DMK v Republic (Criminal Appeal E046 of 2023)
[2024] KEHC 7956 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7956 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E046 OF 2023

RC RUTTO, J

JUNE 28, 2024

BETWEEN

DMK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Principal Magistrate's Court at Kiambu for the offence of incest contrary to Section 20(1) of the Sexual Offences Act delivered by Hon. M. E Omodho (PM) on 1st February, 2022)

JUDGMENT

Background

1. DMK , the appellant herein, was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* Cap 63A Laws of Kenya . The particulars were that on the night of 25th March 2018 at (Particulars withheld)village, (Particulars withheld)Location in Kiambaa sub-county within Kiambu County being a male person caused his penis to penetrate the vagina of MWN, a female person aged 15 years who was to his knowledge his niece. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on the night of 25th March 2018 at (Particulars withheld)village, (Particulars withheld)Location in Kiambaa sub-county within Kiambu County he indecently touched the Vagina of MWN a child aged 15 years with his penis.

2. The Appellant pleaded not guilty to the charges and trial proceeded with the prosecution being tasked with proving its case. At conclusion, the trial court found that the prosecution had proved its case to the required standard and convicted the appellant of the main count. He was sentenced to serve life imprisonment, less period in custody at trial.

3. Aggrieved by that decision of the trial court, the appellant filed this appeal, challenging both the conviction and sentence on the following grounds, that;

   i. The trial court convicted and sentenced the appellant on the offence charged notwithstanding that the prosecution failed to prove the case beyond reasonable doubt.

   ii. The trial court convicted and sentenced the appellant on the offence charged notwithstanding that the prosecution case was riddled with contradictions, inconsistencies and fabricated evidence that resulted in a selective judgment.

   iii. The trial court convicted and sentenced the appellant for the offence charged notwithstanding the vital ingredients of the offence charged were not proved as stipulated by law.

4. The appeal was admitted and parties directed to canvass the appeal through written submissions.

The Prosecution's case

5. The prosecution called a total of four witnesses. Its case can be summarized as follows. PW1, MWN, stated that, on the 25/3/2018 at around 5pm she had gone to fetch a milk container from the hotel of Mbugua and Kshs.120/- being the cost of the milk supplied. On her way back she used the money to buy some cakes and sweets. Afraid of going back home she went to her uncle DMK (the appellant) place where he was alone in the house. MWN decided to sleep there. Then Later in the night at around mid-night the uncle joined the complainant in the same bed and undressed her. She stated that the appellant covered her mouth and threatened to do something bad to her if she would scream or tell on what he was doing. After removing her trouser he raped her and put his penis in her pussy. After sometime she managed to escape from him, put on her clothes and went outside the house to an unfinished building that was next to the house. It is at this house that she spent the night until morning.

6. She also stated that she went to her grandmother's house and was afraid to tell her what had transpired. She states that she was there for 2 days and 2 nights. Thereafter on 28th March 2018, she went to her aunt AM place and later at around noon her father namely SNK came for her and they went home. On reaching home, she found five of her aunties who included Wanjiru and Wambui. The aunties asked what had happened and she informed them. She was then taken to the nearby AP post where she was locked in the cell until around 8.30pm. Her uncle was also arrested before she was released. MWN was then later taken to Karuri Sub County Hospital. It was MWN's testimony that the accused was a brother to her father, and identified her birth certificate, P3 form and PRC form as exhibit.

7. PW2 SWN is MWN's mother. She testified and stated that on 25th March 2018 she arrived home around 10a.m since she worked at night in Muthurwa market. She was served breakfast by MWN and went to sleep. When she woke up at around 1pm she did not find MWN at home. She waited until evening but she did not return. She looked for her in vain.

8. Later on 29th March 2018 MWN aunties went to her home but MWN was still missing. They then informed MWN's mother that MWN had been seen at her uncle's place. She stated that the father then went for her and when she was brought home, she was asked what had happened. She was then told by MWN that she was afraid of coming back home after using the milk money, that she had slept at her uncle's place and the uncle raped her. She then went and reported to the police and later pointed the accused person who is a step brother to her husband to the police.

9. PW3, Dr. Richard Munene, a doctor from Karuri hospital stated that MWN was seen on 30th March 2018 when she reported a sexual assault by a known person on the 29th March 2018. The complainant had told him that she had differed with her mother when she decided to go to her uncle's house. She was

examined after 3 days when it was noted she had broken hymen and whitish foul-smelling discharge on vagina. She had negative results for pregnancy but had a sexually transmitted disease (STD). She was treated for the STD. The doctor produced the P3 form as Exhibit 2, the PRC Form as Exhibit 4 the hospital documents: attendance card as Exhibit 3, and the treatment notes as Exhibit 5

10. PW4, PC Eric Kasamba from Rueno station testified that he was the investigations officer (IO) in the matter. He stated that he was at work on the 30th March 2018 when he was allocated a case of a complainant MWN who had allegedly been defiled by the uncle. He then took her to Karuri hospital where she was examined and it was revealed that she had been defiled. M.W.N informed him that she had been sent to collect cash from a shop on the 25th March 2018 but instead used the money to but her personal items. For fear of going home she went to her uncle's home where he threatened her if she did not agree to have sex with him, the appellant herein then defiled her. She managed to escape in the morning at 3.00 a.m to unfinished building where she stayed till morning then she went to her aunt's home where she stayed for 5 days. Her father later came for her and she told him that her uncle had defiled her.

11. In cross-examination by the appellant, he stated that the complainant had narrated to him that the appellant was the person who had defiled her.

12. Upon closure of the prosecution's case, the trial magistrate found the prosecution had established a prima facie case against the appellant and he was put on his defence.

13. In his defence, the appellant gave sworn evidence and called no witness. He stated that he got arrested when he was coming from work late in the evening. That he arrived at their home, went to his mother's house to give her cash for her utilities and he got arrested while at his mother house and was taken to Ndenderu. He was in police custody from the 26th March to 30th March 2018. He denied defiling the complainant and stated that the charges were trumped up against him, on the alleged night he slept alone in his house.

14. Upon evaluation of the entire evidence on record, the trial court found the appellant guilty of incest as charged and convicted him. He was sentenced to life imprisonment.

Parties' submissions

i. Appellant's submissions

15. Urging his appeal before this Court, the appellant submitted under the following summarized grounds:

    a. Contradictions and inconsistencies

    b. There was no proof of incest

    c. Harsh sentence

16. On contradictions and inconsistencies, the appellant submitted that there were material contradictions, in that PW1 and PW2 testimonies contradicted. He submitted that whereas PW1 stated that she was sent by her mother to get milk, PW2 evidence was that when she came back from Muthurwa market, she was served breakfast by her daughter (PW1) who later could not be found. He stated that a guilty verdict could not be found in such circumstances. Therefore, the credibility of the prosecution witnesses was wanting. He placed reliance on various decisions: Ndung'u Kimanyi v. Republic 1980 KLR 282; Philip Nzaka Watu v. Republic(2016) eKLR.

17. On proof of incest, the appellant admits the complainant was his niece. However, he denied committing the offence even though the evidence of the medical document showed that she had a broken hymen. This could have been caused by her sexual behaviour and that she only decided to fix or frame him for no reason.

18. In addition to the above he submitted that the complainant (PW1) had carried herself as an adult. Her evidence was clear that she was in town from 5.00pm to 8.00pm on the 25.3.2018 and she opted to go to the uncle's home to avoid going to their home. The appellant further submits that the hymen could have been broken by other factors other than sexual inter-course and that the complainant had been treated of sexually transmitted diseases. The sperm samples from the appellant were never taken for forensic examination thus a violation of section 36 of the *Sexual Offences Act*. He referred this court to the decisions in P.K.W v. Republic (2012) eKLR; Queens v. Manual Vincent Quintanilla 199ABQB769 and in Eliud Waweru v. Republic (2019)eKLR.

19. On sentence, the appellant submits that the sentence meted on him was harsh in the circumstances, he had been sentences to life imprisonment yet the sex obtained was with 'consent' of the complainant. He submits that the court failed to exercise its discretion to give another sentence other than life imprisonment. While placing reliance on the Court of Appeal decision in Joshua Gichuki Mwangi v. Republic (2022) eKLR, he urged this court to reduce the sentence meted on him and find that the life sentence he was sentenced to was mandatory and therefore unconstitutional.

20. He also made reference to the case of *Baraka Safari v. Republic HCCRA no. 75 of 2016*(UR) and in Arthur Muya Muriuki v. Republic (2015)eKLR where the appellant's sentence of life imprisonment for defiling an 8 year old girl was substituted with 15 years. According, to the appellant, the proper construction of the words 'shall be liable for" used in the sentence section of the offence is that a lesser penalty can still be imposed.

21. He further urged the court to consider the period he was in custody after his arrest and the time he has spent in prison as provided under section 333(2) of the Criminal Procedure Code. He was arrested on the 3rd April 2018 and convicted on the 10th January 2022, which period he prays that it be factored in. He further states that he is 62 years old and therefore he prayed for leniency.

22. On this basis he urged that the appeal be allowed, the conviction quashed and sentence set aside.

ii. Respondent's Submissions

23. Opposing the appeal, counsel for the State urged that the prosecution established all the ingredients for proof of incest beyond reasonable doubt. On the age of the complainant, it was submitted that the birth certificate was produced to show that she was 15 years at the time of the offence.

24. On penetration, the respondent submitted that PW1's evidence was that the appellant inserted his penis in her vagina which evidence was supported by the P3 form, the hospital attendance card, the PRC form and the treatment sheets. That the appellant was identified as the person who had committed the offence after the complainant had gone to seek refuge at his home and that the relationship between the complainant and the appellant was that of niece and uncle, as the appellant was the brother to the complainant's father.

Analysis and determination

25. This being a first appeal, this Court has a duty to reconsider and re-evaluate the evidence adduced before the trial court and make its own independent conclusion. It should however give regard to the fact that it has neither heard nor seen the witnesses testify. See the cases of Pandya v R {1957} EA 336;

Ruwalla v R {1957} EA 570 and Kisumu Criminal Appeal No. 28 of 2009 David Njuguna Wairimu v. Republic [2010] eKLR where the Court of Appeal held that:

'' the duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusion on that evidence without overlooking the conclusion of the trial court. There are instances where the first appellate court may depending on the facts and circumstances of the case, come to the same conclusion as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions.''

26. Having considered the record of appeal as well as the submissions by parties, I discern the following issues for determination:

    a. Whether the offence of incest was proved;

    b. Whether there were contradictions and inconsistencies; and

    c. Whether the sentence was harsh

a) whether the offence of incest was proved.

27. Section 20(1) of the *Sexual Offences Act* creates the offence of incest. It provides as follows;

    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 10 years:

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

28. In the case of MG v Republic (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) Mativo J, while interpreting section 20(1) of the *Sexual Offences Act* set out the following ingredients for the offence of incest:

    a. Proof that the offender is a relative of the victim;

    b. Proof of penetration or indecent act;

    c. Identification of the perpetrator;

    d. Proof of the age of the victim;

29. From the record, it is not in dispute that the complainant/victim is the niece of the appellant. This was stated by the PW1 who testified that the appellant, DMK was her uncle. This kinship was confirmed by PW2 who stated that the appellant was a step-brother to her husband. Notably, the appellant too in his submissions agrees that PW1 was his niece. Thus, I agree with the trial court in its judgement when it found that indeed the victim is related to the accused within the prohibited degree of relationship (consanguinity). This too goes to address the issue of identification of the appellant, by the victim. The appellant being an uncle, he was well known to the victim.

30. As to the issue of proof of penetration or indecent act, it was the complainant's evidence that she was afraid of going back home and she went to her uncle's (the appellant) place where he was alone in the

house. She decided to sleep there. Then later in the night at around mid-night the uncle joined her in the same bed and undressed her. She stated that the appellant covered her mouth and threatened to do something bad to her if she would scream or tell on what he was doing. After removing her trouser he raped her and put his penis in her pussy. A keen perusal of the record shows that at no time was PW1 adjudged as an incredible witness. Hence her testimony on being penetrated by the appellant was credible and believable. The same was not shaken in cross-examination by the defence or by the appellant in his defence.

31. Richard Munene(PW3), the clinical doctor testified that he examined the complainant after 3 days and noted she had broken hymen whitish foul-smelling discharge on vagina. She had negative results for pregnancy but had sexually transmitted disease (STD). His testimony confirmed that the victim was recently penetrated, hence corroborated the evidence of PW1.

32. In the case of Bassita Hussein v Uganda, Supreme Court Criminal Appeal No 35 of 1995, the court stated thus;

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

33. I am satisfied that in this instance case, the evidence of the victim and that of PW3, the clinical officer sufficiently prove penetration.

34. The trial court found that the evidence of a 15 year old having her hymen perforated and with sexually transmitted disease confirms without any shadow of doubt that indeed she had been sexually penetrated. The trial court in finding that the victim was sexually breached, observed that her evidence to that extent was persuasive and credible. I find no reason to disturb this finding bearing in mind that I did not have the advantage of seeing the witness.

35. I have also noted that in urging his appeal against sentence, the appellant submitted that in sentencing him to life imprisonment, the court failed to consider the fact that the act of sex alleged was by consent. I find the appellant confirming that indeed the act of penetration did take place.

36. Turning to the age of the victim, the victim stated that she was 15 years old, a birth certificate produced as Exhibit 1 confirmed the victim's date of birth as 27th July 2003, this goes to confirming the age of the victim as being 15 years as at the time the offence was committed.

37. Flowing from the foregoing I find that the prosecution proved all the ingredients of incest, and I therefore find no reason to disturb the finding of the trial court. This ground of appeal must fail as it surely does.

b) whether there were contradictions and inconsistencies in the prosecution case

38. The appellant submitted that there were contradictions and inconsistencies in the prosecution case. That if the two witnesses, PW1 and PW2, were talking the truth, then the evidence tendered would have collaborated each other.

39. It is trite law that not all discrepancies and inconsistencies are fatal to the prosecution case. The discrepancies must be of such gravity that they prejudice the accused. In Mwangi v Republic [2021] KECA 345 (KLR) it was held:

> " 34. On the alleged failure of the first appellate court to address inconsistencies, glaring gaps and extenuating gaps, the position in law and which we fully adopt

> is as was stated, inter alia by the court in Joseph Maina Mwangi vs. Republic Criminal Appeal No. 73 of 1993,that:
>
> "In any trial, there are bound to be discrepancies and any appellate court in considering those discrepancies must be guided by the wording of section 382 of the Criminal Procedure Code to determine whether such discrepancies are so fundamental as to cause prejudice to the appellant or they are inconsequential to the conviction and sentences..."

Consequently, the issue is whether in this matter, there were indeed contradictions and inconsistencies and whether the said inconsistencies and contradictions were of such a degree that they prejudiced the appellant.

40. The appellant submitted that there was a contradiction in that PW1 stated that on 25/3/18 at about 5pm she went to collect the container and 120/= being the cost of the milk supplied from the hotel of Mbugua. That thereafter she then went to the shop, bought cake and sweets, and after using the money, she was afraid of going back home. That at about 7-8pm she decided to go to her uncle, the appellant's place where the uncle defiled her. That to the contrary, PW2 stated that on 25/3/18 she arrived home from Muthurwa market and PW1 served her breakfast. That she then slept and woke up at around 1 pm and did not find PW1 there. She waited for her to return but she did not return, she looked for her but did not find her. That later, on the 29th March 2018, PW1 was seen at the appellant's home then brought in by her father. Is there a contradiction and is it material?

41. In answering this question, it is important to take note of the time the alleged incident happened. It happened on the night of 25th March 2018. PW1 in her testimony states when she went to collect the money at about 5pm and from her testimony she never went back home. PW2 woke up at 1pm when PW1 was already not at home. Notably, PW1 did not give evidence to where she was between the period of 1pm and 5pm. Hence there is no contradictions in their testimonies. However, all their testimonies confirms that PW1 never spend the night of 25th March 2018 at their home. I therefore find no contradiction in their testimonies. In any event, any contradictions will be very remote and would not go to the core of the case which is that the appellant defiled th March 2018.

PW1 on the night of 25

42. This court finds that their evidence of PW1 and PW2 was not contradictory in any way to result in setting aside of the conviction. I thus find that the trial court did not err in relying on their evidence to convict the appellant.

43. In his submissions the appellant argued that the complainant was a sex worker, who came to fix him with the case. He questions what she was doing in town from 5.00 p.m to 8.00 pm in the night. Further the appellant contends that the hymen was already broken. I find and hold these allegations by the appellant to be without merit and afterthoughts meant to attempt and sway this Court. Notably, these assertions were never put to the victim by the appellant in his cross-examination. As I have already stated, the prosecution proved all the ingredients for the offence of incest.

44. The appellant also contends that section 36 of the *Sexual Offences Act* was violated. That his DNA sample analysis was never done, yet this would have led to his acquittal. Section 36 of the Act provides for DNA testing, is not couched on mandatory but rather grants the trial court discretion to order for

medical testing and evidence ,which include DNA testing. Further, in IMA v Republic [2019] eKLR it was stated that:

> " 32. It is well established principle of law that a DNA test is not necessary to establish the offence of defilement or rape. In AML v Republic [2012] eKLR the Court of Appeal succinctly held that:-
>
> "The fact of rape or defilement is not proved by way of a DNA test but by way of evidence."

45. As this court has found that the appellant was the person who defiled the complainant the DNA analysis result would have a lesser value to enable this court acquit the appellant. Whether the appellant was the person who infected the complainant with the diseases, it still remains that the evidence points to the appellant having had carnal knowledge with the complainant who was 15 years old at the time. There was no mandatory need for further evidence of the DNA analysis. As already found, the fact that the appellant was the victim's uncle is not dispute, as even the appellant himself acknowledges it. This ground of appeal, thus lacks merit and is dismissed.

c) whether the sentence was harsh

46. As regards sentence, the age of PW1 was proved to be 15 years. By virtue of the age, the appellant was liable to life imprisonment for life as per the requirements of section 20(1) of the *Sexual offences Act*.

47. The appellant submits that the use of the word "liable" connotes that the court retains discretion on the sentence it shall impose on the convict. He makes reference on the cases of Mohamed Famau Bakari v Republic (2016) eKLR; Arthur Muya Muriuki v Republic (2015) eKLR to support his argument. He urges this court to review and come up with a proper sentence as per Article 50 of *the Constitution* and sections 327(2) and 333(3) of the CPC

48. I agree with the appellant arguments and draw further inference in the Court of Appeal for East Africa in the case of Opoya v. Uganda(1967) EA 752 where the court clarified and explained the words, ''shall be liable on conviction to suffer death'' to provide a maximum sentence only and that the courts have discretion to impose sentences of death or imprisonment."

49. On the basis of the above cited decision, and taking into account the age of the appellant, the sentencing guidelines as well as the emerging jurisprudence revolving around life imprisonment such as the decision of the Court of Appeal in Julius Kitsao Manyeso v. Republic(2023) KECA (KLR) which addressed the imposition of a mandatory indeterminate life sentence as being unjustifiable, discriminatory, unfair and repugnant to the principle of equality before the law under Article 27 of *the Constitution*, I find that there is sufficient basis to interfere with the life sentence meted out herein.

50. The court is convinced that the trial magistrate had the discretion to mete out a sentence of imprisonment of any length but one that is not less than 10 years.

51. Given the forgoing, this court is satisfied that the sentence imposed was harsh and excessive in the circumstances thus inviting my intervention. This court in reducing the sentence is guided by the Court of Appeal decision in *JH v. Republic (Criminal Appeal no. 18 of 2019)*[2024] KECA 228 (KLR) (8 March 2024)(judgment) where the a life sentence was reduced to 15 years.

52. The upshot is that this appeal on conviction fails for lack of merit. The conviction was sound and is upheld. However, the appeal on sentence succeeds. I hereby set aside the life imprisonment sentence and substitute the same with 15 years' imprisonment, less days spend in custody during trial

Orders accordingly.

RHODA RUTTO

JUDGE

DATED THIS 28TH DAY OF JUNE 2024

For Appellants: Present in person from Kamiti Maximum Prison

For Respondent: Ms Lubanga

Court Assistant: Peter Wabwire