RM v Republic (Criminal Appeal E043 of 2023)
[2024] KEHC 10752 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10752 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E043 OF 2023

LW GITARI, J

AUGUST 21, 2024

BETWEEN

RM .... APPELLANT

AND

REPUBLIC .... RESPONDENT

JUDGMENT

1. The appellant was charged before the Chief Magistrate's Court at Meru Sexual Offences Case No.E011/2022 with the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars are that on diverse dates between the year 2021 and January 2022 within Meru County intentionally caused his penis to penetrate to genital organ of JN a female child aged ten (10) years who to his knowledge is his daughter.

   In the alternative the appellant was charged with committing an indecent act with child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars are hat on diverse dates between the year 2021 and January 2022 intentionally touched the vigina of JN a female child aged ten (10) years with his penis.

   The appellant denied the charges and was subjected to a full trial and at its conclusion he was found guilty of the charge of incest and was sentenced to imprisonment for life.

2. The appellant was discontented with the conviction and sentence and filed this appeal which was initially based on six grounds which he later amended and filed a supplementary grounds of appeal as follows:

   a. That every person has inherent dignity and the right to have that dignity respected and protected under Article 28 of the *Constitution*.

   b. That the learned trial magistrate erred in both matters of law and fact for failing to notice that the case levelled against the appellant was motivated by a grudge out of child neglect.

c. That the learned trial magistrate erred in both matters of law and facts by rejecting the appellant's defence without cogent reason.

d. That the learned trial magistrate erred in matters of law and facts by rejecting the appellant's defence without cogent reason.

e. That the life sentence imposed on the appellant is excessive, arbitrary, and inhuman it violates the appellant's right to a fair trial under Article 25(c) of the *Constitution*.

f. That the mitigation factors of the appellant ere not considered by the trial court during sentencing.

g. That the time limit for life sentence meted on the appellant is not known.

He prays that the sentence imposed be reduced.

3. The brief facts of the case are that the appellant is the biological father of the complainant, JN who she was living with in the same house. The two were the only occupants of the house. It was the testimony of the complainant that the appellant used to sexually abuse her on several occasions by ordering to strip naked then insert his penis into her vigina. The complainant testified that the ordeal was painful and on complaining of pain the appellant would order he to keep quiet and threaten to kill her. JN did report to her teacher and the area manager LK (PW3). The witness testified that she is the area manager of [Particulars Withheld] and that she is a Community Health worker. In 2021 she heard of an incident of a child who needed support from the Community Health Department. She visited the home of accused and offered to cater for the child's school fees and basic needs while she was in her father's house. She also enrolled the child at[Particulars Withheld] Primary School. Later on 17/1/2022 a teacher from the said school NM (PW2) reported to her that she had noted some social change on the complainant and that she had alleged that there were challenges at home as the appellant would chase her out of the house at night and she would go hungry. PW3 testified on 20/1/2022 she looked for the complainant and enquired from her about the report that she had received from the teacher it is then the complainant reported to her that the appellant used to strip her naked and defile her severally. PW3 resported to the Chief (PW1) who in turn reported to the police she then took the complainant to Nairobi Women Hospital for treatment. Dennis Ndolo (PW3) a clinical officer at the said hospital examined the complainant and filed a P3 form on 5/2/2022. On examination, the hymen was broken with an old tear with normal external genitalia and viginal discharge noted. A P3 form was filled, a Post Rape Care Form and a Gender Violence Recovery Centre Report (GVRC) was also produced. All confirmed a broken hymen with an old tear and whitish discharge. P3 form was produced as exhibit 2, P.R.C Form exhibit 2 and Gender Violence Recovery Report as exhibit 3.

Maurine Kararu (PW6) is a police officer attached to Meru Police Station Gender Desk and is the investigating officer. On 5/2/2022 the complainant accompanied by PW2 went to the police station and reported that she was defiled severally by her father with whom she had lived with for three years after her mother left her with the accused. PW6 commenced investigations and noted that the complainant had been taken to Nairobi Women Hospital where she was examined and treated. The complainant was placed at Ripples International.

PW6 visited the scene and found that the accused was a drunkard who lived in a wooden house where he used to live with the complainant. The complainant was in class 2 special class at [Parrticulars Withheld] Primary and was aged nine years as she was born on 1/8/2012 as per her birth certificate exhibit 4. She produced her admission letter to the school as exhibit 5. She then arrested the accused and charged him. She then took the complainant to hospital.

Defence Case:

4. The appellant was put on his defence at the close of the prosecution case and he opted to give a sworn defence. He denied ever defiling the complainant and told the court the allegations were false and instigated by his sister called C and LK. However in cross-examination he stated that he has never differed with C. He admitted that he used to live with the complainant in his house. He further stated that he had no difference with LK. The learned trial magistrate held that all the ingredients of incest were proved beyond any reasonable doubts and she convicted the appellant on the main charge of incest. She then sentenced him to serve imprisonment for life.

The Appeal:

5. The appeal was canvassed by way of written submissions.

The appellant's submissions:

6. He faults the sentence imposed on him on the basis that it failed to consider his right to inherent dignity which is guaranteed under Section 28 of the *Constitution*. He further contends that the case was instigated by a grudge over child neglect as PW3 visited his home and established that she was living in pathetic conditions. PW3 bought her clothes, mattress and a bed which they took to the homestead. That this was a case of child neglect which was aggravated by the fact that he was a drunkard.

7. The appellant submits that the charge was framed in order to get rid of him. He relies on the case of *Maina –v- Republic* (1970) EA 370.

8. The appellant submits that he was not examined in hospital as ordered by the court and the examination would have had a bearing in this matter as he had a problem of erectile disfunction which was caused by his second wife who cut his genital in 2014.

9. On the sentence the appellant submits that Section 20(1) of the *Sexual Offences Act* which provides for a mandatory life imprisonment sentence fails to confirm to the principles of fair trials as it robs him the opportunity for individualized sentence and from his mitigation being considered. He relies on Article 25(c) of the *Constitution*, Section 216 and 329 of the *Criminal Procedure Code*. He also relies on the case of Francis Karioko Muruatetu & Another –v- Republic Petiti*on No.15/2015* (2017) eKLR Jared Koita Injiri –v- Republic Court of Appeal Kisumu Appeal No. 93/2014.

Respondent's Submissions:

10. The respondents submits that the ingredients of the charge wee proved by the complainant evidence which was corroborated by other witnesses and the medical report. On the sentence the respondent relies on *M.K-v- Republic* (2015) eKLR and submits that the trial magistrate exercised discretion while sentencing the appellant as she considered that the appellant was the minor's father yet turned her into a slave and abused her sexually. That he did not deserve leniency. He submits that the appeal fails.

Analysis and Determination:

11. I have considered the record of appeal and the submissions. The issues which arise for determination are:-

    1. Whether the charge against the appellant was proved beyond any reasonable doubts.

    2. Whether this court should interfere with the sentence.

12. This appeal is a first appeal and this court has a duty to analyse the evidence, evaluate it and reach its own independent finding but leave room for the fact that it had not opportunity to see the witnesses when they testified. Sele *Okeno-v- Republic* (1972) E.A 32 and *David Njuguna Wairimu –v- Republic* (2010 eKLR.

Whether the charge was proved beyond any reasonable doubts.

13. The appellant was charged with incest. Section 20(1) of the *Sexual Offences Act* provides as follows:-

> " 20(1) 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."

14. For the prosecution to prove the charge it had to prove the ingredients of the charge which are:

    1. Proof of age of the victim
    2. Penetration
    3. Identity of the perpetrator and that he was a family member.

Proof of Age:

15. The complainant (PW4) testified that the appellant was her biological father and she was living with him in the same house. She could not tell her age. PW6 produced the birth certificate of the complainant JN showing that she was born on 1/8/2012. This shows that at the time the offence was committed she was nine (9) years old. I find that the birth certificate was credible evidence which proved the age of the complainant to the required standards.

Penetration:

16. It was the testimony of the complainant that the appellant defiled her severally as the two lived together. The complainant was a minor. The trial magistrate conducted a voire dire examination and found that she was a young minor but she understands the importance of saying the truth. She ruled that the complainant could give unsworn testimony. The complainant was the sole witness to the fact of defilement.

17. In *Mohammed-v- Republic* (2006) 2KLR 138. The Copurt of Appeal asserted that;

> " it is now settled that the courts shall no longer be hamstrung by the requirement of corroboration where the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

18. The Court of Appeal has also addressed itself on the issue where the child has given unsworn evidence in support of the allegation of defilement. In *Jamaar Omani Hussein –v- Republic* (2019) eKLR the court stated that- "This is nonetheless not to say that the unsworn evidence is totally worthless. It only means that the court considering such evidence has to consider it with circumspension and look for corroboration from other evidence adduced in the matter.

19. The *Evidence Act* (Cap 80 Laws of Kenya) was amended to give courts discretion to rely on the testimony of the victim of Sexual Offences where she is the only witness provided that witness provided

that the trial Judge is satisfied that the victim was telling the truth. Section 124 of the *Evidence Act* provides as follows:-

> “ 124. Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

20. 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.”

21. In this case the learned trial magistrate found that the victim understood the importance of saying the truth. In her Judgment at page 20 of the record the learned magistrate stated that she believes the complainant is truthful. I find that the testimony of the complainant is sufficient to prove the fact of penetration. The testimony was corroborated by the medical evidence adduced by PW5 who produced the P3 form. He told the court that the complainant alleged to have been sexually abused by the father severally and the last incident was on 4/2/2022. On the examination of the genitalia the hymen was broken and there was a whitish discharge which was indicative of viginal penetration.

22. PW5 testified that the child gave a history of sexual abuse by the father. The Gender Violence Rescue Form which was produced in evidence showed that Harm on the genitalia was due to previous sexual encounter, the hymen was broken since it was not a fresh wound, it appeared it took place on several occasions. This was also noted on the P.C.R Form which was produced as exhibit. The P3 form indicates that there was an old torn hymen. Penetration under the sexual offences is defined as-

> “ the partial or complete insertion of the genital organs of a person into the genital organ of another person.”

23. The testimony of the complainant sufficiently proves that thee was penetration in her genital organ and is corroborated by medical evidence. The prosecution sufficiently proved the fact of penetration.

Identity of the Perpetrator and his relation to the victim:

24. The complainant testified that it is the appellant who is her birth father who used to defile her. In her testimony she gave graphic details on how the appellant used to strip her named and put her through a painful experience of dong ‘tabia mbaya’ by inserting his penis in her vagina. The learned magistrate found no difficulties in relying on the victim on finding that she was truthful.

25. The father was well known to the complainant. The appellant confirmed that she was living with the complainant. The appellant has not denied that he is the biological father of the victim. He was therefore aware of the relationship between him and the minor. He therefore commit the offence of incest by committing an act which causes penetration with a female who to his knowledge was his daughter.

26. The appellant in his defence stated that the charge was based on a grudge motivated by child neglect. It is indeed true that he had neglected his own child and the community came her rescue. This defence is a sham because upon being cross-examined after giving his defence he admitted that he had no differences with LK (PW3) the area manager. As for clarity he stated that he has never differed with her.

The witness (PW3) testified on her they assisted the complaint who was neglected by her father. The appellant admits that in deed the community assisted the complainant by buying clothes and beddings for her and other items. They also took her to school where she could be getting food. Little did they know that the appellant was defiling the child until she opened up. The defence is 'illicit' as evidence is bare that he had neglected the child and to add insult to injury, he sexually assaulted her. The learned magistrate cannot be faulted for rejecting that defence. The evidence of DW2 did not add any probative value, he could not tell the age of the child or her name. He said he had a grudge with a lady who remained imaginary as he did not give her name. The learned magistrate rejected the testimony of DW1 and for a good reason. I find that the prosecution proved the relationship between the appellant and the child (victim) and that he was the perpetrator.

27. That the appellant was not examined for the allegation that he suffers from erectile disfunction, it is well settled that the court relies on the victim's evidence and corroboration by medical evidence to convict. Medical examination of the perpetrator is not mandatory or even the only evidence upon which an accused can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond any reasonable doubts that the defilement was perpetrated by the accused. See Court of Appeal in Criminal Appeal No.270/2012 *George Kionji –v- Republic*.

28. In this case the appellant was identified as the perpetrator. The minor testified that the appellant used to insert his penis in her vigina. This is confirmed by the broken hymen, an old tear. This confirms that he was function properly to commit the crime. Penetration need not be deep inside the vigina, even touching the genitals with his penis of other 'tabia mbaya' of partial penetration like rubbing his penis on her genitalia was penetration. A child of such age would experience pain. Penetration was proved. The ground fails.

Sentence:

29. The appellant has challenged the sentence under Section 20(1) of the *Sexual Offences Act* as unconstitutional in as far as it is mandatory sentence. This issue was discussed at Length in *MK- v- Republic* (2015) eKLR where the court stated:-

> In the instant case, the appellant was charged with an offence under Section 20(1) of the *Sexual Offences Act*. This section provides for minimum term of 0 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned Judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?

30. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20(1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. Phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life

31. What does "shall be liable " mean in law" The Court of Appeal for East Africa In The Case Of *Opaya- v- Uganda* (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death." The court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion ti

impose sentences of death or of imprisonment. The court cited with approval the dicta in *James –v- Young* 27 Ch.D at P.655 where North J. said:

> "But when the words are not "shall be forfeited' but 'shall be liable to be forfeited 'it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced."

32. Guided by the decision in *Opoya-v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in James-v- Young 27 at page 655. We are satisfied that the sentence stipulated in the proviso to Section 20(1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20(1) is that a person convicted of incest when the female victim is – under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment."

33. I am persuaded by this decision as it gives the correct of interpretation of term shall be liable and shall and where the Act expresses itself as- not less. The appellate court can only interfere with the discretion of the trial court in sentencing if it has overlooked some relevant materials or taken into account some irrelevant matters or that the sentence is so excessive and therefor an error of principle.

34. See *Ogella s/o Owuor –v- Republic* 1954 E.A.C.A 270 where the court held that, the appellate court does not alter the sentence unless the trial Judge has acted on wrong principles or overlooked some material factors. See *Shadrack Kogo Kipkoech –v- Republic* Court of Appeal Eldoret Criminal Appeal 253/2003.

35. Section 20(1) of the *Sexual Offences Act* provides for that a person shall be liable to a sentence of life imprisonment.

36. The learned magistrate stated that she considered the nature of the offence. The mitigating circumstances, victim impact report and the accused person's response to it, the court has also considered the age of the minor and the fact that accused has been in custody.

37. I am of the view that the court considered relevant material factors in arriving at the decision to pass the sentence of life imprisonment. I find no reason to fault the learned trial magistrate on the sentence imposed.

Conclusion:

38. I find that the appeal is without merits and is dismissed.

DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF AUGUST 2024.

L.W. GITARI

JUDGE