



REPUBLIC OF KENYA



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**LKO v Republic (Criminal Appeal 16 of 2020)
[2022] KEHC 16765 (KLR) (Crim) (19 December 2022) (Judgment)**

Neutral citation: [2022] KEHC 16765 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CRIMINAL

CRIMINAL APPEAL 16 OF 2020

CW GITHUA, J

DECEMBER 19, 2022

BETWEEN

LKO APPLICANT

AND

REPUBLIC RESPONDENT

(From original conviction and sentence in Criminal Case No.9 of 2016 of the Chief Magistrate's Court at Kibera dated 25th September 2019 (Hon. Kitagwa SRM))

JUDGMENT

1. The appellant, LKO was charged in the main count with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* (SOA). The particulars thereof alleged that on January 21, 2016 at Marisho Area in Kajiado County, the appellant intentionally touched the buttocks, breasts, and vagina of BO (name withheld) with his penis who was to his knowledge, his daughter.
2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *SOA* in that on the same date and place, he intentionally touched the buttocks, breasts and vagina of BO, a child aged 17 years with his penis.
3. After a full trial, the appellant was convicted of the main charge of incest and was sentenced to serve 20 years imprisonment.

He was aggrieved by his conviction and sentence hence this appeal. He initially filed his petition of appeal on January 29, 2020 which he amended with leave of the court by filing amended grounds of appeal together with his written submissions on April 22, 2022.
4. In his amended grounds of appeal, the appellant complained that in convicting him, the learned trial magistrate erred in law and fact by; failing to find that the element of penetration was not conclusively



proved by the prosecution; relying on the evidence of the complainant (PW 1) whose integrity was questionable; failing to find that the charge of incest was bad for duplicity and by failing to find that the voire dire examination was not done in accordance with the law. He beseeched this court to quash his conviction and set aside his sentence.

5. The appellant prosecuted his appeal in person. During the hearing, both the appellant and the Respondent chose to prosecute the appeal by way of written submissions which they both duly filed.
6. In his written submissions, the appellant expounded on his grounds of appeal. He emphasized that he was wrongly convicted since the medical evidence adduced in support of the prosecution case did not prove penetration which was an essential ingredient of the offence of defilement. He averred that PW1 was not a credible witness and therefore section 124 of the *Evidence Act* was not applicable in his case. He further submitted that the learned trial magistrate failed to follow the guidelines given by the Court of Appeal in *Joseph Opondo v Republic* CR App No 91 of 1999 regarding the steps to be followed by trial courts when conducting voire dire examinations.

He contended in a nutshell that the evidence adduced by the prosecution fell short of establishing his guilt as charged to the standard required by the law; that his appeal was merited and ought to be allowed.

7. The appeal is contested by the State. Learned prosecuting counsel Mr Kiragu submitted that the prosecution through its five witnesses had proved all elements of the charge of incest against the appellant beyond any reasonable doubt and that the appellant was properly convicted.

Regarding the appeal against sentence, Mr Kiragu asserted that the sentence of 20 years imprisonment imposed on the appellant was not only lenient but was also unlawful as the law prescribed a sentence of life imprisonment. He implored me to set aside the sentence and substitute it with a sentence of life imprisonment. Finally, Mr Kiragu urged me to dismiss the appeal for lack of merit.

8. The brief facts of the case were well captured in the complainant's evidence. After a brief voire dire examination, the victim testified as PW1 and stated that on September 27, 2015, she left Western Kenya where she had been living with her mother and other siblings and travelled to Nairobi at the invitation of the appellant who was her biological father who had promised to take her to school in Nairobi.
9. On arrival in Nairobi, the appellant met her and escorted her to his house which was a single room with only one bed. From September 2015 to January 2016, she lived peacefully with the appellant. The appellant would sleep on the bed while she slept on a mattress spread on the floor. PW1 recalled that in January 2016, the appellant started asking her to sleep with him on his bed which she flatly refused. He then resorted to pouring water on her mattress and beddings which left her with no choice but to sleep on his bed.
10. According to PW1, during the time she slept on his bed, the appellant defiled her twice. She described her ordeal in the following words

“....my father used to make me his wife. He used to undress me and he asked me to have sexual intercourse with him. He inserted his penis inside my vagina. We did sexual intercourse with my father twice.....”

After the two incidents, PW1 recalled that she reported the matter to the appellant's brother and sister in law but when they refused to take any action, she reported the matter to a neighbour. The neighbour escorted her to the chief's office from where she was taken to Matasia Police Post where she formally reported the matter to PW5 PC Martin Mwiti.



11. PW5 recalled that PW1 came to the Police Station accompanied by the area chief. He observed that she looked disturbed. Together with other police officers, they accompanied her to a house in which they found the appellant. In the single house, there was one bed and on the bed, he saw some clothes which PW1 identified to be hers. Upon identification by PW1 as her father and assailant, PW5 arrested the appellant and escorted him to Matasia Police Station.

12. He also escorted PW1 to Nairobi Women Hospital. PW4, Dr Peter Wanyama testified on behalf of his colleague Dr Kimani who had examined PW1 at the Nairobi Women Hospital on January 29, 2016.

According to the post rape care form completed by Dr Kimani, PW1 gave a history of having been defiled by her father on several occasions, the last incident being on January 21, 2016. His examination revealed that her external genitalia was normal but her hymen was broken with old tears. PW4 stated that PW1 admitted to having had sexual relations with her boyfriend previously in September 2015. He produced the post rape care form (PRCF) as Pexbt4.

13. Other prosecution witness were Dr. Maundu (PW2) who examined PW1 on May 26, 2016 and filed a P3 form which he produced in evidence as Pexbt I and PW3, a Government analyst whose evidence did not add any value to the prosecution case.

14. Upon being placed on his defence, the appellant elected to give a sworn statement and did not call any witness.

In his sworn statement, he admitted that the complainant was his daughter but denied having committed the offence as alleged. He denied having lived with PW1 from September 2015 to January 2016 and claimed that the charges preferred against him were false.

15. This being a first appeal to the High Court, I am enjoined to re-evaluate and subject the evidence presented before the trial court to a fresh and exhaustive examination to arrive at any own independent conclusions bearing in mind that unlike the trial court, I did not have the advantage of seeing or hearing the witnesses.

This duty of the first appellate court was well articulated in the celebrated case of *Okeno v Republic* [1972] EA 32; and *Kiilu & another v Republic* [2005] 1 KLR 174 among many other authorities.

16. I have carefully considered the grounds of appeal alongside the written submissions filed by the appellant and the Respondent and the authorities cited. I have also considered the evidence on record and the judgment of the trial court.

Having done so, I find that only two key issues arise for my determination in this appeal which are:

- i. Whether the charge subject matter of the appellant's conviction was duplex and incurably defective.
- ii. Whether the prosecution proved the charge of incest against the appellant beyond any reasonable doubt.

17. I have isolated only the above two issues for my determination well aware that the appellant had also complained about the manner in which the trial court conducted the voire dire examination on the complainant. In my view, this complaint did not have any basis in law considering that there is evidence on record which is not disputed that the complainant was about 17 years old when the alleged offence was committed but by the time she testified in court on October 31, 2016, she was one month away from attaining the age of majority. I make this finding because a copy of PW1's birth certificate produced as P Exhibit 5 reveals that she was born on November 23, 1998 which means she was not a child of tender years whose evidence to be admissible had to be preceded by a voire dire examination



as required under section 19 of the [Oaths and Statutory Declarations Act](#). In [Marripett Loonkomok v Republic](#) [2016] eKLR the Court of Appeal cited with approval the decision in [Kibageny Arap Kolil v Republic](#) [1959] EA 82 in which a child of tender years was defined to mean a child under the age of 14 years. This means a *voire dire* examination was not necessary in this case and therefore nothing turns on that ground of appeal.

18. Turning now to the first issue, though the appellant averred in his grounds of appeal that the charge subject of his conviction was bad in law for duplicity, he apparently subsequently abandoned this complaint as he did not make any reference to it in his written submissions. Duplicity is the joining in a single count two or more distinct offences which renders such a charge incurably defective. The basis for this legal position is section 134 of the [Criminal Procedure Code](#) which requires that;

“Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.”

The rationale for this requirement is that a charge should disclose with clarity and specificity the offence preferred against an accused person so that at the earliest opportunity, an accused person understands the offence facing him or her to enable the accused to adequately prepare for his or her defence.

19. In this case, a look at the charge sheet reveals that the appellant was charged in the main count with the offence of incest and in the alternative with the offence of committing an indecent act with a child contrary to the relevant provisions of the [Sexual Offences Act](#).

Although the particulars supporting the main count accused the appellant of having intentionally touched different private parts of the victim’s body with his penis, the particulars basically described only one offence of incest as stated in the statement of the charge. The issue of duplicity in the charge does not therefore arise.

20. That said, I note that the charge sheet contained a defect related to multiplicity of charges. This occurs when an accused person is charged in the same charge sheet with offences founded on the same facts in two or more counts. I say so because the offence of incest charged in the main count was founded on the same facts as the offence of indecent act with a child charged in the alternative count. A reading of section 20(1) of the [Sexual Offences Act](#) shows that to prove the offence of incest, penetration need not be proved. To establish committing an indecent act with a female who was within the degree of consanguinity specified in section 20(1) of the [Sexual Offences Act](#) was sufficient to prove the offence. Charging the appellant with the offence of incest in the main count and that of committing an indecent act with the same victim in the alternative count amounted to a multiplicity of charges.

21. In a persuasive decision in [KN v Republic](#) [2018] eKLR, Nyamweya J (as she then was) held that;

“...Multiplicity can be corrected by amendment of the charge without necessarily dismissing the case. The error or mistake in the charge is also one that can be cured on appeal under section 382 of the [Criminal Procedure Code](#) where it is shown that no prejudice has been occasioned by the multiplicity of charges.”

I wholly agree with the above sentiments and hold that as the main count was properly drafted and the trial court did not make any finding on the alternative count, the appellant was not in any way prejudiced by the multiplicity of charges. I am thus satisfied that the above defect in the charge sheet was curable under section 382 of the [Criminal Procedure Code](#)(CPC)



22. Regarding the second issue of whether the prosecution proved the charge in the main count beyond any reasonable doubt, I start by reiterating my finding that it is not disputed by the appellant that the complainant was his biological daughter and that she was about 17 years old at the time the offence was allegedly committed. What was disputed was the prosecution's claim that the appellant sexually assaulted his daughter as alleged.
23. After reproducing and analysing the evidence on record, the parties submissions as well as the relevant law, the learned trial magistrate in convicting the appellant relied on the proviso to section 124 of the *Evidence Act* which removed the requirement for corroboration of the victim's evidence in sexual offences involving minors. The provision empowers the court to convict an accused person on the sole evidence of the child victim's evidence if the trial court believed the child's evidence and recorded its reasons for so doing.
24. In this case, the trial court made a finding of fact that PW1 was a truthful witness because she gave consistent evidence and she had no reason to frame her father with the offence; that in his defence, the appellant did not allude to any bad blood between him and the victim which would have motivated her to give false evidence against him.
25. After my re-appraisal of the evidence, I am unable to fault the learned trial magistrate for her finding that the complainant was indeed a truthful witness who gave cogent and straightforward evidence which left no doubt about her credibility. She gave a vivid description of the house in which the appellant defiled her and where it was located. PW5, the investigating officer upon being led by PW1 to the house in which she was defiled found the appellant in the said house. He corroborated PW1's evidence by confirming that it was a single room with one bed and that on top of the bed, he found clothes that PW1 identified to be hers.

The appellant's claim in his defence that PW1 had never been to his house when compared to the rest of the evidence is not plausible or worthy of belief.

26. The fact that the medical evidence relied on by the prosecution did not establish penetration is neither here or there because as stated earlier, penetration need not be proved to establish the offences of incest. Evidence proving intentional commission of an indecent act on a female who was within the degrees of consanguinity specified in section 20(1) of the *Sexual Offences Act* was sufficient to sustain a conviction.

From the evidence on record, I am satisfied that the prosecution proved its case against the appellant in the main count beyond any reasonable doubt. It is thus my finding that the appellant was properly convicted.
27. Turning to the appeal against sentence, the appellant was sentenced to serve 20 years imprisonment. Section 20 (1) of the *Sexual Offences Act* provides for a penalty of life imprisonment if the victim of incest is a minor. The learned trial magistrate, in her pre-sentence notes, stated that in imposing a sentence of 20 years imprisonment, she was guided by the decision of the Supreme Court in *Francis Karioko & 5 others v Republic* [2017] eKLR in which the mandatory death sentence for the offence of murder was declared to be unconstitutional as it fettered the court's discretion in sentencing, which reasoning was subsequently applied by the courts to other mandatory minimum sentences provided by the law for other offences including sexual offences.
28. The Supreme Court has since clarified in *Francis Karioko Muruatetu & another v Republic, Katiba institute & 5 others (Amicus Curiae)* [2021] (Muruatetu 2) that its earlier decision on the unconstitutionality of the mandatory death sentence applied only to the mandatory death sentence prescribed for the offence of murder and not any other offence.



29. The court record shows that the appellant was sentenced on October 4, 2019 long before the Supreme Court made its clarification in the Muruatetu 2 decision. As the Supreme Court's decision in Muruatetu 2 cannot be applied retrospectively, I cannot fault the learned trial magistrate for exercising her discretion and sentencing the appellant to 20 years imprisonment guided by the principle enunciated in the first Muruatetu decision. I therefore find no basis for interfering with the sentence as urged by the respondent save for directing that the sentence shall take effect from the date the appellant was arrested, that is, January 29, 2016 in compliance with section 333(2) of the Criminal Procedure Code since the record shows that the appellant was in lawful custody throughout the trial.
30. In view of the foregoing, it is my finding that this appeal lacks merit and it is accordingly dismissed in its entirety.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KISII THIS 19TH DAY OF DECEMBER 2022.

CW GITHUA

JUDGE

In the presence of:

The appellant

Ms Adhiambo for the State

Ms Karwitha Court Assistant

