VK v Republic (Criminal Appeal E184 of 2022)
[2023] KEHC 18038 (KLR) (30 March 2023) (Judgment)

Neutral citation: [2023] KEHC 18038 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CRIMINAL APPEAL E184 OF 2022

LW GITARI, J

MARCH 30, 2023

BETWEEN

VK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Introduction

1. This appeal arises from the proceedings in the Chief Magistrate's court at Maua Sexual offence case no. 58/2020 where the appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. No. 3/2006. It was alleged that on 21st August 2020 at Miori Location in Igembe Central sub-county intentionally forced his penis to penetrate the vagina/anus of NM who was to his knowledge his daughter, a child aged three (3) years.

2. The appellant pleaded not guilty. After a full trial the appellant was found guilty, convicted and sentenced to serve twenty five (25) years imprisonment.

3. The appellant was aggrieved by the conviction and sentence and filed this appeal based on ten grounds of appeal. The appellant later filed supplementary grounds of appeal together with his written submissions. These grounds are as follows-;

    1. That the learned trial magistrate erred in both matter of law and fact by failing to note that the conviction of the appellant was not safe as he was a genuine case who would have required legal aid assistance to defend himself against the charge he faced under the provisions of article 50 (2) (h) of the *Constitution* and section 43 (1) (b) (c) of the *Legal Aid Act*.

    2. That, the learned trial magistrate erred in both matters of law and fact by failing to note that failure by the appellant to cross – examine the prosecution witnesses and give a defence

statement was as a result that the appellant never understood the consequences of remaining silent as a defence strategy on such severe charges levelled against him by the prosecution witnesses as he lacked the capacity to defend himself properly as he was a mentally unstable person who never understood the law.

3. That the appellant humbly begs the court to allow him to mitigate and review his sentence downwards as the sentence of 25 years imprisonment is harsh and excessive to him as he is 24 years old a young man with a live to live ahead of him.

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

Brief Facts

5. The brief facts of the case are that the complainant is a girl who was aged three (3) years at the time this offence was committed. The complainant is daughter of the appellant. The appellant who is the son of P.w 2 was living together in the same compound as well as the complainant. On 21st August 2020 the complainant's grandmother (P.w 2) had left her at home and went to the shop where she stayed for about thirty (30) minutes. P.w 2 had left the victim and the appellant at home. Upon her return, the P.w 2 found the complainant outside the house. The appellant had locked himself inside the house. The victim was crying and that prompted P.w 2 to check what could have been the problem. P.w 2 noticed that her pant had bloodstains and she could not walk. P.w 2 asked the appellant what had happened to the child and he said that the child had fallen. P.w 2 doubted the explanation. The child was escorted to hospital and the accused was handed over to the police at Maua Police station. The minor was escorted to hospital and she was admitted for about four days. On examination, the doctor found that she was in pain and he could not examine her. She was taken to the theater under general anesthesia and surgical repairs were done. The complainant had sustained anterior and posterior lacerations on the anus. She was stitched. The hymen was perforated. There was no communication between rectum and vagina. A P.3 form was filled and produced in this court as exhibit 4 together with treatment notes, Post rape care form and lab request notes. The notes show that constructive surgery had to be done and the child was admitted in hospital for five days.

6. The appellant who is the biological father of the complainant was charged with this offence.

7. The appellant did not offer any defence.

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

Appellant's Submission

9. The appellant submits that he is mentally unstable. He submits that he was not given legal aid in the lower court which he deserved owing to his mental illness. The appellant has cited article 50 (2) (g) and section 43 (1) (a) of the *Legal Aid Act*. The appellant submits that a retrial be ordered or he be given an opportunity to mitigate as the sentence imposed was harsh.

10. For the respondent, submissions were filed by the learned state counsel, Nancy Njeru. She submits that the conviction should be upheld and the appeal be dismissed. It is further submitted that right to legal representation is limited to cases of murder, robbery with violence and children in conflict with the law. She has urged the court to find the appellant did not suffer any prejudice during the trial. It is also the contention that a retrial would prejudice the victim under the *Victim's Protection Act* and traumatize the complainant. The respondent has relied on *Macharia v Republic* and *Karisa Chengo & 2 others*, Supreme Court Cr. No. 44, 45 & 76 of 2014.

Analysis And Determination

11. I have considered all the proceedings before the lower court and the submissions. The issues which arise for determination are:

    1. Whether the appellant was entitled to legal counsel.

    2. Whether the appellant was fit to stand trial.

    3. Whether the sentence imposed was harsh.

12. This is a first appeal and this court has a duty to evaluate the evidence which was tendered before the trial court and come up with its own findings. The court is however supposed to leave room to the fact that it had no opportunity to see the witnesses and assess their demeanor. This was so held in the case of *Okeno v Republic* [1972] E.A 32 where it was hold that;

> " An appellant on a 1st appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination and the appellate court's own decision on the evidence. The first appellate must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the appellate court to merely scrutinize the evidence to see if there was some evidence to support the lower courts findings and draw its own conclusion. In doing so it should make allowance for the fact that the trial court has had the advantage of hearing and seeing he witnesses"

The prosecution called four witnesses. The first witness who is recorded as P.w 2 testified that on the material day she had left the victim at home with his father who is the appellant. On returning home she found the victim crying and had passed some stool which was blood stained. Her pant was also blood stained. She checked and found out that the victim had been defiled. She informed her husband and together they took the complainant to hospital and handed the appellant to the police.

13. The testimony of P.w 2 was not challenged in cross-examination. According to P.w 2 the appellant was inside the house. As the complainant was crying outside the appellant did nothing. According to P.w 2 the appellant blamed the injuries on the complainant to a fall. P.w 2 produced a birth certificate which shows that the victim was born on 7th May 2017. The P.w 2 is the mother of the appellant. Her testimony was not challenged. The complainant was availed in court but could not testify due her tender age.

14. Pw 3 Ann Kendi Itabara was the Clinical Officer who produced the P.3 form and treatment notes. She testified that the complainant had lacerations on her anus and the hymen was perforated. Constructive surgery was done in the theater. She produced the P.3 form, treatment notes and the laboratory request notes. She also produced the PRC (Post Rape case) form as exhibits.

15. Pw 4 Janice Imburi a police officer based at Maua Police station. She investigated the matter and charged the appellant. The evidence of the witness was not challenged. The appellant upon being given an opportunity to give his defence, informed the court that he had no comment. I note from the record that the appellant had indicated that he had a mental illness. The court ordered that he be examined by a psychiatrist. He was examined and was found fit to stand trial. The report by doctor Bordaon Ambayo Psychiatrist consultant stated that the appellant had no mental illness, had no history of mental illness and was mentally fit to plead and stand trial. I find that the issue of mental illness does not arise. The Doctor observed that the appellant was admitted in a rehabilitation centre in Kiambu for drugs abuse. He was treated for three months and confirmed to the doctor that he had not abused drugs ever since.

16. The appellant in his ground of appeal stated that the trial magistrate error for failing to avail to him a legal counsel. Article 50 (2) (h) of the *constitution* provides that-;

> Every accused person has the right to a fair trial which includes the right-
>
> > " to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;"

To buttress this, section 43 of the *Legal Aid* provides as follows-:

(1) A court before which an unrepresented accused person is presented shall—

(a) promptly inform the accused of his or her right to legal representation;

(b) if substantial injustice is likely to result, promptly inform the accused of the right to have an advocate assigned to him or her; and

(c) inform the Service to provide legal aid to the accused person. (1A) In determining whether substantial injustice referred to in paragraph (1) (b) likely to occur, the court shall take into consideration—

(a) the severity of the charge and sentence;

(b) the complexity of the case; and

(c) the capacity of the accused to defend themselves.

(2) The Service shall provide legal aid to the accused person in accordance with this *Act*.

(3) Where a child is brought before a court in proceedings under the *Children Act* (No. 8 of 2001) or any other written law, the court may where the child is unrepresented, order the Service to provide legal representation for the child.

(4) Where an accused person is brought before the court and is charged with an offence punishable by death, the court shall, where the accused is unrepresented, order the Service to provide legal representation for the accused.

(5) The provision of legal representation under sub-section (4) shall be subject to the criteria for eligibility for legal aid under this Act.

(6) Despite the provisions of this section, lack of legal representation shall not be a bar to the continuation of proceedings against a person."

The court has a duty to inform an accused person of his right to legal representation if substantial injustice is likely to occur, and promptly inform the accused of this right and assign him a legal counsel. The *Legal Aid Act* has also listed the matters which the court is supposed to consider determining whether substantial injustice is likely to occur. These are-: Severity of the charge and sentenceThe complexity of the case.The capacity of the accused to defend himself.

The courts have considered the rights to legal representation under the above provisions. The Court of Appeal in *Macharia v Republic* stated as follows;

> " Art. 50 *constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is the interests of ensuring justice. This varies with the repealed law by ensuring that an accused person regardless of the gravity of their crime may receive a court appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law, where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence... We are of the considered view that in addition to situations where "substantial injustice would otherwise result" persons accused of capital offences where the penalty is loss of life has the right to legal representation at state expense"

17. On the other hand the Court of Appeal in *Karisa Chengo & 2 others v R* Cr. Appeal 44, 45, 76 state as follows:

> " It is obvious that the right to legal representation is essential to the realization of a fair trial more so in capital offences.The constitution is crystal clear that an accused person is entitled to legal representation at the state's expense where substantial injustice would otherwise be occasioned in the absence of such legal representation. This court in the *David Njoroge Macharia case* (*supra*) seems to have expanded the constitutional requirement that legal representation be provided at state expense in cases where substantial injustice might otherwise result?. And to include all situations where an accused person is charged with an offence whose penalty is death. This may be misunderstood to mean that all persons, regardless of their economic circumstances would be entitled, as of right to legal representation at state expense if they are charged with an offence whose penalty is death. However, substantial injustice only arise in situations where a person is charged with an offence whose penalty is death, and such person is unable to afford legal representation pursuant to which the trial is compromised in one way or another only then would the state obligation to provide legal representation arise"

The right to legal representation is enshrined in the constitution and is to be given to an accused person where substantial injustice may occur. The right is to be given to person charged with an offence where the penalty is death and is unable to afford legal representation. From the above decisions, the right to legal representation is a fundamental human right and is essential to the realization of a fair trial but the court is stating that it may be limited in some instances. See *Thomas A Ndegwa v R* Court of Appeal [2016] eKLR.

18. The appellant was charged with defilement. The appellant has stated that he was entitled to legal representation due to the severity of the charge. From the record of the lower court the appellant appeared in court and was given an opportunity to challenge evidence and adduce evidence. He did not suffer any prejudice. Although he submits that he did not cross examine the witnesses, as he had a mental illness, in my view, this does not arise. The fact that the sentence is severe is one of the considerations. The entitlement to legal representation at state expense will be given where substantial injustice would arise. The appellant was fit to stand trial, the case before the trial magistrate was not complex. The appellant was not prejudice. On the charge of incest under section 20 (1) of the *Sexual*

Offences Act it provides for a maximum sentence of life imprisonment. The appellant was sentenced to twenty five years. The appellant's right to legal representation was not violated as there was nothing before the trial court to suggest that the appellant was likely to suffer injustice. Failure to cross examine may be attributed to the relationship he had with them, his mother and his own biological child. In my view no prejudice was suffered and no injustice was likely to arise in the circumstances.

19. The 3rd issue for determination is whether the sentence was harsh. Section 20 (1) of the *Sexual Offences Act* provides

> "
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> "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 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"

There is no dispute that the complainant in this case is the biological child of the appellant. The appellant was sentenced to serve twenty five years imprisonment. The sentence is therefore lawful. The prosecution proved that the appellant was a relative of the victim, that there was evidence of penetration which was adduced by the Clinical Officer. Medical evidence sufficiently corroborated the evidence of P.w 2 that the complainant was penetrated and her genital organs badly damaged. The prosecution proved the age of the complainant with the production of her birth certificate. The appellant was identified as the perpetrator by his mother and the child victim. Although nobody witnessed the defilement, the circumstantial evidence that he is the one who was left with the complainant is so strong. The appellant alleged that the victim might have fallen. This suggests that he was aware that something happened to the victim. This was not the case. I find that all the ingredients of the offence were proved. I find that the sentence imposed was not harsh in the circumstances. The Court of Appeal in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR it was held;

> " It is now settled law, following several authorities by this court and by the High court that sentence is a matter that rests in the discretion of the trial court. Similarly sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if the appellate court feel that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any one of the matters already stated is shown to exist."

20. The appellant has not demonstrated any of these grounds. I therefore have no reason to interfere with the sentence. The trial magistrate exercised her discretion judicially in view of the seriousness of the charge.

Conclusion

21. I find that the conviction of the appellant sound. The appeal is without merit. I order as follows-;

    1. The appeal is dismissed.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF MARCH 2023

L. GITARI

JUDGE