JO v Republic (Criminal Appeal E036 of 2022)
[2023] KEHC 22718 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22718 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E036 OF 2022

FROO OLEL, J

SEPTEMBER 29, 2023

BETWEEN

JO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(APPEAL ARISING FROM THE JUDGMENT OF THE CHIEF MAGISTRATE COURT AT MOVOKO – S. KANDIE, (RM) IN CRIMINAL CASE (S.0) NO.14 OF 2020 DELIVERED ON 9 th May, 2022)

JUDGMENT

A. Introduction

1. The Appellant herein JO was charged with the offence of Incest by a male person contrary to section 20(1) of the *sexual offences Act* No 3 of 2006. The particulars of the offence were that on 25th December 2019 in Athi River Sub County within Machakos County being the father of A.K intentionally and unlawfully caused your genital organ (penis) to penetrate into the female genital organ (vagina) of A.K. who is to your knowledge a child aged 13 years.

2. The Appellant was further in the alternative charged with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act No.3 of 2006. The particulars were that that on the 25th day of December 2019 in Athi River sub county within Machakos county intentionally and unlawfully committed an indecent Act by touching the female genital organ (vigina) of one A.K a child aged 13 years.

3. During trial in the subordinate court the prosecution called four (4) witnesses who testified as against the accused person. The appellant was placed on his defense and gave sworn evidence. After considering all the evidence adduced the trial Magistrate did find the Appellant guilt as the prosecution had proved

their case to the required standard of beyond any reasonable doubt, on the principle charge of Incest and proceeded to sentence the appellant serve 20 years imprisonment.

4. The appellant being dissatisfied by the conviction and sentence did file his petition of appeal, where he raised the following grounds of appeal.

    a. That the learned trial Magistrate erred in matters of law and fact failing to find that the critical ingredients of the offence were not established against him thereby leaving his conviction to be unsafe.

    b. That, the learned trial Magistrate erred in matters law and fact by failing to find that the facts of the case lacked necessary compliance on corroboration as per section 124 of the *Evidence Act*.

    c. That the trial learned magistrate erred in matters law and fact by failing to subject both PW1 and the accused person to compulsory DNA testing to ascertain the identity of the person responsible for the pregnancy and hence the sexual assault in question.

    d. That the learned trial Magistrate erred in matters law and fact by failing to find that the burden of proof was not established owing to the incredible evidence that was relied on to base the conviction.

    e. That, the learned trial magistrate erred in matters of law and fact by failing to properly consider the defence case which not only exhibited bad blood between the accused person and PW2 but also reasonably exonorated him from any wrongful doing.

B. Facts of the Case.

5. PW1 A.K. underwent voire dire examination and gave sworn evidence. She stated that she was 14 years old and was a class 8 pupil at M Academy. she resided at [Particulars Withheld] scheme with her mother J, the appellant who was her father and her brother. She did recall on 25.12.2019, she was with the appellant alone in the house (described as a Mabati structure) as both her mother and brother had left. At around 11a.m the appellant who was drunk locked the door and directed her to undress and go to his bedroom. She tried to reject the appellant's advances but he threatened to beat her up if she refused.

6. The appellant also undressed and proceeded to lay on PW1, who further stated that he inserted his penis into her vigina. She felt pain and bled, when he was done the appellant told her to put on her cloths and go outside. She did not report this incident to her mother as she was afraid the appellant would punish her. After a while her mother discovered that her moods had changed and she could not eat well. In March 2020 her mother took her for a pregnancy test and it revealed that she was indeed pregnant. It is at that point that the case was reported to the police. PW1 identified the appellant as her father on the dock and pointed at him.

7. In cross examination PW1 insisted that on the said 25.12.2019, the appellant was drunk and smelt of Alcohol. He had initially tried to rape her but she had declined his advances. The incident took about five (5) minutes and her shout for help was not heard by any of the neighbors. After the incident there were stains of blood on the bed, but she did not inform her mother of what had transpired. In re examination PW1 reiterated that it was the appellant, her father who defiled her.

8. PW2 JO, testified that PW1 was her daughter, while the appellant was her husband. She had married him when she already had two children. In March 2020 she did realize that PW1 had missed her

monthly periods and was not using sanitary towels. She became concerned and decided to take her for pregnancy test, which revealed that indeed PW1 was expecting. she asked her who was responsible and PW1 confessed that the appellant had defiled her on 25th December 2019. She confronted the appellant who suggested that he pawns his phone and they get money for Abortion but she declined. Due to the confrontation neighbors came and the appellant was arrested and taken to the police station. PW2 produced PW1 birth certificate as Exhibit 1 and identified the P3 form and PRC form.

9. In cross examination, PW2 stated that she would check every month if PW1 used her sanitary pad and was not aware if she had engaged in sex before. There was nothing unusual which she saw on the date of the incident and as a couple they had family disputes which were normal. At one time the appellant had found her in a certain building with a man, where she had gone to pick her business items and was not having sex with the said person. After the said incident her mother in law had to come to help them sort out their domestic dispute. She also insisted that she did not fabricate the charges leveled as against the appellant.

10. PW3 Pauline Nzulu Nyangu did testify that she was a clinical officer who had specialized in reproductive health and was currently based at Machakos level five hospital. She had ten (10) years' experience and held a bachelor's degree in clinical medicine and a higher diploma in reproductive health. On 24.03.202 she examined PW1 aged 13 years and had a history of being defiled by her father on 25.12.2019. on examination she did find that she had a palpable mass on the abdomen and further investigation did reveal that she was pregnant. Vaginal swap also revealed that she had numerous epidemical cells. The pregnancy was estimated to be 12 weeks. The hymen wad broken and she concluded that the appellant had been defiled. she filled in both the P3 form and PRC form and priced them as Exhibits 2 & 3.

11. In cross examination she confirmed that indeed she was the author of both the P3 form and PRC form and signed the same. She could not recall who accompanied PW1 to the hospital but she was brought by police officers. At the time she saw the patient, she was 3 months pregnant. her examination could not establish who was responsible for the pregnancy.

12. PW4 P.C MIAKO testified that she was based at the NPS Headquarters personnel directorate, but when the case was reported, she was based at Mlolongo police station gender desk. On 23.03. 2020 PW2 came to the station accompanied by PW1 and reported and incident of defilement, which they alleged was done by the appellant. PW2 had discovered the issue late, after she realized that PW1 was not using her sanitary towels and had taken her to the clinic where it was discovered that PW1 was pregnant and that was why she opted to report the incident at the station.

13. She did record their statement and referred them to Athi river health center where the P3 form and PRC form were filled. The birth certificate indicated that the minor was 13 years at the time of the incident and after investigations were complete, she did arrest the appellant and charged him with the offence before court. PW1 delivered in August 2020 and she did request for DNA testing to be conducted on the baby born and the appellant, which order was granted but the appellant objected to the same. The date when the minor was defiled was consistent to the period of the child birth.

14. In cross examination PW4 affirmed that she was the investigating officer and the incident had occurred when both PW1 and the appellant were residing in one house. PW1 informed her that the incident had occurred 25.12. 2019 and that she did not report the same due to fear of the appellant. Further she did not visit the locus in quo as the minor had been relocated. PW 1 was taken to hospital which confirmed the pregnancy and issued her with the relevant medical forms which had been produced.

15. The appellant was placed on his defence and gave sworn evidence. He did state that on 24.03. 2020 he woke up and went to work. He later received a call from an unknown phone number and was requested

to go back home as there was a problem. On arrival he found people who arrested him and took him to Mlolongo police station, where he was informed of the charge he faced of incest/ defiling his daughter. PW2 had a grudge with him because he had found her red handed with a man in their house and it brought a big rift as between then, which had to be sorted out by his parents. Further he had bought a plot without involving PW2 and she was wanted him to sell it be he had refused.

16. As a result of their differences in 2018, PW2 had framed him with a similar charge of defilement being SO Case No 3 of 2019, which was withdrawn. He had an issue with PW2 because of her infidelity and prayed that he be acquitted. In cross examination he denied hiding the minor as he was in custody and the minor was in a children's home. PW1 had been coached to lie and he never declined to have his DNA taken for examination by the Government Chemist.

C. Appellants Submissions

17. The appellant filed his submissions on 30th January 2023 and did submitted that "after receiving the court proceedings and the perusal of the same and after owing to the circumstances of the offence, the appellant has opted to abandon the appeal against conviction and sentence and pleads to this honourbale court to consider the appeal as against sentence."

18. The appellant submitted that the sentence imposed was harsh and excessive given the disability of his right hand and health status. Further the trial magistrate was faulted for not considering a rehabilitative sentence, and did not give him benefit of the period he had spent in custody as prescribed under section 333(2) of the criminal procedure code. Section 354(3) of the criminal procedure code did allowed the court on appeal to reduce sentence. Reliance was placed on Ogolla s/o Owour vs Republic, Republic Vr Shershowsky (1912) CCA 28 TLR 263, Eldoret Cr Appeal No 253 of 2003 Shadrak Kipkoech Kagoi Vs Rep & Ahmed Abolfathi Mohammed & Ano Vr Republic (2018) eklr.

D. Respondents Submissions

19. The respondent counsel did orally submit that they are willing to concede to this appeal and an order of re trial be made on the basis that the trial court did not allow the appellant to recall PW1 and PW2 and that breached his right to fair trial under Article 50(2) of *the constitution* of Kenya 2010. The appellant further was not informed of his right to be provided with counsel to help him conduct his case. It was thus in order to order for a re trial as the witness could be traced.

E. Determination

20. It is now well settled that a trial court has a duty to carefully examine and analyse all the evidence adduced a fresh to enable it come up with its own conclusion, while at the same time noting that it did not have the advantage of seeing the witnesses and observing their demeanour. See Okeno versus Republic (1972) EA 32 and Pandya versus Republic (1975) EA 366.

21. Further being the first appellant court, it must itself also weigh conflicting evidence and draw its own conclusion. In Shantilal M. Ruwala versus Republic (1975) EA 57, it was held that;

> " It is not the function of the first appellant court to merely scrutinize the evidence to see if there was some evidence to support the lower court findings and conclusion. The court must make its own findings and draw its own conclusion only then can it decide whether the magistrate's finding 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.

22. The appellant has expressly opted to withdraw his appeal as against conviction and has only appealed as against sentence and that being his personal democratic and legal right, his appeal as against the conviction is marked as withdrawn. This court will thus only deal with the appeal as against the sentence melted out of 20 years.

23. Section 20(1) of the *sexual offences Act* does provide that ;

> " 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, Aunty or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than 10 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 or the indecent act was obtained with the consent of the female person.

24. Upon his conviction, the trial magistrate did consider the appellants mitigation, various decisions on what would constitute an appropriate sentence, the circumstances of the case and handed down a sentence of 20 years to the appellant.

25. Sentencing is a discretion of the court. But the court should look at the facts and the circumstances of the case in its entirely so as to arrive at appropriate sentence. The Court of Appeal Thomas Mwambu Wenyi Vs Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra at paragraph 70-71 where the court held the following on sentencing:

> " Sentencing is an important task in the matter of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.

26. The Court of Appeal also in the case of Bernard Kimani Gacheru vs Republic (2002) eKLR did stated that ;

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are

not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist.

27. In the case R Vs. Scott (2005) NSWCCA 152 Howle J. Grove & Baar JJ then stated –

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

28. Having put into consideration, the seriousness of the offence committed, the sentence as prescribed by Section 20(1) of the *Sexual offences Act* No 3 of 2006, I do find that it is reasonable proportionate considering the sentence passed and the crime committed. It is not manifestly excessive nor has it been shown that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle.

29. Be that as it may, the appellant is right to point out that he should have benefited from the provisions of section 333(2) of the criminal procedure code as he was in custody from 24th March 2020, when he was arrested and spent the entire trial period in custody.

30. Section 333(2) of the criminal procedure code provides that;

> " 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 into account of the period spent in custody"

31. The provisions of Judiciary sentencing policy Guidelines also state that;

> " The provision's 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 has been in custody during 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 the offender, the court must take into account the period in which the offender was held in custody during the trial."

32. The applicant has a legitimate expectation that during trial he is subject to equal treatment before law and is accorded a fair hearing, which includes his right to have all relevant provisions of the law to be applied favourably where the circumstances allow. See Ahmad Abolfathi Mohammed & Another Vs Republic (2018) Eklr & Bethwel Wilson Kibor Vs Republic (2009) eKLR.

F.Disposition

33. The sentence handed down upon the appellant was lawful and no basis has been laid to enable this court disturb the same except to the extent that the trial court should have taken into consideration the period he spend in custody as provided for under section 333(2) of the CPC.

34. The upshot is that the appellant appeal is partially successful to the extent that the period he spent in custody during trial from 24.03. 2020 to 09.05. 2022 when he was sentenced should be included as part of his sentence.

35. The appellants appeal as against sentence is thus without merit and is dismissed. His sentence though will be computed from 24.03.2020.

36. Right of Appeal 14 days.

37. It is to ordered

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF SEPTEMBER 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 29th day of September 2023

In the presence of;

Appellant

....For O.D.P.P

....Court Assistant