AMO v Republic (Criminal Appeal E024 of 2021)
[2024] KEHC 3151 (KLR) (7 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3151 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E024 OF 2021

WA OKWANY, J

MARCH 7, 2024

BETWEEN

AMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment and Sentence in Nyamira CMCR (S0) No. 25 of 2017 at Nyamira Chief Magistrate's Court by Hon. W.C. Waswa, Resident Magistrate on 30th July 2020)

JUDGMENT

1. The Appellant herein, AMO, was charged with the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act*. The particulars of the charge were that on diverse dates between 1st January 2-17 and 4th July 2017 in Nyamira South Sub-County being a male person, caused his genital organ, penis to penetrate the genital organ, vagina, of TN (particulars withheld) aged 10 years, a female person who was to his knowledge his daughter.

2. TheAppellant also faced the alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars were that on diverse dates between 1st January 2-17 and 4th July 2017 in Nyamira South Sub-County intentionally and unlawfully touched the genital organ, vagina of TN (particulars withheld) a child aged 10 years with his genital organ, penis, who was to his knowledge his daughter.

3. The Appellant pleaded not guilty to the charge after which a trial ensued in which the prosecution called a total of 6 witnesses.

4. At the close of the Prosecution's case, the trial court placed the Appellant on his defence upon finding that the prosecution had established a prima facie case against him.

5. The Appellant gave a sworn statement in his defence and did not call any witnesses.

6. In a judgement delivered on 8th November 2018, the trial court found that the prosecution had proved its case against the Appellant beyond reasonable doubt. The Appellant was consequently convicted and sentenced to life imprisonment.

The 1st Appeal

7. Aggrieved by the conviction and sentence, the Appellant filed an Appeal, being Criminal Appeal No. 44 of 2018 (hereinafter "the 1st Appeal"). The 1st appeal was heard and determined by Maina J. who found that the Appellant's right to a fair trial was violated as voire dire examination of the minor was not properly conducted. The learned judge also found that the trial was conducted in a casual manner since the trial court did not indicate the language used during the hearing. The learned judge then ordered for a retrial before a different magistrate.

Retrial

8. The retrial was conducted before Hon. Waswa where the charges were read to the Appellant afresh. He once again pleaded not guilty to the charges and the prosecution presented the evidence of the same witnesses who testified during the first trial.

9. The victim (TN) testified as PW1 that the Appellant is her father and that he repeatedly had sex with her at home. She stated that she slept in the same room with her brothers and that the Appellant would leave his bedroom and come to their bedroom (study room) where he had sex with her almost on a daily basis. She testified that they used to sleep on the floor and that on the 4th July 2017, the Appellant had sex with her. She informed her teacher, one madam T, of her tribulations on 5th July 2017. She further explained that her mother had gone to Nairobi and that they lived alone with their father. She was examined and treated at Nyamira County Hospital.

10. PW2, TK, testified that she knew the complainant and her father the Appellant herein. She stated that while at school on 5th July 2017, she noticed that the complainant was walking with difficulty and appeared weak while the other children were laughing at her while saying her father defiles her. PW2 reported the matter to the guidance and counselling teacher who then accompanied the head teacher to the police station where they reported the matter.

11. PW3, Robert Nyakundi, the Assistant Chief of Miruka sub-location testified that the head teacher of the complainant's school informed him that the complainant appeared to have a problem walking. He contacted the police who thereafter arrested the Appellant.

12. PW4, CN, a teacher at the complainant's school, testified that she noticed that the complainant was walking with difficulty. She followed the complainant to the toilets where she found her crying. The victim informed her that her father (the Appellant) defiled her on a daily basis. PW4 reported the matter to the school administration.

13. PW5, Paul Mayaka Obure, a Clinical Officer, examined the complainant on 5th July 2017. He testified that the complainant was in a pathetic state as she was infested with jiggers and had soiled her underwear. She also had a broken hymen, fungal infection, puss and blood in the urine and a Sexually Transmitted Decease. PW5 concluded that the child had been defiled. He produced the P3 Form (P.Exh 1), the laboratory results (P.Exh2) and PRC Form (P.Exh3).

14. PW6, No. 66xxx Sgt. Jedidah Nyatichi, a police officer attached at Nyamira Police Station, Gender office, received the complainant when she was brought to the station by her school teacher on 5th July 2017. The complainant informed her that the defilement started in January 2017. She escorted the complainant to the hospital for examination when the P3 Form was filled. She later recorded

the witness statements and requested the area chief to arrest the Appellant. She testified that her investigations revealed that the Appellant separated with his wife in January 2017 and that he was living alone with the children. PW6 also took the complainant for age assessment on 12th July 2017 which established that she was 11 years old. She produced the Age Assessment Report (P.Exh4). She preferred charge of incest against the Appellant.

15. At the close of the Prosecution's case, the trial court found that the prosecution had established a *prima facie* case against the Appellant and placed him on his defence under Section 211 of the *Criminal Procedure Code*. The Appellant opted to give a sworn testimony and did not call any witnesses.

16. The Appellant (DW1) denied the charges and testified that he was at his work place in Nyamira on 7th July 2017 when the Assistant Chief summoned him to his office before escorting him to Nyamira Police Station over the allegation that he had defiled his daughter.

17. The Appellant claimed that his daughter's teachers had fabricated the charges against him because of a debt that they owed him in respect to land that he sold land to them. He stated that the teachers not only refused to complete the payments for the land but also threatened him when he denied them entry to the land.

18. On cross-examination, the Appellant stated that he sold land to one TO (PW2) for Kshs. 65,000/= but that she only paid Kshs. 35,000/=. He did not call any witnesses to the transaction even though he claimed that there were but he did not intend to call them to testify. He also testified that he had 5 children and that the complainant was the 2nd born and his only daughter. He added that the mother of his children was at home in 2017.

19. At the conclusion of the trial, the trial court found that the prosecution had proved its case against the Appellant beyond reasonable doubt. He was subsequently convicted and sentenced to serve life imprisonment.

The 2nd Appeal

20. Aggrieved by the conviction and sentence, the Appellant filed the instant appeal and listed the following grounds of appeal in his Petition of Appeal: -

    1. Thatthe learned trial magistrate erred both in law and fact by imposing a life sentence against him in the absence of corroborative evidence of the Prosecution witnesses, thus rendering the sentence null and void.

    2. Thatthe learned trial magistrate erred both in law and fact by convicting and sentencing the Appellant to life imprisonment based on the evidence of a single witness without warning himself of the dangers involved hence prejudiced (sic).

    3. Thatthe learned trial magistrate erred both in law and fact by failing to note that there was no proper medical report presented in court proving any wrong doing by the Appellant hence a mistrial.

    4. Thatthe learned trial magistrate erred both in law and fact by failing to note that it was pure malice since the cause of the allegation was related to his piece of land which he sold.

    5. Thatthe learned trial magistrate erred both in law and fact by failing to note that the evidence presented in support of the Prosecution case was a mere allegation and that the complainant was examined outside the 72 hours lawfully known to law.

    6. That he wished to be present at the hearing of the appeal.

21. The Appeal was canvassed by written submissions.

The Appellant's Written Submissions

22. The Appellant submitted that were glaring inconsistencies and uncorroborated testimonies in the prosecution's case which could not be overlooked. He cited the case of *Pandya vs Republic* (1990) EACA 93 where it was held that it would be difficult to establish the truth where evidence was contradictory. The Appellant submitted that the investigations were shoddily conducted and that the evidence of PW6, the investigating officer, was biased and insufficient to sustain a conviction.

23. It was submitted that the age of the complainant was not proved. Reference was made to the decision in *JOO vs R* (2015) eKLR where the standard of proof in criminal trial was explained. It was the Appellant's case that medical evidence did not prove penetration. He relied on the case of *Josphat Machoka Nyabwabu vs. R.* Kisii HCCRA 126 of 20122 where it was held that a broken hymen was not proof of penetration.

24. The Appellant also submitted that since the Prosecution did not call material witnesses (the complainant's siblings) to support its case, the Court ought to construe the failure to imply that the witnesses could have given evidence that is adverse to their case.

25. The Appellant faulted the trial court for failing to consider his alibi defence. For this argument, he relied on the decision in the case of *Seketoleko vs. Uganda* (1967) EA 531 where the court held that the accused should not be convicted on the weakness of his case but on the strength of the Prosecution's case.

26. He further submitted that the sentence passed by the trial court was harsh and oppressive. Reliance was placed on *GM vs. Republic* (2017) eKLR where the Appellant, who was convicted of defiling his child, a minor of 9 years and sentenced to life imprisonment had his sentence reduced to 15 years' imprisonment. He urged the Court to quash the conviction and set aside the sentence.

The Respondent's Submissions

27. The Respondent submitted that the evidence tendered by the prosecution established the offence of incest to the required standards. It was submitted that there was no possibility of mistaken identity of the Appellant as the Appellant was the complainant's father and that she was 11 years old at the time she was defiled. The Respondent's case was that the Court could convict the Appellant on the sole evidence of the minor in accordance with the provisions of Section 124 of the *Evidence Act*.

28. The Respondent submitted that the sentence was lawful and appropriate considering the age of the complainant and the gravity of the offence.

Analysis and Determination

29. The duty of a first appellate court is now settled through several authorities. In *David Njuguna Wairimu vs. Republic* [2010] eKLR the Court of Appeal stated thus: -

> " The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered

the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

(see also Okeno v. R [1972] EA 32).

30. I have considered the Record of Appeal and the parties' rival submissions. I find that the main issues for my determination are as follows: -

i. Whether the offence of incest was proved to the required standard.

ii. Whether the sentence was legal and appropriate.

i. Proof of Incest

31. Section 20 of the *Sexual Offences Act* (hereinafter "the Act") stipulates as follows on incest: -

> 20(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 cases penetration or the indecent act was obtained with the consent of a female persons.

32. The above provision highlights the ingredients of the offence of incest to be: -

i. Proof of consanguinity

ii. Proof of the age of the victim.

iii. Proof of penetration or indecent Act

iv. Positive identification of the perpetrator.

33. Section 22 of the Act defines the degree of consanguinity as follows: -

> 22 Test of Relationship
>
> 1. In cases of the offences 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 ...
>
> 2. .....
>
> 3. An Accused person shall be presumed, unless contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him of her and the other party to the incest.

34. In the instant case, it was not disputed that the complainant was the Appellant's daughter. The complainant testified that the Appellant was her father, a relationship that the Appellant did not deny. PW2 and PW4 also stated that they knew the Appellant as the complainant's father. I find that the first ingredient of incest was proved

35. Turning to the age of the minor, I note that the Appellant contended that the minor's age was not adequately established, In the case of Francis Omuroni vs. Uganda, Criminal Appeal No. 2 of 2000, the Court of Appeal of Uganda held thus:-

> " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense …."

36. In the present case, PW6, Sgt. Jedidah, testified that the complainant was subjected to an age assessment test which revealed that she was 11 years old at the time in question. PW6 produced the Age Assessment Report dated 12th July 2017 as an exhibit marked P.Exh 4. I find the age of the minor was proved to the required standard.

37. Penetration is defined under Section 2 of the Act as follows: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

38. Courts have held that penetration can either be partial or complete. In Erick Onyango Ondeng vs. Republic (2014) eKLR, the Court of Appeal held that: -

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured."

39. Penetration can be established through the victim's testimony and corroborated by medical evidence or by the victim's sole testimony.

40. In the instant case, the complainant testified that Appellant defiled her on numerous occasions from January 2017 when her mother left home for Nairobi. She stated that she informed her teacher that her father had been defiling her almost on a daily basis. Her testimony was as follows: -

> " …My father the Accused person had sex with me at home….The Accused left his bedroom and came to our bedroom. We slept in the study room. He had sex with me in the study room…The Accused had sex with me several times. Almost daily. I can't recall how many times…On 4th July 2017, the Accused had sex with me also…."

41. The complainant's testimony was corroborated by the testimony of her teachers PW2 and PW4 who stated that they noticed that she was walking with difficulty and that the minor informed them that her father had defiled her. PW2 added that other children in the school knew about the complainant's predicament and were making fun of her.

42. In addition to the oral testimonies of PW1, PW2 and PW4, the prosecution also tendered the medical evidence of the Clinical, PW5, who produced the P3 Form (P.Exh 1) and PRC Form (P.Exh.3) which indicated that the complainant had a broken hymen, a fungal and Sexually Transmitted infection, puss cells, yeast cells and blood in her urine. I am persuaded that the findings of the Clinical Officer confirmed penetration beyond a shadow of doubt.

43. Having found that PW1 positively identified the Appellant as her defiler and considering the fact that the complainant's mother was not at home at the time she was defiled, it means that the Appellant was the only parent left to the care of the children. I have also considered the minor's testimony that she

slept with her siblings in the study room and that her father would defile her on several occasions when the other children were asleep. I am of the view that the minor positively identified her assailant because the sexual assault occurred on several occasions. My take is that, in the circumstances of this case, the Appellant's identification as the perpetrator of the offence was proved to the required standard.

44. It did not escape the attention of this court that during the retrial, the victim faced her assailant, the Appellant herein, in court for the second time when she had to relive her ordeal all over again. The trial court's record reveals that the victim broke down and cried during her testimony against her own father. It is my considered view that the victim was candid and consistent in her testimony and in her identification of the Appellant as the one who had defiled her on a daily basis over a long period of time.

45. Considering at the manner in which the Appellant preyed on his own daughter undetected for a long time, one can only shudder to imagine what would have befallen the minor had her teacher (PW2) not noticed that she was walking with difficulty due to the agony she had to endure. I have no doubt in my mind that the identification ingredient of the offence was proved to the required standard.

46. I have carefully considered the Appellant's defence which was consisted of a denial of ever committing the offence. The Appellant attributed his woes to a land sale deal with the teachers that went sour. He claimed that the teachers had a vendetta against him after he sold them land whose full purchase price they were unable to pay. The Appellant further claimed that there were witnesses to the land sale agreement but did not call any of them to support of his case.

47. My finding is that the Appellant's defence consisted of mere denial that did not oust the otherwise watertight evidence presented by the prosecution. I find that if indeed the Appellant had a land sale deal with the complainant's teachers, nothing would have been easier than to present the said agreement or the testimonies of the alleged witnesses in court.

48. Turning to the Appellant's alleged alibi defence, I find that the offence in question was not a one-off event but was committed over a long period of time. This means that the Appellant could not claim that he was not at the scene of the crime during the nights that the complainant was defiled.

49. Regarding the Appellant's claim that material witnesses (the complainant's siblings) were not called to support the prosecution's case, I note that the prosecution did not state that the complainant's siblings witnessed the defilement so as to necessitate the presentation of their corroborative evidence. Furthermore, it is trite that the court may, in defilement cases, convict an accused person on the sole evidence of the complainant. This position is fortified by the provision of Section 124 of the *Evidence Act* which stipulates that: -

> " Notwithstanding the provisions of section 19 of the oaths and Statutory Declaration Act, where the evidence of the victim 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 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."

50. Case law is awash with numerous decisions affirming the position that in sexual offences where the victim is a minor, corroboration is no longer necessary as a matter of law. In the case of J.W.A. vs. Republic [2014] eKLR, the Court of Appeal observed:-

> "We note that the appellant was charged with a sexual offence and the proviso to section 124 of the *Evidence Act*, clearly states that corroboration is not mandatory. The trial court having conducted a voire dire examination of PW1 and being satisfied that the complainant was a truthful witness, we see no error in law on the part of the High Court in concurring with the findings of the trial magistrate."

51. A similar position was taken in Mohamed vs. Republic [2006] 2 KLR 138 where the court stated:-

> "It is now settled that the courts shall no longer be hamstrong by requirements of corroboration when the victim of a sexual offence is a child of tender years if it is satisfied that the child is truthful."

52. In the present case, the complainant's siblings who shared the same room with her in the same room at the time she was defiled were not called as witnesses, a fact which the Appellant did not take lightly, arguing that they were necessary witnesses. The court addressed the issue of calling witnesses in Julius Kalewa Mutunga vs. Republic, Criminal Appeal No.32 of 2005, as follows:-

> "As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion, unless, for example, it is shown that the prosecution was influenced by some oblique motive."

53. The Court of Appeal again addressed that issue in the case of Benjamin Mbugua Gitau v Republic [2011] eKLR thus:-

> "This court has stated severally that there is no particular number of witnesses who are required for proof of any fact unless the law so requires – see section 143 of the *Evidence Act* Cap 80 laws of Kenya. In the circumstances therefore we find that no prejudice was caused to the appellant or to the prosecution by failure to call the two boys"

54. In this appeal, the trial magistrate noted that the offence was committed in the family house while the other children were asleep. I find that in the circumstances of this case, it would have been an exercise in futility to call the complainant's siblings as witnesses when they did not witness the Appellant commit the offence. It is my finding that the evidence led was sufficient to prove the offence that the Appellant was charged with.

55. Having regard to the findings and observations that I have made in this judgment, I find that the Prosecution discharged its burden and proved the charge of incest against the Appellant beyond reasonable doubt. I therefore uphold the conviction by the trial court.

ii. Whether the Sentence was harsh and appropriate

56. Section 20 of the Act provides that a person found guilty for the offence of incest 'shall be liable to imprisonment for life'.

57. In M K vs. Republic [2015] eKLR, the Court of Appeal held thus: -

> " 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."

58. In S. vs. Malgas, 2001 (2) SA 1222 SCA 1235 para 25 the court held thus: -

> " What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

59. In Bernard Kimani Gacheru v Republic [2002] eKLR, the Court of Appeal held thus: -

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

60. Taking a cue from the above cited case, I find that it will not be in the place of this court to interfere with the life sentence that the trial court passed on the Appellant unless it is shown that the sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle.

61. The issue which arises is whether the life sentence meted out on the Appellant herein was appropriate. I have considered the law and the mitigation presented by the Appellant during the trial. I am also alive to the fact that life sentence was however declared unconstitutional in the recent Court of Appeal decision in Julius Kitsao Manyeso vs. R, Criminal Appeal No. 12 of 2021, where the Court decision by the European Court of Human Rights in Vinter and Others v The United Kingdom (Application Nos. 66069/09, 130/10 and 3896/10 (2016) III ECHR 317 (9 July 2013) and held as follows: -

> " .....such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality under Article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also

> inhumane treatment and violates the right to dignity under Article 28.....an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment....”

62. Guided by the law, the decision in the above cited case and considering the nature of the offence and the relationship between the Appellant and the minor, I find that the sentence passed by the trial court, even though legal, was not appropriate. It is very disheartening that the minor fell prey to the heinous schemes of her biological father who was her legal guardian at the time. What is most unfortunate in the circumstances of this case is the manner in which the Appellant, continuously and for days on end, defiled his daughter until her teachers came to her rescue. Such conduct is not only abhorred by this Court but must receive punishment befitting the heinous extent to which the Appellant violated and robbed his daughter of her innocence.

63. Having considered the punishment stipulated under Section 20 of the Act, the objectives of sentencing under the Judiciary Sentencing Policy Guidelines (2016), the circumstances of this case and the fact that the Appellant opted not to offer any mitigation before the trial court, I align myself with the principles espoused by the Court of Appeal and find that the life imprisonment sentence was unconstitutional and hereby sets it aside.

64. This Court appreciates the fact that sentences must not only be determinate but must also be commensurate to the gravity of the offence in question. It is not lost on this Court that the victim in this case was subjected to trauma at a tender age of 11 years when she was subjected to uncountable nights of sexual violation. The seriousness of this crime means that the Appellant is not a suitable candidate for a non-custodial or a lenient sentence. Consequently, and taking into account the period, if any, that the Appellant had spent in custody while awaiting his trial, I hereby substitute his life sentence with 40 years’ imprisonment. The sentence period shall begin to run from the date he was sentenced by the trial court.

65. It is so ordered.

66. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 7TH DAY OF MARCH 2024.

W. A. OKWANY

JUDGE