PKN v Republic (Criminal Appeal 88 of 2023)
[2025] KEHC 1934 (KLR) (Crim) (21 February 2025) (Judgment)

Neutral citation: [2025] KEHC 1934 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYANDARUA

CRIMINAL

CRIMINAL APPEAL 88 OF 2023

KW KIARIE, J

FEBRUARY 21, 2025

BETWEEN

PKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S. O. Case No. 24 of 2018 of Senior Principal Magistrate's Court at Engineer by Hon. D.N. Sure– Senior Resident Magistrate)

JUDGMENT

1. PKN, the appellant herein, was convicted of the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that in November 2017 at [particulars withheld] village in Kinangop within Nyandarua County being, a male person caused his penis to penetrate the vagina of R.W.M., a female child aged fifteen years, who was, to his knowledge, his niece.

3. The appellant was sentenced to serve thirty years' imprisonment. He has appealed against both conviction and sentence. He was in person and raised the following grounds of appeal:

    a. That the Appellant pleaded not guilty in the instant case.

    b. That the learned trial Magistrate erred in law and facts when he convicted the appellant in a prosecution case where the charge of incest was not proved.

    c. The learned trial Magistrate erred in law and fact when he convicted the appellant in the prosecution case, in which the victim's age was not proved.

d. That the Learned trial Magistrate erred in law and fact by applying wrong standards of proof in a criminal case, which was a standard of probability instead of reasonable doubt.

e. That the Learned trial Magistrate erred in law and fact by convicting the appellants but did not consider the appellant's defence.

f. That the Learned trial Magistrate erred in both law and fact when she convicted the appellant to a harsh sentence.

g. That the Learned trial Magistrate erred in law and fact by acting on the wrong principles of the law and gave an unlawful sentence. He did not find out that the proviso to section 20(1) of the *Sexual Offences Act* uses the words that the accused shall be liable to imprisonment for life. It was an error to hold that this sentence is mandatory while it is a maximum sentence and that the sentence of 30 years imprisonment period prescribed for the appellant is harsh and unproportionate.

4. The state opposed the appeal through Alex Ndiema, prosecution counsel, on the following grounds:

a. That the Learned trial Magistrate properly convicted the appellant on the count of incest.

b. That the prosecution proved its case to the required standards.

c. That the sentence meted out was legal.

d. That the appeal lacks merit.

5. This court is an appellate court. As expected, I have carefully reviewed and assessed all the evidence presented to the lower court, keeping in mind that I did not witness any of the witnesses give their testimonies. Therefore, I will follow the well-known case of Okeno vs Republic [1972] E. A 32 to guide my decision-making process.

6. 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 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 penetration or the indecent act was obtained with the consent of the female person.

7. From the provisions of this section, the ingredients for incest are as follows:

a. The accused must be a male;

b. The victim must be a female;

c. She must be his daughter, granddaughter, sister, mother, niece, aunt or grandmother;

d. He must know the relationship; and

e. There must be penetration.

8. The appellant is undoubtedly male. His name suggests as much; had it been otherwise, the trial court could have seen to the contrary.

9. N.W. (PW1) is the complainant's mother. She testified that when she received a report of her daughter's defilement, she promptly filed a report. She was advised to wait for her daughter to give birth before the matter could progress. She testified that the culprit was the appellant, who was her brother.

10. R.W.M. (PW2) 's evidence was that in November 2017, the appellant, who is her uncle, defiled her. Due to the defilement, she conceived and gave birth to a child on the 25th of August 2018.

11. Pamela Kamala Okello (PW5) produced the DNA report for her colleague, Nelly Papa. Her evidence was that samples were obtained from the appellant, R.W.M. (PW2) and J.M., a child. The analysis disclosed that there was a 99.99 per cent chance that the appellant was the father of J.M., whose mother is R.W.M. (PW2).

12. The DNA findings supported the complainant's evidence despite the appellant's denial of involvement.

13. I, therefore, find that the prosecution proved its case against the appellant to the required standards.

14. The appellant contended that the sentence meted out was harsh. An appellate court would interfere with the trial court's sentence only where there exists, to a sufficient extent, circumstances entitling it to vary the trial court's order. These circumstances were well illustrated in the case of Nillson vs Republic [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act, in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs. Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R Vs. Shershewsity (1912) C.CA 28 T.LR 364.

15. The proviso to section 20 of the *Sexual Offences Act* states:

> 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 penetration or the indecent act was obtained with the consent of the female person.

16. The complainant's Certificate of Birth indicates that she was born on 28 January 2003. This means that she was under the age of eighteen when the offence was committed.

17. The life sentence has been declared unconstitutional, and the learned trial magistrate appreciated this fact. The offence is repugnant to morality and an abuse of trust. I have not been persuaded to interfere with the sentence. Consequently, the appeal is dismissed.

DELIVERED AND SIGNED AT NYANDARUA THIS 21ST DAY OF FEBRUARY 2025.

KIARIE WAWERU KIARIE

JUDGE