JTM v Republic (Criminal Appeal E042 of 2021)
[2023] KEHC 3698 (KLR) (28 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3698 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E042 OF 2021

A MSHILA, J

APRIL 28, 2023

BETWEEN

JTM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Background

1. The appeal for determination emanates from the judgment of CM Makari Resident Magistrate Court at Gatundu in Gatundu Criminal Case No 24 of 2016 delivered on November 15, 2017.

2. JTM the appellant herein was charged with the offence of incest by male person contrary to Section 20 (1) of the *Sexual Offences Act* No 3 of 2006. The particulars are that on the 6th day of October 2016 in Gatundu South Sub- County within Kiambu County, intentionally and unlawfully did an act which caused penetration with his genital organ namely penis into the genital organ namely vagina of LGW a child aged 11 years old and whom he knew to be his niece.

3. In the alternative charge the Appellant was charged with the offence of committing an Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars were that on October 6, 2016 in Gatundu South Sub – County within Kiambu County intentionally and unlawfully touched the breasts of LGW a child aged 11 years with his hands.

4. The Appellant was arraigned in court for plea on October 10, 2016, the charges and the particulars were read out to him. He pleaded not guilty and a plea of not guilty was entered.

5. After the hearing the Trial court found the Prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant for the offence charge and sentenced the appellant to 30 years in imprisonment.

6. Aggrieved by the Judgment of the trial court the appellant filed the current appeal vide a petition of appeal, seeking leniency of the sentence. The appellant cited the following grounds of the appeal:-

   i. That the court does include the time spent in custody as part of the sentence.

   ii. The court does award a much lenient sentence due to the appellant's health- Status and age.

   iii. The court does allow the appellant a chance to reunite with his family who depends on him.

   iv. He urged the court to be present during the hearing of the mitigation.

7. The appeal was heard by way of written submissions of which both parties complied.

Appellant's Submissions

8. The appellant filed submission on January 18, 2018, in which he submitted that the sentence of 30 years was harsh and excessive, he urged the court to reconsider the same and award a lenient sentence considering he is aged 44 years and if let to serve the 30 years he will be released at the age of 74 years to serve the society and will thus not use his skills attained in the institution to serve the public. He urged the court to review the sentence and be guided by Article 25 (c) and 50(2)(p) of the *Constitution of Kenya*.

9. He submits that he has reformed and he is a person of good character having acquired skills from prison.

10. The appellant submits he is cognizant of the offence before him and there are no compelling circumstances to decline the prayers sought as the appellant has utilized the 12 years spent in prison well and obtained a recommended from the prison authority. He urges the court to review the orders and issue a lesser sentence citing the fact that perpetrators of defilement do not benefit from presidential mercy.

Respondent's Submissions

11. Opposing the appeal the Respondents' counsel Mr. Gacharia Prosecution Counsel filed written submissions on 23rd January 2023. He urged the court to uphold the judgment of the trial court and dismiss the appeal herein. He submits the prosecution in the trial court proved beyond reasonable doubt all the ingredients of the offence charge.

Analysis

12. This being the first appeal, this court has a duty to examine all the evidence tendered in the trial court, evaluate and analyze it and arrive at its own findings and conclusions. The court is mindful that it did not have the benefit of hearing the witness as they testify in the trial court.

13. As per the case of *Okeno v Republic* (1972) EA 32 AT PG 36, the EA Court of Appeal said:-

> " An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v Republic (1957) EA 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Ruwalla v Republic (1957) EA 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions. It must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's

findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses,"

14. Before dealings with the merits of the appeal this court will first analyze the trial court evidence.

Trial Court Evidence

15. The prosecution called a total of 4 witnesses. PW1 was the complainant LGW, after conducting a voire dire the court was satisfied that the minor understood the importance of telling the truth and she understood the meaning of oath taking. The court directed the complainant to give sworn statement.

16. PW1 testified that she lives in [Particulars Withheld] and schools at [Particulars Withheld] Primary School in grade 4. She lives with her mother and grandmother. The accused is his uncle and they lived in the same compound. She testified she could not recall the date when he called her to go and pick a plate from his house at take it to their house. When he went into his house the appellant put her on the bed and did bad manners to her (pointed at the vagina) she told the court he used his penis. She said the appellant removed her pant and he also removed his trouser. She said she felt a lot of pain but she could not scream as the accused had crossed her mouth with his hands. She told the court she did not tell anybody as the accused threatened to kill her.

17. PW1 told the court they were alone at home as the mother had gone to the river and the grandmother had gone to take nappier grass to the cows. She told the court it was not the first time for the accused to defile her as he had done it on three (3) occasions. She told the court she later told her friend AW, who told the class teacher and she accused was arrested by police officers from their home. She said the accused gave her Kshs 10/= in return.

18. PW2 AW after conducting a voire dire the court established she understood taking of oath and she posed sufficient intelligence. The court found she would give sworn evidence.

19. PW2 testified she is in class 5 in [Particulars Withheld] Primary that on October 7, 2016 during break time while in school LGW her friend told her that the accused used to tell her to go and pick a plate from his house and he would in turn do bad manners to her and then give her money. She said she told teacher G . They went with teacher G to the home of LWG to see if her mother was around but she was not. They went to Gatundu police station and recorded statement. She told the court LWG used to go with money in school. She said the defiler was LWG's uncle called K.

20. PW3 EWK testified she lives in [Particulars Withheld], the Complainant PW1 is her granddaughter while the accused is her son. That on October 7, 2016 the accused was arrested. She testified she took the complainant to hospital and she adduced the treatment notes and the P3 form filed as PMF 11 and 13. In cross examination she told the court that Pw1 told her the accused had threatened to kill her if she spoke out about the issue.

21. PW4 MNM she testified she is a teacher at [Particulars Withheld] school and that on October 7, 2016 other students reported to her the that PW1 had told them that accused did bad manners to her and she was given money for mandazi or ngumu. She called PW1 in the presence of other 2 teachers and she opened up. she called the head teacher and the area sub- chief and informed them. She testified she took PW1 to Gitare Health Centre for treatment. she told the court she had noticed PW1 could not control her bladder while in school.

22. PW5 Faith Muthoni testified she is a doctor from Gatundu Level 4 Hospital. She was employed from July 2016. She testified she filled the P3 form for LGW aged 11 years' old who came with a case of defilement. That the accused lured her to his house and defiled her. According to PW5 the clothes of the day of the incident were not availed. On examining PW1 she was in fair general condition,

there were no injuries on head, stomach, chest, arms or legs. PW1 testified the incident was a weak before exam. There was no weapon used. PW5 assessed the injury as grievous harm on genital exam the external appearance was normal, the hymen was broken, she had a white discharge, no blood. The HIV test was negative, but on a vagina swap PW1 had an infection. She relied on treatment notes from Gatundu Hospital. which she adduced in court. she testified she examined PW1 after a week and she had changed her clothes and no sperms were found.

23. In re-examination she stated the hymen was broken and from the history it was through sexual intercourse and she also had an infection in the private parts.

24. PW6 Corporal Marion Chogo testified she is from Gatundu Police Station, in charge Gender and Children and was the Investigating Officer. That on 8/10/16, she was at the station when she received a report from Kigaa AP Post, it was at noon, it was a defilement case whereby the accused JTM had filed LGW aged 11 years old a student at [Particulars Withheld] Primary. The defilement was on 6/10/16 at 4pm. She booked the accused when he was arrested. She took the complainant to Gatundu Hospital, she was examined and defilement confirmed and the P3 from filled. She charged the accused person. She adduced the P3 Form as an exhibit and the PRC form and the treatment notes. She also adduced the complainant immunization card which shows the victim was born on 18/01/05.

25. PW7 APC Richard K. Wachira testified he is attached at Kigaa AP Post at Kamwangi. on 8/10/16, while at the post with his colleague Ronald Korir at 6.00am the chief called informing them the heads teacher [Particulars Withheld] Primary School had a student with a case of defilement. In the company of Pw4 and the assistant chief he arrested the accused at his home and escorted him to Gatundu Police Station.

26. DW1 JTM testified that he did not know the reasons for the arrest on October 8, 2016 was arraigned in court and pleaded not guilty to the charge.

27. Section 20 (1) of the *Sexual Offences Act* provides;

> " 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 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.'

28. The above section creates the offence and the penalty to the offence. It is not in dispute that the Appellant was an uncle to the victim. Thus, the offence falls within the meaning of Section 20 (1) of the *Sexual offences Act*.

29. For the prosecution to prove a case of incest the following ingredients must be established:

    i. An indecent act or an act that causes penetration;

    ii. The victim must be a female person who is related to the perpetrator in the degrees set out in Section 22 of the *Act*.

30. The act of penetration as stated by PW1 was properly proved and corroborated by the P3 form and the medical notes.

31. The Prosecution witness PW3 who was the grandmother to the PW1 and the Appellant testified that PW1 was aged 11 years, she adduced a copy of the immunization card which also indicated the age of PW1 as 11 years. Thus, the age of the victim having been properly proven the offence committed by the Appellant attracts a penalty of life imprisonment as per the wording of Section 20 (1) of the *Sexual Offences Act*.

32. The trial court in its judgment sentenced the appellant to 30 years imprisonment, which sentence was within the law; this court is satisfied that the trial court did not err in sentencing the appellant to 30 years imprisonment.

33. The appellant in his appeal acknowledges the sentence and the conviction and he submits that the appeal is to request for leniency and for the court to review the sentence imposed to a less severe sentence.

34. The appellant has urged this court to take into account time spent in custody and set him free to reunite with his family. In its considered opinion releasing the appellant to the society will not be in the best interest of the victim (PW1) as they live in the same compound. Setting the appellant free will mean moving the victim from the family setting and committing her to a safe place which would not in the best interest of the victim. The victim should continue enjoying the warmth and peace of a family set up. The court is tasked with protecting the children from the society and to ensure that their best interest is well taken care of.

35. The victim was 11 years. The Appellant is an uncle to the victim who was expected to protect the victim but took advantage of her. One of the main purposes of sentencing is to protect the public from the commission of such crimes and deter other offenders from committing a similar offence.

36. In the case of *R vs Scott* (2005) NS WCCA 152, Howie J. Grove and Barn JJ stated:

> " There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed. ... one of the purposes of punishment is to ensure that an offender is adequately punished. ... a further purpose of punishment is to denounce the conduct of the offender."

37. In the circumstances thereof having considered the mitigation by the petitioner, this court is not persuaded that the appellant is entitled to a review of the sentence to term served. The period served is an inadequate punishment for the defilement of a minor aged 11 years, the appellant destroyed the life of a young girl and this action requires stiffer and deterrent punishment.

38. The sentence imposed of 30 years is considered as sufficient and thus the trial court's sentence shall be upheld.

Consideration of time spent in custody

39. The appellant was arrested on October 8, 2016. He was sentenced on November 15, 2017. He was in custody throughout the subsistence of the trial which period translates to approximately one (1) year and one month. In the appeal the appellant has urged the court to consider this period spent in custody;

40. Section 333(2) of the *Criminal Procedure Code* provides: -

> " Subject to the provisions of Section 38 of the Penal Code, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under sub section (1) has prior, to such sentence shall take account of the period spent in custody."

41. The court in the case of *Bethwel Wilson Kibor vs Republic* [2009] eKLR expressed itself as follows:-

> " By proviso to section 333(2) of the Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at September 22, 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

42. From the trial court record, this court notes that the trial court did not consider the time spent in custody by the appellant. By virtue of Section 333(2) of the *Criminal Procedure Code* the time spent in custody is to be taken into consideration.

43. Further the Judiciary *Sentencing Policy Guidelines* provides that:-

> " The proviso to section 333(2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

44. Thus, this Court will review the sentence and include the period spent in custody. Therefore, the sentence of 30 years to run from the date of arrest.

45. The upshot is the appeal partially succeeds.

Findings & Determination

46. In the light of the forgoing this court makes the following findings and determination;

    i. The appeal is found to be partially meritorious;

    ii. The conviction and sentence are both upheld; the commencement date of the sentence of 30 years imprisonment to run from the date of arrest.

    Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT KIAMBU THIS 28TH DAY OF APRIL, 2023.

HON. A. MSHILA

JUDGE