



REPUBLIC OF KENYA



**PKS v Republic (Criminal Appeal 56 of 2013)
[2023] KEHC 373 (KLR) (27 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 373 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL 56 OF 2013
RN NYAKUNDI, J
JANUARY 27, 2023**

BETWEEN

PKS APPELLANT

AND

REPUBLIC RESPONDENT

*(From original conviction and sentence in criminal case number 4748
of 2011 in the Chief Magistrate's Court delivered on 15th March 2013)*

JUDGMENT

1. The appellant herein was charged with the offence of incest contrary to section 20(1) of the [Sexual Offences Act](#) No 3 of 2006. The particulars of the offence are that on the December 24, 2011, at [Particulars Withheld] location within Uasin Gishu County of the Rift Valley Province unlawfully and intentionally caused penetration of his genital organ (penis) into the genital organ (vagina) of MC, a child aged 10 years who to his knowledge was his niece.
2. In the alternative, he was charged with the offence of committing an indecent act with a girl contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the offence are similar to those in the main charge.
3. The appellant pleaded not guilty and the matter proceeded to full trial.
4. The trial court conducted a voir dire on the complainant and established that she understood the consequences of being untruthful in her testimony. PW1, MC, testified that she was born on November 22, 2001 and produced her birth notification as MFI-1. On December 24, 2011, she was at home with K, her younger brother when the appellant accused person came to their home and chased K away. He then took her to her bedroom and forced her to lie down. He removed her underwear and unzipped his trousers. It was her testimony that he did 'tabia mbaya' to her by removing his penis and inserting it in her part (she pointed to her genitals). He then penetrated her thrice. After the incident



- she escaped the house and ran to the house of her uncle called M where she met his wife J. She then explained what had happened. They later on went to xxxx police station where she was given a form to fill. She identified the accused as her uncle.
5. PW2, JS testified that she was the complainant's mother and that the complainant was born on November 22, 2001. She also produced the birth notification as evidence of the same.
 6. It was her testimony that on November 24, 2011 she left for work in the morning. Later on in the day her 5-year-old son, K ran to her place of work crying that he had been beaten by the accused. Some moments later, the complainant was brought to her by E who told her she had been injured and needed to go to the hospital for treatment. she then took her to xxxx Hospital then to the police station. They were then referred to Moi teaching and referral hospital where she was treated and discharged.
 7. PW3, JKAT, the assistant chief xxxx location, testified that he knew the accused and the witnesses. He was at xxxx trading centre on the material date when PW2 accompanied with PW1 informed him that the accused had defiled her. After conducting investigations, he apprehended the suspect and took him to xxxx police station.
 8. PW4, Kipsang Kipkazi testified that he was the investigating officer and he handed the file to PC Kimathi when he went on transfer. He was at xxxx police post at 3pm when he received the complaint from PW1 and PW2. He booked the report in the OB and the chief who was present informed him that he arrested the accused. He then accompanied PW1 to Moi Teaching and Referral Hospital. He also gave the minor a P3 form, recorded their statements and charged the accused with incest.
 9. PW5, Dr Cynthia Kibet, presented the P3 form as evidence and testified that she examined the complainant. She observed that she had no other injuries save for her genitalia. Her hymen was broken and her private parts were red in colour. There was no discharge and no sperms were seen from her urine. She concluded that there was vaginal penetration.
 10. The trial court, upon considering the evidence, found that the accused had a case to answer and he was placed on his defence. He gave unsworn evidence that on the November 24, 2011 he was at xxxx with his lorry. He initially had a disagreement with his sister then proceeded to xxxx on November 23, 2011 where the lorry they were using broke down. They went to buy spare parts and spent the night there and on November 24, 2011 they went to load the lorry with logs up to 12pm. When he alighted the lorry, he met the assistant chief with another person. They then informed him that he had beaten PW2s children and he was arrested and taken to xxxx dispensary then xxxx police station.
 11. Upon considering the testimony of the parties, the evidence before the court and the facts of the case the trial court was convinced that the prosecution had proved its case to the required standard and he was convicted of the main charge. The court sentenced him to life imprisonment after considering his mitigation.
 12. The appellant being aggrieved by the conviction and sentence appealed against the same vide a petition of appeal filed on March 22, 2013 on the following grounds;
 1. That (I) did not plead guilty to the charges
 2. That the trial magistrate erred both in law and in fact by convicting (me) without citing that the prosecution case was inconsistent.
 3. That the trial magistrate erred both in law and fact by not holding that the prosecution case was bot proved beyond any reasonable doubts.



4. That the trial magistrate erred in both law and fact in finding that he was found guilty without any cogent reasons.
 5. That the trial magistrate came obliged to convict (me) without considering his defence
 6. That (I) pray to be present during the appeal.
13. He sought to have his appeal allowed and the sentence and conviction quashed.
14. When the matter came up for admission of the appeal on November 23, 2021, this court directed that the appeal be disposed of by way of written submissions. None of the parties have filed submissions to date.

Analysis and determination

15. Upon consideration of the petition of the appeal and the grounds contained therein, the following issues arise for determination;
1. Whether the prosecution proved its case to the required standard
 2. Whether the sentence was harsh/excessive

Whether the prosecution proved its case to the required standard

16. As the first appeal court, my duty is to re-consider and re-evaluate the evidence adduced before the trial court and come up with my own conclusion as to whether the evidence was sufficient to sustain a conviction (See *Okeno -vs- R (1972) EA 32*).
17. Section 20(1) of the *Sexual Offences Act* states as follows;
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 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.
18. It follows that the ingredients that are required to prove the offence are as follows;
1. Knowledge that the person is a relative
 2. Penetration or indecent act

Knowledge that the person is a relative

19. The complainant identified the appellant as her uncle. Further, the appellant admitted that PW2 was his sister. PW2 having confirmed that PW1 is her daughter, it is not in dispute that the accused person was the uncle to the complainant and that he was aware she was his niece. There was no evidence produced to the contrary and therefore this element was satisfied.

Penetration

20. The evidence of Dr Cynthia Kibet, corroborated by the P3 form was conclusive proof that there was penetration. Section 124 of the [Evidence Act](#) allows the court to convict on an uncorroborated



evidence of a sexual offence victim if the court is convinced of the truthfulness and credibility of the complainant's evidence.

21. The trial court conducted a voir dire and was satisfied that the minor was intelligent and able to differentiate between a lie and the truth, thereby lending credence to the testimony of the complainant.
22. The plurality of the evidence has the legal effect of establishing the guilty of the appellant beyond a reasonable doubt. This standard principle means that the probability of the appellant's guilt was so high that it eliminated all reasonable doubt to warrant a conviction for the offence charged. Proof beyond reasonable doubt was of such a convincing nature that even on appeal there were no significant errors of law or facts to interfere with the finding of the learned trial magistrate. Going back to the defence tendered by the appellant on the elements of the charge it remained clear that the amount of evidence by the prosecution gave rise to the primary meaning of the standard of proof beyond reasonable doubt. Undoubtedly the appellant was properly convicted which I hereby affirm on appeal.

Whether the sentence was harsh or excessive

23. Section 20(1) of the *Sexual Offences Act* provides for a sentence of life imprisonment if the complainant is a minor. In this case, the complainant was not only a minor but she was 10 years of age. In light of the new jurisprudence on mandatory sentences terming them as unconstitutional, specifically [*Maingi & 5 others v Director of Public Prosecutions & another \(Petition E017 of 2021\) \[2022\] KEHC 13118 \(KLR\)*](#) this court is obliged to consider the sentence and whether the appellant was given an opportunity to mitigate. In the petition the court held as follows;
24. To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of article 28 of the *Constitution*. However, the court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.
25. The proceedings reveal that the appellant was given an opportunity to mitigate and did the same. In the premises, if this court were to uphold the life sentence the same would be within its mandate as it would be considered discretionary. Struggles between broad penal policy and judicial discretion on mandatory minimum resentencing has recently emerged resulting into a new transformed jurisprudence. This what I call the politics on minimum sentences and the rule of law in Kenya. May be the extreme form mandatory minimum sentencing reflected between the period of 2006 and 2017 with strict sentencing guidelines may have contributed to the near thinking by the judges. The judges have emphasized that the deepening in mandatory minimum sentences has the potential of disproportionate harsh effects on the offenders.
26. As noted in the Odunga, J as he then was in the case of : *Maingi & 5 others vs Director of Public Prosecution & another (Petition E017 OF 2021) (2022) KEHC 13118((KLR)* in which he drew inspiration from the Supreme Court decision in: [*Francis Karioko Miruateru & another vs Republic \(2017\)eKLR*](#). The judge considered inter alia that mandatory sentencing give slice to significant human rights concerned under Kenya's bill of rights as guaranteed in our Constitution 2010. For instance in his judgement making reference to both comparative and local jurisprudence he did make the following observations. In this context the principles in the cases of *State-vs- Tom, State -vs- Bruce (1990 SA 802 (A)*, which states:

"The first principle is that the in infliction of punishment is pre-eminently a matter for the discretion of the trial court. That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such discretion permits of balanced and fair sentencing, which is a hallmark



of enlightened criminal justice. The second, and somewhat related principle, is that of the individualization of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law. A mandatory sentence runs counter to these principles. (I use the term 'mandatory sentence' in the sense of a sentence prescribed by the legislature which leaves the court with no discretion at all -either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof.) It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. Harsh and inequitable results inevitably flow from such a situation. Consequently, judicial policy is opposed to mandatory sentences as they are detrimental to the proper administration of justice and the image and standing of the courts.'

27. In arriving at a minimum mandatory sentence of life imprisonment, the court should not ignore the basic guidelines on the seriousness of the offence, the manner in which he was committed, and the gravity of the harm occasioned the victim. This is what the court in South Africa in the case of: [*S v Mahomotsa 2002 \(2\) SACR 435\(SCA\)*](#) the court had to say:

'Evan in case falling within the categories delineated in the Act there are bound to be difference in the degree of their seriousness. There should be no misunderstanding about this. They will all be serious but some will be more serious than others and, subject to the caveat that follows. It is only right that the difference in seriousness should receive recognition when it comes to the meting out of punishment. At this court observed in Abraham. Some rapes are worse than others and the life sentence ordained by the legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is in appropriate and adjust. Of course. One must guard against the notion that because still more serious cases than the one under consideration are imaginable. It must follow inexorably that something should be let in reverse for such cases and therefore that the sentence that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdiction. Be it death, life or some lengthy term of imprisonment. And there will always be case which, although differing in their respective degree of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crime under consideration are not all equally horrendous may not matter if the lead horrendous of them is horrendous enough to justify the imposition of the maximum penalty.'

28. In respect of this jurisprudence question the approach laid down in our jurisdiction is a pointer to the departure from mandatory minimum sentences as a norm. This is clear from the position taken by the Court of Appeal in [*David Kipkogei Letting vs Republic \(2021\) eKLR*](#) and [*Jared Koita Injiri v Republic\(2019\) eKLR*](#) in which the court says:

'The purpose and objective of sentencing as stated in the judiciary sentencing policy should be commensurate and proportionate to the crime committed and the manner in which it was committed. The sentencing should be one that meets and end of justice and ensures that the principles of proportionality, deterrence and rehabilitation are adhered to. In this regard we think that the complaint that the sentence imposed was harsh and excessive in valid though it was the only sentence available then. We are therefore inclined to interfere with it. We therefore set aside the sentence of live imprisonment imposed on the appellant.



Having considered the mitigation proffered by the appellant on record the sentence that commends to us is 25 years imprisonment.'

29. It is acknowledged in the sentencing regime that though deterrence is an important factor in the interest of society, however it is not always the most critical nor the only factor to carry more weight than rehabilitation or reformation of the offender. Without attempting to lay down a general rule on minimum mandatory sentences, given the guiding principles stated above I am persuaded to exercise discretion in interfering with the decision of the trial court in sentencing by substituting the life imprisonment with a definite custodial sentence of 40 years to balance the gravity of the crime and punishment for it. The aforesaid sentence commence on the December 20, 2011 to give effect to the provisions of section 333 (2) of the *Criminal Procedure Code*. As a consequence the committal warrant be so amended to inflect the variation and review order on sentence. In sum the appellant appeal in conviction failed and the partial success on sentence as dully substituted.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 27TH DAY OF JANUARY 2023

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R. NYAKUNDI

JUDGE

Coram: Hon. Justice R. Nyakundi

