JNM v Republic (Criminal Appeal 209 of 2018)
[2025] KEHC 1476 (KLR) (Crim) (5 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1476 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL APPEAL 209 OF 2018

LN MUTENDE, J

FEBRUARY 5, 2025

BETWEEN

JNM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. JNM, the Appellant, was charged with the offence of Incest contrary to Section 20(1) of the *Sexual offences Act*. The particulars of the offence were that on 13th April, 2009, Njiru District in Nairobi, he intentionally caused his genital organ to penetrate the genital organs of MWN aged 7 years old who to his knowledge was his daughter.

2. In the alternative, he faced the charge of committing an Indecent Act with a child contrary to section11(1) of the *Sexual Offences Act*. Particulars being that on the 13th day of April 2009 at [Particulars Withheld] he committed an indecent act with MWN a child aged 7 years by touching her genital organs.

3. Having been taken through full trial he was convicted for the offence of incest and sentenced to serve life imprisonment.

4. Pursuant to leave of court granted by Ngenye-Macharia (As she then was) the appellant proffered an appeal on gronds that: Life imprisonment has been declared unconstitutional and was harsh and excessive; The trial court failed to find that provisions Section 26 and 36 of the *Sexual Offences Act* were not complied with; charges were defective; there were material contradictions which should have been in favour of the defence; evidence adduced was insufficient; and, that the plausible defence put up was dismissed.

5. However, subsequently the appellant who abandoned other grounds of appeal sought amendment pursuant to Section 350 (2) (v) of the *Criminal Procedure Code* to rely on grounds thus: That life imprisonment has been declared unconstitutional as it interferes with the discretion of the court and was harsh and excessive; That voire dire was not carried out; and, that the judgment did not comply with Section 169 of the *Criminal Procedure Code*. That following jurisprudence of the Court of Appeal, this court should consider mitigation circumstances, including time spent in custody.

6. This was a case where the complainant lived with her mum and the appellant, her step-father, a husband of her mother who was not her biological father. That the appellant would take her to his bed whenever the mother was not around and would violate her sexually by inserting his penis into her vagina and then warn her against disclosing this to anyone. However, on 14th April,2009, PW2 EN, their neighbor saw the complainant who was playing with her grandchildren walking with difficulty. She questioned her and she divulged what was happening to her. PW5 MW, their neighbor who was within, on confirming circumstances of the child also queried her and the complainant divulged the information.

7. To deal with the situation, the two ladies needed help. Hence PW5 notified the complainant's aunt, W, who turned up with her husband M, the following morning. They went to the house of the appellant who was arrested by a crowd that surged. The police who were informed got an ambulance that took the child to hospital for examination. The complainant was found with warts on the vaginal orifice and the vagina was perforated. After treatment she was taken to stay at a Children's home.

8. Upon being placed on his defence, the appellant who made an unsworn statement testified that he was woken up by his in-law and on opening the door, he found about fifteen people who accused him of defiling his daughter. He was taken to the police station and placed in custody. The following day he was subjected to medical examination. Then he was arraigned in court, tried, and sentenced to serve life imprisonment, a sentence that the High Court quashed and ordered a retrial. He blamed his woes on the disagreement over a plot left by his mother-in-law that his wife's family wanted but he refused to let it be taken, hence they wanted him jailed so as to grab it.

9. The appeal was disposed through written submissions. The appellant urged that the judgment was not signed hence failed to meet tenets of the law as required by Section 169 of the *Criminal Procedure Code*; and, that the court failed to perform a voire dire examination to inform itself as to the statement of the complainant within the meaning of Section 124 of the *Evidence Act*.

10. On Sentence, he submits that his mitigation was not considered by the trial court. That considering that he was 45years old and the objective of sentencing which is restoration of the offender, he would have been given a lesser sentence.

11. That the prosecution failed to place relevant records against him under Section 216 of the *Criminal Procedure Code*. That the trial court also had discretion to mete out a lesser sentence instead of the maximum sentence. That the High Court has jurisdiction to interrogate and resolve in his favour considering recent cases on Sentencing under Section 20(1) of the *Sexual Offences Act*. The appellant relies on the case of M.K v R [2015] eklr holding that the sentence under Section 20 (1) is not a minimum mandatory sentence and that the correct interpretation is that a when the female victim is under 18 years the accused is liable to be convicted between 10 years and life imprisonment.

12. That the trial court was also supposed to consider Section 333 of the *Criminal Procedure Code*. That the period served by the appellant herein is sufficient for his rehabilitation

13. That the court failed to consider relevant factors of sentencing, that the sentence did not take into account the dignity of the accused and his family. Further that sentence is aimed at social rehabilitation.

14. That there was no case placed by the prosecution to justify long term limitation of the appellant's right to freedom for unknown period. The appellant refers to Article 24 as read with Article 29 of *the Constitution*.

15. That Article 10 (3) of the ICCPR as adopted in Article 2 of *the Constitution* provides that sentence shall be aimed at reforming the offender and to promote social rehabilitation.

16. The appellant also relies on the case of Francis Kariokor Muruatetu v Republic (2017) eklr , Philip Mueke Maingi v DPP & Attorney General E017 of 2021 and Wachira & 12 others v Republic (2022) klr.

17. Further that the sentence violates the appellant's right to equal protection and benefit of the law pursuant to Article 27 (a) as read with Article 24 (6) of *the Constitution* and the benefits of remission under Section 46 of the *Prisons Act*. That the appellant prays that the period spent in custody should be considered. He also prays to be released as he has served 15 years from date of arrest.

18. The State vehemently opposed the appeal. It is submitted that the burden of proof was discharged and that the evidence proved the elements of the offence of incest. That the child's testimony was clear and precise and medical evidence also proved penetration.

19. I have considered the evidence on record at trial, the grounds of appeal and the submissions filed by parties. This being the first appellate court, it is duty bound to subject evidence adduced before the trial court to a fresh evaluation and analysis bearing in mind the fact of not having had the opportunity of hearing the witnesses and observing their demeanor. This was set out in Okeno v Republic [1972] EA 32 where it was stated as follows:

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala 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, (See Peters v. Sunday Post, [1958] EA 424.)"

20. Looking at the amended grounds of appeal, they exclude some issues that came up in submissions which must be disregarded. The appellant was indicted with incest that is created by Section 20(1) of the *Sexual offences Act* (SO Act) which enacts that:

> "(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."

21. The prosecution was required to prove that: An indecent act or act of penetration was committed; the offender had knowledge that the victim was a relative; and, for purposes of sentencing, age of the victim is relevant.

22. It is argued that voir dire was not conducted. Voir dire is a process through which it is determined if a child of tender age is speaking the truth so that the evidence adduced is admissible. The reason why

the examination is carried out was stated in the case of Johnson Muiruri v Republic [1983] KLR 445 where the court delivered itself thus:

> " 1. Where, in any proceedings before any court, a child of tender years is called as a witness, the court is required to form an opinion, on a voire dire examination, whether the child understands the nature of an oath in which even his sworn evidence may be received if in the opinion of the court he is possessed of sufficient intelligence and understands the duty of speaking the truth. In the latter event, an accused person shall not be liable to be convicted on such evidence unless it is corroborated by material evidence in support thereof implicating him.
>
> 2. It is important to set out the questions and answers when deciding whether a child of tender years understands the nature of an oath so that the appellate court is able to decide whether this important matter was rightly decided.
>
> 3. When dealing with the taking of an oath by a child of tender years, the inquiry as to the child's ability to understand the solemnity of the oath and the nature of it must be recorded, so that the cause the court took is clearly understood.
>
> 4. A child ought only to be sworn and deemed properly sworn if the child understands and appreciates the solemnity of the occasion and the responsibility to tell the truth involved in the oath apart from the ordinary social duty to tell the truth.
>
> 5. The judge is under a duty to record the terms in which he was persuaded and satisfied that the child understood the nature of the oath. The failure to do so is fatal to conviction."

23. In the case Patrick Kathurima v Republic, [2015] eKLR, the Court of Appeal held that the age of fourteen remains a reasonable indicative age for purposes of Section 19 of Cap 15 unlike the definition under Section 2 of the *Children Act*. the court held that:

> " We are aware that Section 2 of the Children's Act defines a child of tender years to be one under the age of ten years. The definition has not been applied to the Oaths and Statutory Declaration Act, Cap 15. We have no reason to import it thereto in the absence of express statutory direction given the different contexts of the two statutes"

24. On 21/4/2017 the court recorded the victim's evidence. The court placed her age between14 and 15 years. Evidence also proved that she was born on 22/11/2003 and that she was 14 years during the trial. In the circumstances voir dire was not necessary in this case and that the evidence was also corroborated.

25. Section 22(1) of the SO Act enacts that:

> " (1) In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not."

26. On the question of the degree of consanguinitas that did exist between the parties, evidence tendered was that the victim was the appellant's step daughter which he acknowledges. Penetration is defined

by Section 2 of the SO Act as the partial or complete insertion of the genital organs of a person into the genital organs of another person;

27. The complainant testified how the appellant would insert his penis into her vagina in the absence of her mother. On being examined by the medical doctor, she had viral warts that were sexually transmitted. She had a widened vaginal opening and the hymen had haematoma (clotted blood) The hymen was perforated due to trauma.

28. At the time of the incident the child was 7 years old. Therefore, Section 124 of the *Evidence Act*, comes into play. The provision of law enacts thus:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:
>
> Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

29. Evidence adduced proved the fact of penetration having occurred, and the victim identified the appellant as the perpetrator of the act. The trial court believed the victim account as to what transpired.

30. On the question of sentence, it is contended that the sentence passed was harsh and excessive. Further, that life imprisonment has been declared unconstitutional. In this regard, I am guided by the case of Republic v M, Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) Petition No. E018 of 2023 (2024) KEC 34 KLR where the Supreme Court stated that;

> " The ratio decidendi in the decision was summarized as follows:
>
> > "69. Consequently, we find that section 204 of the *Penal Code* is inconsistent with *the Constitution* and invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
> >
> > We therefore reiterate that, this court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the *Penal Code*, the *Sexual Offences Act* or any other statute." (Emphasis added).

31. The question of sentences provided for in sexual offences was clarified, hence the allegation that the sentence imposed was unconstitutional does not hold water. The theory advanced by the appellant is not valid.

32. The proviso to Section 21(1) of the SO Act states that:

> 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.

33. The word liable in the sentence clause permits the court to exercise its discretion. In M.K v R [2015] eklr cited by the appellant, the Court of Appeal stated that:

> " ...Readings of the diverse provisions of the *Sexual Offences Act* reveal that in most sections, a minimum sentence is provided for. For example, under section 3(3), a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years .....; Section 4 of the Act stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years ..... Section 8 (3) of the Act provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years.
>
> Our reading of the *Sexual Offences Act* shows that whenever a minimum sentence is imposed, the phrase not less than is used."

34. In the stated case, the court set aside life imprisonment and sentenced the appellant to 20 years imprisonment.

35. In Cecilia Mwelu Kyalo v Republic; the Court of appeal in Nairobi Criminal Appeal 166 of 2018, it was held that the court has power to consider the circumstances of the offence and to mete out the appropriate sentence, this is with exception of minimum sentences.

36. The above notwithstanding, life imprisonment can still be meted out in deserving cases granted that it is still permitted in statute.

37. This court has limited power to interfere with the trial court's sentence, it must be demonstrated that the sentence was harsh and excessive or that it was too lenient or that the court acted on wrong principles.

38. In mitigation the appellant admitted that evidence adduced was overwhelming making his submission unpersuasive such that the court could not be persuaded. He contends that the prosecution did not demonstrate the need for the maximum sentence. The appellant was a first offender, he also informed court that he had rehabilitated during his stay in remand. The judiciary policy guidelines,2023, provide that:

> " 4.5.1 In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm."

39. Maximum sentences meted out on a first offender may be deemed to be harsh unless the aggravating circumstances permit it. See the case of Arissol v R (1957) E.A 447 and further rehashed by the Court of Appeal in James Nganga Njau v Republic Court of Appeal in Nairobi Criminal appeal case No 28 of 2015(2016) JELR101097(CA).

40. The appellant repeatedly defiled the victim who was a vulnerable child raised by her grandmother prior to her demise. The incident occurred after appellant moved into the house where the child had been raised by her grandmother. The victim was a child of tender years who had to be protected by law considering that those with parental responsibility failed in their duties towards her. Worst of is that the appellant stepping in as her father was tasked with this role. But, he repeatedly defiled her in her home and the effect of the sexual abuse of the child resulted into emotional damage that would last a life time.

41. Sentencing is a balance between the mitigating factors and aggravating factors, the appellant was a first offender, but the severity of the offence and the damaging effects did not favour a lenient sentence.

42. The appellant also complains that the judgment was not signed in contravention of Section 169(1) of the *Criminal Procedure Code*. The alluded to provision of the law provides that:

> "(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by or under the direction of the presiding officer of the court in the language of the court, and shall contain the point or points for determination, the decision thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open court at the time of pronouncing it."

43. A perusal of the judgment shows that the trial magistrate appended a signature on the judgment, he indicated as delivered on 7/9/2018.

44. The upshot of the above is that considering the age of the appellant, the sentence imposed is set aside and substituted with a sentence of thirty (30) years imprisonment which will run from the date of arrest, 15/4/2009.

45. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 5TH DAY OF FEBRUARY, 2025.

L.N. MUTENDE

JUDGE