Case Number:	Criminal Appeal 32 of 2020
Date Delivered:	04 Feb 2022
Case Class:	Criminal
Court:	High Court at Kakamega
Case Action:	Judgment
Judge:	William Musya Musyoka
Citation:	RW v Republic [2022] eKLR
Advocates:	Benjamin Meja Barasa, Appellant, in person. Mr. Mutua and Mr. Mwangi, instructed by the Director of Public Prosecutions for the Respondent.
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. F Makoyo, Senior Resident Magistrate
County:	Kakamega
Docket Number:	-
History Docket Number:	Sexual Offence No. 15 of 2018
Case Outcome:	Appellant convicted
History County:	Kakamega
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL APPEAL NO. 32 0F 2020

RW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence of Hon. F Makoyo, Senior Resident Magistrate (SRM), delivered on 2nd September 2020 in Butere SRMC Sexual Offence No. 15 of 2018)

JUDGMENT

1. The appellant was convicted and sentenced to serve 10 years' imprisonment for the offence of attempted incest, contrary to section 20(2) of the Sexual Offences Act, No. 3 of 2006. The particulars of the offence were that on the 22nd April 2018 in Bubala Sub-County, within Kakamega County, he attempted to cause his penis to penetrate the vagina of PLW, a child aged 16 years, who was to his knowledge his daughter. He pleaded not guilty to the charges before the trial court on 30th May 2018, he was tried, convicted of the offence and sentenced accordingly on 5th August 2020.

2. The appellant being aggrieved by the judgment of the trial magistrate, has preferred this appeal against the conviction and sentence. His grounds of appeal are stated in the memorandum of appeal, dated 16th September 2020, and they relate to failure by the trial court to consider that there was a grudge between the appellant on one side and the complainant and her mother on the other, shifting the burden of proof to the appellant, failure to consider that the prosecution had failed to call crucial witnesses, failure to determine that there was no corroborating evidence of the struggle between the appellant and the complainant during to the commission of the alleged offence, believing evidence that the complainant fled from the scene when it had been alleged that the door had been locked, and the sentence imposed being harsh and excessive in the circumstances.

3. Incest and attempted incest are defined in section 20(1)(2) of the Sexual Offences Act, and they constitute the offences of indecent acts, defilement and rape when committed in the context of familial relationships. Incest and attempted incest are defined as follows:

"20. Incest by male persons

(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 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.

(2) If any male person attempts to commit the offence specified in subsection(1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years."

4. Parties agreed, on 6th May 2021, to canvass the appeal by way of written submissions. Both sides did file written submissions. The appellant submitted that the complainant did not describe how she managed to escape when the door to the house was locked, the evidence that there was a struggle between the appellant and the complainant was not corroborated, the conviction was founded on circumstantial evidence which did not meet the test in *MKM vs. Republic [2018*] eKLR (**JN Mulwa J**) and *Abanga alias Onyango vs. Republic* (UR) Criminal Appeal No. 32 of 1990 (unreported), and there was failure to find that there was a grudge

between the appellant and the complainant's mother.

5. The respondent submitted that the complainant had testified that she had been groped by the appellant, and that he had tried to force himself on her after removing his clothes. On the matter of the locked door, the respondent submitted that it was a minor issue, when looked against the rest of the evidence. On failure to call witnesses, the respondent submitted that the appellant and the complainant were in a locked room together, and she did not tell her siblings what had transpired, but told PW3. On corroboration, it was submitted that the same was not necessary as the testimonies were consistent, and that section 124 of the Evidence Act, Cap 83, Laws of Kenya, in any event, allowed the court to convict on uncorroborated evidence in sexual offences cases provided it was convinced that the witnesses were truthful.

6. I will consider each of the grounds in turn. The first ground is the failure by the trial court to consider that the complainant was motivated by a grudge that existed between her and her mother on one side, and the appellant. He talked about it when he gave he gave his sworn statement in defence, and aspects of it came up when he cross-examined PW2, an Assistant Chief. The trial court did consider the issue in the judgment, and dismissed it. Having looked at the record, I am not persuaded that there was any material suggesting that any such grudge between the two had anything to do with the charges before the trial court.

7. The second ground is about the court shifting the burden of proof, presumably to the appellant. The appellant did not dwell on this ground in his written submissions, and it should be presumed that he has abandoned the same. In any case, from my perusal of the record, I have not seen anything that suggests any such shift of the burden of proof.

8. The third ground is about failure by the prosecution to call crucial witnesses, to wit the siblings of the complainant who were within the compound when these alleged events happened, to testify on the alleged struggle between the appellant and the complainant before she fled. I find this ground curious, because the alleged struggle happened inside a locked house, and it involved the appellant and the complainant, and there was no one else in the house. In her testimony, the complainant did not allude to having told her siblings about what had happened. Indeed, she did not mention that they were anywhere near the house, where they would have heard any commotion. There would have been no basis, therefore, for the prosecution to have called them as witnesses, for they would have added no value to the complainant's case.

9. The fourth ground is that the alleged struggle between the appellant and the complainant was not corroborated. I have dealt with that ground in paragraph 8 here above. The alleged struggle was between the two in a locked room, no one witnessed it, and no one else could, therefore be called to testify to it. Corroboration could, of course, come from other pieces of evidence, like a description of the state of the scene after the alleged struggle, but that could only be evidence by a third person visiting the scene shortly after the alleged struggle. There was no evidence that any third person visited the scene thereafter, who would have offered such corroboration. In any case, the appellant has not demonstrated that there is a legal requirement for corroboration of evidence of such nature.

10. The fifth ground is about how the complainant would have fled from the house, yet the appellant had allegedly locked the door. No evidence was led on how the door had been locked, or the nature of the lock, and the mechanism for locking and unlocking it. The appellant did not raise that concern when he cross-examined the complainant, or even when he gave his sworn statement in defence. How the complainant managed to unlock the door and flee is, in my view, not a critical factor, it would not help one way or the other to answer the question as to whether or not the appellant was guilty of the offence of attempted incest.

11. The final ground is on the sentence imposed, of ten years' imprisonment being harsh and excessive. Under section 20(2) of the Sexual Offences Act, the minimum penalty for attempted incest is ten years in jail. It would mean that the trial court awarded the appellant the minimum penalty available under section 20(2) of the Sexual Offences Act. Being a minimum statutory sentence, it was not open to the trial court to consider any alternatives.

12. As an appellate court, I am enjoined to review and reevaluate the original record of the trial court, and and to draw my own conclusions, whilst bearing in mind the fact that I did not have the benefit of observing the appellant and the witnesses during the trial. I am guided in that regard by the decision of the Court of Appeal in ***Okeno vs. Republic*** **(1972) EA 32 (Sir William Duffus P, Law and Lutta JJA). The objective is, of course, to be satisfied that the procedings were proper, and the conviction matched the evidence presented.**

13. I have done that in this case. The offence charged is an attempted sexual offence. I note from the judgment of the trial court that that court was alive to what the offence of incest constitutes, in terms of a sexual contact between an accused person and a person

related to them. The trial court did make findings on that, that the appellant was the father of the complainant. The court also grappled with what attempted incest is, and stated that it was a failed incest. It also examined intention as an ingredient of attempted incest, and stated that the same was established, from the conduct of the appellant of offering money to the complainant in order to have sex with her, removing his pair of trousers and trying to subdue her. However, the court did not address itself to the *actus reus* elements of the offence, that is the physical aspects of it. Of course there is the evidence that the appellant stripped down to his underwear and tried to physically subdue her, but the question is whether that amounted to an attempt. Incest is a sexual offence, what should a sexual offender do for it to be said that they have attempted to commit a sexual act" How far does he need to go before it can be said that he or she crossed the line and that from that point on the conduct amounted to an attempt to commit a sexual offence" The trial court did not address that, the appellant and the respondent did not deal with it in their written submissions.

14. Incest, as defined in section 20 of the Sexual Offences Act, is commission of an indecent act or an act which causes penetration with a female person related to them. An indecent act is defined in section 2 of the Sexual Offences Act as 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. So incest does not have to be penetrative, touching or coming into contact with the the genital organs, breasts or buttocks of another, would suffice. An attempt with respect to incest, therefore, should not be limited to an attempt or effort to penetrate the sexual organs of another, but also an attempt to cause any contact between any part of the body of a person with the genital organs, breasts or buttocks of another.

15. So, what evidence was placed on record, to prove attempted incest by the appellant, by either attempting to penetrate the sexual organs of the complainant or to commit an indecent act with her, by attempting to to come into contact with her genital organs, breasts or buttocks" The complainant, testifying as PW1, stated: *"He locked the door and started groping me. He removed his trousers remaining with his underwear. Because he was drank* (sic) *I managed to struggle and get away … I never said the accused removed his penis and tried to insert it into my vagina. He wanted to do it but did not get that far … This accused removed his trouser."* PW2 and PW3 were individuals to whom PW1 reported the incident. PW2 said of what she informed him: *"The father closed the door and remove* (sic) *his clothes remaining with his underwear. She got brave and managed to flee to the neighbour."* The neighbour was PW3, who told the court that PW1 informed her, that: *"He removed clothes and tried to use force but she ran away."*

16. Clearly, from the testimonies above, the appellant did not attempt to have penetrative sex with the complainant, by attempting to insert his penis into her vagina, for the complainant was quite clear that his penis remained tucked away safely inside his underwear. The evidence presented did not match the particulars set out in the charge sheet, in the circumstances.

17. The complainant talked of the appellant groping her. However, it is not elaborated what that groping constituted. According to the *Concise Oxford English Dictionary*, Oxford University Press, 2011, grope, in the formal sense, refers to feeling about or searching blindly or uncertainly with the hands. Informally, it means fondling someone for sexual pleasure, especially against their will. Fondle is defined, in the same dictionary, as stroking or caressing lovingly or erotically. Either way, it is about touching someone with hands. In the formal sense, it is about touching someone in an uncertain and blind manner, such as in darkness or by a person who is unable to see. The informal sense is self-explanatory.

18. So, when the trial court used the word "grope" to describe what the appellant allegedly did to the complainant, in what sense did the court use it" Was in it the formal sense, to mean or suggest that the appellant touched the complainant blindly and uncertainly, as if to feel her, probably because he was drunk and unstable" Or was the court using it in the informal sense, that the appellant fondled her with a view to get sexual pleasure out of it, and probably to get her into the mood, and thereby lure her into the sexual act" The other question is with respect to use of words by a court in a judgment, should it use them to convey the formal or the informal meaning"

19. It is not clear from the record, why the trial court chose to use the word "grope," and it also not clear the sense in which the said word was used, whether in the formal or informal. Ordinarily, a court should use formal language, for court proceedings are formal, and the communication by the court with the parties, in whatever manner, must be in formal language. The assumption, therefore would be that the word "grope" was used in the judgment in the formal sense, for that is what is to be expected in a judgment. However, it is also possible that the court intended the informal use of the word, now that the appellant was making sexual overtures to the complainant, and I suspect that the trial court used the word in that informal sense.

20. Grope, when used in the informal sense, to mean touching with intent to derive sexual pleasure, is a strong word. Ideally, it should not be used without reference to the part of the body touched, for not every part of the body is sensitive in the sexual context.

For the purpose of sexual offences, and especially with respect to indecent acts, section 2 of the Sexual Offences Act limits physical contact to genital organs, breasts or buttocks. Groping is about fondling, and fondling is about touching erotically, which suggests the touching of the erotic parts of the body, essentially the genital organs, breasts or buttocks. So, when the complainant said that she was groped, it should have been made clear as to which erotic parts of her body were touched by the appellant. It is not enough to just say that one was groped, it should be clear from the record as to which parts of the body of the complainant were touched, in order for the court to assess whether the act of touching amounted to groping or to an indecent act. If she was touched at her erotic spots, then that amounted to incest, if the appellant made an attempt to touch those spots, then that was attempted incest. It should be clear that indecent exposure does not form part of the definition of indecent acts under the Sexual Offences Act.

21. In view of what I have stated in paragraph 20 here above, I am not persuaded that the trial court properly handled the evidence with respect to whether the offence of attempted incest was committed, for it did not properly address the question as to whether the *actus reus* element of the offence was established. The court also used the word “grope” without defining the parts of the body of the complainant that were allegedly touched by the complainant. The complainant testified in Kiswahili, and the choice of the word “grope” was by the court, it is not clear from the record the exact Kiswahili words that the complainant might have used to describe what the appellant did to her, which the court translated to “grope” in English. The word is imprecise, and given the circumstances of the case, it did not mean that the appellant had touched either the genital organs, breasts or buttocks of the complanant, quite apart from any other part of her body, and if any of the three were touched, then there should have been precision as to which of them was touched.

22. It should not be lost to the parties that these are criminal proceedings, and there is a burden to proof on the prosecution, to establish the case against the accused to a standard beyond reasonable doubt. It would not be proof beyond reasonable doubt to say that one was groped, without precisely stating which part of the body came into contact with that of the accused or, if the allegation is that it was an attempt, which part he attempted to touch. I am not saying that the appellant did not act in a manner, with respect to the complainant herein, which amounted to an offence, what I am saying is that either the prosecution did not present the material in their possession in a manner that brought out the crucial facts, or the trial court did not record the testimony of the complainant in a manner which brought the key elements.

23. Overall, I find that the conviction of the appellant was not safe, for the reasons given above. The appeal before me is, therefore, merited. I shall allow it, with the result that the conviction is hereby quashed, and the sentence of ten years’ imprisonment set aside. The appellant shall be forthwith be set free, if he is in prison custody, unless he is otherwise lawfully held. It is so ordered.

PREPARED, DATED AND SIGNED AT KAKAMEGA ON THE 17TH DAY OF SEPTEMBER, 2021

W MUSYOKA

JUDGE

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF FEBRUARY 2022

W MUSYOKA

JUDGE

MR. ERICK ZALO, COURT ASSISTANT.

BENJAMIN MEJA BARASA, APPELLANT, IN PERSON.

MR. MUTUA AND MR. MWANGI, INSTRUCTED BY THE DIRECTOR OF PUBLIC PROSECUTIONS FOR THE RESPONDENT.