



REPUBLIC OF KENYA



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**JKM v Republic (Criminal Appeal 32 of 2020)
[2022] KEHC 10667 (KLR) (24 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 10667 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CRIMINAL APPEAL 32 OF 2020**

**J WAKIAGA, J
MAY 24, 2022**

BETWEEN

JKM APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the original conviction and sentence in Criminal case SO No 32 of 2019 of the SPM Court At Kangema Hon. I Gichobi on the 18.12. 2020)

JUDGMENT

1. The appellant was charged with the incest contrary to section 20(1) of the *Sexual Offences Act* no 3 of 2006, the particulars of which were that on September 22, 2019 at Wanjerere shopping centre in Kagema sub county of Maringa County intentionally penetrated the anus of PG with his penis who was to his knowledge his son. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. He was tried, convicted and sentenced for life on the main count and being aggrieved by the said conviction and sentenced filed this appeal and raised the following summarized grounds of appeal:
 - A) There was no medical examination and or DNA conducted and therefore the case not proved beyond reasonable doubt
 - B) The prosecution was full of contradiction and inconsistency
 - C) He was not accorded fair trial contrary to article 50(5)(b) of the *Constitution*.
 - D) Crucial prosecution witnesses were not called to testify



Submissions

3. This appeal was heard by way of oral submissions. The appellant who was unrepresented stated that he was remorseful and sought for forgiveness. He submitted that there was a dispute over a farm which led to his arrest by the village elder. He admitted that the victim was his child.
4. Ms Otieno, for the State opposed the appeal and stated that the age of the complainant was proved to be between 8-9 years and that penetration was proved through the evidence of the doctor. The relationship between the appellant and the victim was not denied and that the appellant was positively identified. It was contended that there was no need for DNA and that under section 11 of the [Penal code](#) every person is deemed to be of sound mind, so there was no need to subject the appellant to mental assessment. It was finally submitted that the appellant understood and fully participated in the trial.

Proceedings

5. This being a first appeal, the court is required to re-evaluate the evidence tendered before the lower court and to come to its own determination, while giving allowance to the fact that it unlike the trial court did not have the advantage of hearing and seeing witnesses.
6. PW1 PG testified that the appellant was working at Esther's place and that they were not staying with him. On September 22, 2019 he fell down in school and hurt his buttock. Together with his siblings, they visited the appellant and that night he slept with the appellant on the same bed. While he was sleeping he removed his trousers and pierced his anus. He did not feel any pain but the appellant hit him and told him to remain silent.
7. The following morning, he went to school late and told his teacher that he got pierced in his buttock when sleeping with his father. She then told him to go call his mother who took him to hospital where a P3 form was filed. In cross examination he said that on the material day, they had been chased from school for lack of school fee.
8. PW 2 Donah Maihima a clinical officer produced a P3 form which confirmed the age of the victim to be 8 years and that on examination of the anus, it had a reduced anal sphincter tone meaning that it was loose confirming penetration.
9. PW3 PNG the head teacher of the complainant's school stated that he was in class two at that time. On September 23, 2019, the class teacher informed him that the complainant who had not been coming to school, reported back and told her that he had been sodomised by his father from time to time. They called his mother to school and upon interrogation the victim stated that he had visited his father who sodomized him, he thereafter sent him together with the mother to the clinic.
10. PW4 NWK, the class teacher stated that the complainant had not come to school for about two weeks, when she saw him near their home, she went to pick him and met his mother.
When she asked him why he had missed school, he told her that his father who was not staying with them, would wherever he visited him, tell him not to go to school and that he would tell him to remove his clothes and lie on his stomach before sodomizing him. She stated that she had not met the appellant.
11. PW 5 BW, the mother stated that she was married to the appellant and that they had three children. She stated that the appellant left home and got a house at the camp where he was a tee picker. It was her evidence that the appellant used to love the complainant very much and would ask him to go pick ugali flour and that on September 23, 2019 she was called to his school and asked whether he could have engaged in sexual activities with his father. She then took him to the hospital where he was examined



- sand referred to the police station for P3 form. in cross examination, she stated that the appellant used to stay in his employer's compound.
12. PW 6 PC Chispin Barasa recorded the statement of the complainant and his mother and that he told him that he had gone to visit his father together with his brother and later at night after meals, the appellant asked him to remove his clothes and sodomised him, the following day he went back to school and informed his teacher. He later on notified his colleagues at Wanjerere who arrested the appellant. he produced the age assessment report confirming the age of the complainant to be between 8-10. He stated that at that time the appellant had dreadlocks
 13. When put on his defence, the appellant gave sworn statement and confirmed that the complainant was his son. In cross examination, he confirmed that he had slept in his house on the material night and that his elder son also slept in the house and that in the morning, he gave them flour to take home and go back to school. In the evening he was arrested.
 14. In convicting the appellant, the court made the following observation,

“it appeared to the prosecution and the court, that complainant was not being truthful and had been couched what to say. He was extremely pensive and sweaty

He was removed from the family members for few days

The following hearing date, prosecution counsel applied for victim complainant to be declared vulnerable under section 31 of the *Sexual Offences Act* “

Determination and analysis

15. From the submissions, grounds of appeal and the proceedings as re-evaluated herein, I have identified the following issues for determination;
 - A) Whether the appellant's rights to free and fair trial were violated
 - B) Whether the prosecution case was proved to the required standard
 - C) Whether the sentence was lawful
16. On the issue of violation of right to fair trial, the appellant's complaint is that he was tried during covid through the virtual link and therefore was not afforded fair trial. I have looked at the recorded proceedings and not that the appellant participated fully in the trial and was able to cross examine the witnesses he chose to, and find no merit on this ground
17. On proof of the prosecution case, the appellant was put together with the complaint on the material night a fact that he confirmed in his defence and his allegation that the case was as a result of marital difference with the complainant's mother was displaced by the way the incidence was report. The evidence tendered shows that the same was reported in school and I therefore find this allegation as lacking merit
18. The relationship between the appellant and the complainant was not disputed and the penetration and the age were proved through the documentary evidence produced by PW2 and corroborated through the oral evidence by other prosecution witnesses and the appellant defence did not raise any doubt in the prosecution case



19. I therefore agree with the trial court finding on conviction as all the elements constituting the offence as stated in Charles Wamukoya Karani v Republic, quoted in *Chaka Mangisi Ngao v Republic* [2018] e KLR as follows

“the critical ingredient forming part of defilement are age of the complainant, proof of penetration and positive identification of assailant “were proved and would affirm the same.

20. On sentence, it must be noted that this is the discretion of the trial court which can only be interfered with by the appellate court if the same was erroneous as was stated in the case of *Mkirani v Republic* [2021] KEHC 377 (KLR)

“Regarding the sentence, sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors. Certainly, the appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon wrong principle or if the court exercised its discretion capriciously. The above position was enunciated in Shadrack Kipchoge Kogo v Republic in which the Court of Appeal stated: - See Makhandia J (as he then was in Simon Ndungu Murage v Republic, Criminal appeal no 275 of 2007, Nyeri. Criminal Appeal no 253 of 2003 (Eldoret), Omolo, O’kubasu&Onyango JJA) “Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred”

42. The Supreme Court of India in State of M P v Bablu Natt stated that ‘the principle governing imposition of punishment would depend upon the facts and circumstances of each case. In Alister Anthony Pareira vs State of Maharashtra, it was held that:-{2009} 2S C C 272 para 13 {2012}2 S C C 648 para 69 “sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances.”
43. While exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.
21. in sentencing the appellant to life imprisonment, the trial court had this to say; “what is most unfortunate in this case is that while per the old times saying that “even a hyena has never devoured its young ones “we meet a man who devoured his own flesh and blood
- Accused introduced his own biological son to unorthodox sex at an extremely tender age of only eight (8) Years.

That is something that humanity cannot fathom. To me such a man does not deserve to breathe air of freedom or even walk in the streets of freedom. Society is much safer with his alienation from them “



22. It is clear that the trial court took into account the circumstances of the offence in passing the sentence herein, which is a lawful sentence and would therefore not interfere with the same.
23. In the final analysis, I find no merit on the appeal, both on conviction and sentence and accordingly dismiss the same and affirm the conviction and sentence by the lower court and it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 24th DAY OF MAY 2022

J WAKIAGA

JUDGE

In the presence of:-

