. She did not have her menses in August 2020. There was evidence of penetration that was not recent. She was 22 weeks pregnant.

29. I have evaluated the P3 and PRC that were produced. PW3 the mother testified that she left the minor at home and went to see the sick grandson. She stated after some time Ruth became pregnant. It was also apparent that there was no love lost between the mother of the child and the Accused. PW4 the investigation officer testified on the arrest. The results were more than 99.99 march.

30. I note that Ruth’s son’s DNA showed the Appellant to be the father. She indicated that the initial report indicated that she had a relation with a teacher. The Appellant gave evidence that he was framed. He did not acknowledge the relationship with PW3 and the complainant. He stated that he went to sleep and woke up to find that he had a painful penis and a vaginal discharge.

31. The Appellant also stated that he had a myriad of deceases on mitigation. The appellant was convicted and sentenced to life imprisonment. It was against this sentence that the Appellant appealed.

32. The DNA examination was positive. The Defence given does not in any way respect intelligence of Judicial wisdom. It is not possible to imagine that the penis became erect on its own, penetrated against the Appellant’s will, removed the boxers. The Appellant made a futile attempt to dupe the Court into believing that despite closing the door, the girl miraculous caused penetration by his father for quite some time. It is unfathomable that such events as listed by the Appellant happened. I therefore dismiss the Appeal on conviction. It is such conduct on the part of a witness that Odunga J (as he then was), alluded to in the case of *Kioko Peter v Kisakwa Ndolo Kingóku* [2019] eKLR while referring to the

reasoning of Madan J, (as he then was) in the case of *N v N* [1991] KLR 685. The Learned Judge lamented as follows: -

> " Parties and Counsel ought to give the courts some credit that the courts are not manned by morons who can be easily duped into believing all manner of incredible stories with little or no iota of truth. It is these kinds of allegations that Madan, J (as he then was) had in mind when in *N v N* [1991] KLR 685 when he expressed himself in the following terms:
>
> > "I wish people would not tell me absurd and unbelievable lies. I feel disappointed if a lie told in court is not reasonable imitation of the truth and is not reasonably intelligently contrived. I wish people who tell lies before me would respect my grey hair even if they consider that my intelligence is not of high order. I wish the witness had not told me the most stupid of his lies, which both disappointed and made me feel intellectually insulted".

33. On sentence, the court gave life imprisonment. The minor was aged 15 years. The sentencing guideline required judicial officers to be accountable to their sentences. The sentence should also be proportional to the crime. It is unfortunate the Appellant is now a father to his own grandchild. It is a child who will need maintenance from grandfather, the Appellant.

34. In any case the sentence should be proportional. The Court of Appeal in the case of *Thomas Mwambu Wenyi v Republic* (2017) eKLR stated as follows: -

> " A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and hat the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence".

35. The sentence of life imprisonment is consequently set aside. Given the conduct of the Appellant a strict sentence is necessary. The sentence should be commensurate to the offence. I therefore substitute, a life sentence with 20 years imprisonment starting from the date of arrest excluding the period the Appellant was on bond.

Determination

36. In the circumstances, I make the following orders: -

    a. The appeal against conviction is dismissed.

    b. Appeal against sentence is allowed. The life sentence is set aside and substituted with 20 years' imprisonment starting from the date of arrest excluding date of time spent on bond.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 22ND DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Appellant present

Miss Nyawinda for the state

Court Assistant - Brian