JWK v Republic (Criminal Appeal E072 of 2022) [2024] KEHC 1511 (KLR) (5 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1511 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIVASHA

CRIMINAL APPEAL E072 OF 2022

GL NZIOKA, J

FEBRUARY 5, 2024

BETWEEN

JWK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the decision by Hon E. Mburu, Senior Resident Magistrate (SRM) in Chief Magistrate Criminal Case S/O No. E042 of 2021 delivered on 1st December, 2021, in the Chief Magistrate's Court at Naivasha)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Naivasha charged vide Criminal Case S/O No. E042 of 2021, with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* (herein "the Act").

2. That, on the 26th day of April 2021 at [particulars withheld] in Naivasha Sub-County within Nakuru County, he intentionally and unlawfully caused his genital organ namely penis to penetrate the genital organ namely vagina of "FWK" a girl aged 11 years old, whom to his knowledge was his sister.

3. He was also charged in the alternative count with an offence of committing an indecent act with a child contrary to section 11(1) of the *Act*.

4. The particulars thereof are that, on the 26th day of April 2021 at [particulars withheld] in Naivasha Sub-County within Nakuru County, he intentionally and unlawfully caused his genital organ namely penis to come into contact with the genital organ namely vagina of FWK a girl aged 11 years old.

5. The appellant pleaded not guilty and the case proceeded to hearing on 11th August 2021, wherein FWK (PW1), (herein "the complainant"), testified that, on 26th April 2021 she was in the house with her

three younger siblings when the appellant, who is her older brother, told her that; "nataka nikutombe" translated "I want to have sex with you" and threatened to kill her if she refused.

6. That, her other siblings ran away and left her with the appellant, in the house and the appellant undressed her by force and defiled her. That, he told her even if she reported the matter no action would be taken against him.

7. However, the complainant reported the incident to a lady who in turn reported to her mother. She was taken to hospital and the defilement confirmed and was treated. Thereafter, the reported the matter to the police station, the appellant was arrested and charged accordingly.

8. The matter was scheduled for further hearing on the 10th November 2021. However, on that date the appellant informed the trial court that he wanted to change his plea and the matter was stood to 29th November, 2021.

9. On the 29th November 2021, the appellant was not produced in court and the matter rescheduled to 1st December, 2021, when the charges were read afresh to the appellant and he pleaded guilty to the main charge.

10. The appellant was then convicted on his own plea of guilty after confirming that, all facts as read out were correct and sentenced to serve life imprisonment.

11. However, the appellant has appealed against the decision of the trial court vide grounds of appeal which verbatim states as follows:

    a. That the appellant pleaded guilty in the instant case.

    b. That the plea of guilty was not unequivocal.

    c. That, the learned magistrate erred in law and fact when she convicted the appellant in a prosecution case where age was not proved.

    d. That, the learned trial magistrate erred in law and fact when she convicted the appellant in the prosecution case where penetration was not proved.

    e. That, the learned trial magistrate erred in law and fact by applying wrong standards of proof in criminal cases which was a standard of probability instead of reasonable doubt.

    f. That, I pray to be present during the hearing of this appeal.

12. The appeal was opposed by the respondent vide grounds of opposition dated 24th May 2023 in which the respondent argues: -

    a. That, the appellant was convicted on his own plea of guilty and subsequently sentenced.

    b. That the appellant was duly cautioned of the serious nature of the offence and the sentence likely to be imposed once he pleaded guilty.

    c. That the sentence that was meted out by the trial court was lenient having taken into account his mitigation and his record as a first time offender, he was awarded a minimum sentence.

    d. That the appellant's appeal lacks merit and should accordingly be dismissed

13. The appeal was disposed of vide filing of submissions. The appellant filed submissions dated 28th June 2023, and argued that the plea recorded was not unequivocal as the trial court failed to explain all the facts to him. Further, the trial did not record a conviction against him before passing the sentence contrary to the provisions of section 207 of the *Criminal Procedure Code* (hereinafter "the Code").

14. Furthermore, the trial court did not explain to him the penalty of the offence when he changed his plea and proceeded to sentence him to life imprisonment which is the mandatory minimum sentence. He cited the case of; *Adan vs Republic* (1973) EALE 445 where the court discussed the principles to be followed when recording a plea of guilty.

15. The appellant further submitted that the sentence of life imprisonment imposed against him was harsh. That mandatory minimum sentence of life imprisonment does not allow a convict an opportunity for rehabilitation and a second chance at life.

16. Further mandatory minimum sentences are unconstitutional as they contravene; the provisions of Article 27 and 28 of *the Constitution* and Article 10 (3) of the International Covenant on Civil and Political Rights, 1996.

17. That, provisions of the law imposing such sentences should be construed in accordance with clause 7 of the Transitional and Consequential Provisions of *the Constitution* of Kenya to bring them into conformity with *the Constitution* of Kenya. He relied on the cases of; *Dismas Wafula Kilwake vs Republic* [2019] eKLR and *Eliud Waweru Wambui vs Republic* [2019] eKLR where the Court of Appeal stated there was a need for sober and pragmatic re-examination of the *Sexual Offences Act* No. 3 of 2006.

18. The appellant cited several cases where the courts have imposed a term sentence instead a life sentence is provided for under the law. The subject cases cited are: *M. vs Republic* (2017) eKLR , *Peter Matheri Macharia vs Republic* Criminal Appeal No. 24 of 2017, and *Julius Kitsau Manyeso vs Republic* Criminal Appeal No. 12 of 2021 where the Court of Appeal declared life imprisonment is unconstitutional.

19. However, the respondent, filed submissions dated; 24th May 2023 and cited the case of; *Adan vs Republic* (1973) EA 445, where the Court of Appeal outlined the procedure of plea taking and stated that the essential ingredients of the offence should be explained to the accused in a language he understands, that the accused own words should be recorded if it an admission and the prosecution read the facts to the accused who should be given an opportunity to dispute, explain or add any relevant facts, and where there is no change of plea a conviction should be recorded.

20. That in the present case, the charge and all the elements of the offence were read out to the appellant in Kiswahili language, which the appellant understood and he pleaded guilty and then facts were read out and translated into English.

21. Further, the appellant changed his plea to guilty three (3) months after the complainant had testified. That, when given an opportunity to mitigate, the appellant never retracted his plea of guilty and instead prayed for leniency stating that he was drunk when he committed the offence.

22. Furthermore, the learned trial Magistrate deferred sentencing to a later date to await the pre-sentence report during which time the appellant had an opportunity to change his mind and plea before sentencing but never did so.

23. Further still section 348 of the *Criminal Procedure Code* provides that an appeal on conviction where an accused pleads guilty is untenable except to the extent or legality of the sentence.

24. On the sentence, the respondent relied on the case of; *MMM vs Republic* [2017] eKLR where the court in interpreting section 20(1) of the *Act* stated that the minimum sentence is ten (10) years but that the trial court has discretion to impose a sentence of more than ten (10) yeas and up to life imprisonment where the victim is below eighteen (18) years of age.

25. The respondent further relied on the case of; *PMM vs Republic* [2018] eKLR, where the court held that sentence of life imprisonment was not invalid as it was well within the scope of a proper sentence for the offence of incest where the victim was a child under eighteen (18) years

26. That, the appellant was not deserving of any sympathy as he defiled his sister aged eleven (11) years old, which offence is heinous and would leave the complainant traumatized for the rest of her life and under mental stress. As such, in the circumstances the sentence is deserved and therefore the appeal be dismissed and conviction and sentence upheld.

27. Having considered the appeal in the light of material placed before the court and submissions tendered I find that the main issues that have arisen for determination are whether; the plea was unequivocal and/or the plea taking process was complied with and whether the sentence meted out is harsh and/or excessive in the circumstances of the case.

28. In this case, it is noteworthy that, the appellant pleaded guilty. The provisions of section 348 of *Criminal Procedure Code*, (Cap 75) Laws of Kenya, provides that, where an accused person pleads guilty to the charge, no appeal shall be allowed, except as to the extent or legality of the sentence.

29. However, a plea of guilty can be challenged where it is not unequivocal as held in the case of; *Alexander Lukoye Malika v Republic* [2015] eKLR where the Court of Appeal thus stated: -

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

30. In the instant matter, the trial court records indicates that, the charge was read to the appellant in Kiswahili, a language he understood and he responded: *"Ni kweli"* translated into English as "it is true", and a plea of guilty recorded as entered.

31. Further, the facts were read out in detail as follows:

> " The brief facts of the case as read out are that, the complainant minor aged 11 years was in the house. She was the sister to the accused. He came home, found her in the house, stated he wanted to defile her and took her and put her on a sitting room seat. He removed her panties and defiled her by putting his penis in her vagina after which he left.
>
> That the complainant went and reported to the mother who then went to the police station and hospital. There were two documents filled on her behalf; a P3 form indicating she had been defiled and her hymen broken, and the post rape care form that the position (prosecution exhibits 1 and 2). The accused was charged accordingly".

32. It suffices to note that the appellant changed plea after the complainant had testified to the same facts and not cross examined at all. As such the appellant was fully aware of the facts and the facts as recorded are clear and detailed enough.

33. It is noteworthy that the following facts the issue of the plea being unequivocal is not tenable. Even then at the appeal stage the appellant clearly stated he is not challenging the conviction and the provision of section 348 of the *Criminal Procedure Code* do not accord him that opportunity

34. As regard sentence, the provision of section 20(1) of the [Act](https://new.kenyalaw.org/akn/ke/act/2006/3) states:

(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:

> 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".

35. The appellant contention on the sentence herein is twofold; the constitutionality and the validity thereof. I will not venture into the constitutionality as that is a subject of constitutional interpretation not of the appeal herein and which cannot be canvassed in this appeal anyway but will deal with the validity.

36. Further the issue is whether life imprisonment is a mandatory sentence for the offence of incest. In this regard, the Courts have pronounced themselves on the same as demonstrated by the following authorities. The Court of Appeal in *M K v Republic* [2015] eKLR stated thus:

17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?

18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.

19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of *Opoya -v- Uganda* (1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the *dicta* in *James -v- Young* 27 Ch. D. at p.655 where North J. said:

> "But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".

We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".

20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said *Act*. The contrast will shed light as to whether the sentence

in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

21. Guided by the decision in *Opoya -v- Uganda* (1967) EA 752 and the persuasive dicta of North J. in *James -v- Young* 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment.

22. Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in *Opoya -v-Uganda* (1967) EA 752. It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment. We reiterate the principles in the case of *Ogolla s/o Owuor*, (1954) EACA 270 wherein the predecessor of this court stated:

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

23. We are of the considered view that the High Court misinterpreted the proviso to Section 20 (1) of the *Sexual Offences Act* and acted on wrong principles and overlooked the decision in *Opoya -v- Uganda* (1967) EA 752."

37. Further, in the case of; *JMM v Republic* (Criminal Appeal 28 of 2014) [2023] KECA 479 (KLR) (12 May 2023) (Judgment), the Court of Appealstated that: -

> " 13. In our view, the provisions of Section 20(1) of the *Sexual Offences Act* provides a lower limit sentence for the offence of incest with an adult as ten years. The same section, when dealing with incest concerning a minor, leaves an element of discretion to the trial court to go as far as life imprisonment. The provision therefore does not tie the hands of the court; it is couched in a manner which preserves the discretion of the trial court to impose any sentence between ten years and life imprisonment. A reading of the *Sexual Offences Act* discloses that where the legislature intended to have a minimum sentence, it did not mince its words. For instance, the sentence provided in Section 8(2) of the *Act* for a person who commits an offence of defilement with a child aged eleven years or less is couched in mandatory terms as follows:
>
> > "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."
>
> It is therefore our opinion that the use of the word "liable" in the proviso to Section 20(1) of the *Sexual Offences Act* was therefore deliberate. In providing the sentence under Section 20(1) the lawmaker must have been alive to the

> fact that the sentences in Section 8 of the *Act* are also applicable to those who sexually violate children in circumstances that can be deemed to be incestuous."

38. Pursuant to the aforesaid, the law is settled that the sentence of life imprisonment under section 20(1) of the *Act* is not mandatory. As such the learned trial magistrate erred by holding that it was a minimum mandatory sentence. On that ground this court can interfere with that sentence.

39. Be that as it were, the offence the appellant committed herein is heinous and cruel. An offence committed by a family member of close blood relationship has far reaching psychological impact on the victim. The victim has to nurse the permanent wounds of the offence and the continuous remind thereof by virtue of the fact the offender remain in the family. He is not a stranger who she can wish away

40. Furthermore, the appellant was an elder brother of the victim. The victim looked upon him for protection only for him to turn around and be the hunter and defiler. The court cannot shut its eyes to the plight of the victim as it considers the appellant's plea for reduced sentence. The appellant need to be kept away from the victim for a considerable period of time to allow the victim heal.

41. In that case I set aside the sentence imposed of life imprisonment and substitute it with a sentence of twenty- five (25) years. The sentence will run from the date the appellant was arraigned in court.

42. It is so ordered. Right of Appeal 14 days explained

DATED, DELIVERED AND SIGNED ON THIS 5TH DAY OF FEBRUARY 2024

GRACE L. NZIOKA

....

JUDGE

In the presence of:

The appellant present virtually

Mr. Abwachi for the respondent

Ms. Ogutu: court assistant