AKK v Republic (Criminal Appeal E071 of 2022)
[2024] KEHC 3450 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 3450 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E071 OF 2022

RN NYAKUNDI, J

APRIL 11, 2024

BETWEEN

AKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Kigen in Eldoret Law courts Cr. S.O No. 59 of 2019)

JUDGMENT

1. The Appellant was charged with the offence of Incest contrary to section 20(1) of the *Sexual offences Act* No. 3 of 2006. He equally faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between October 2018 and 10th February, 2019 within Elgeyo Marakwet County, the appellant intentionally and unlawfully caused his genital organ to penetrate into the genital organ of JJR a child aged 10 years who was in his knowledge his daughter.

3. The Appellant was found guilty as charged, convicted and sentenced to life imprisonment. He was aggrieved with both conviction and sentencing after which he instituted the present appeal. The appeal is based on the amended grounds as follows:

    i. That the trial court erred in law and fact as it failed to hold that the charge sheet was fatally defective.

    ii. That the trial court erred in law and facts as it failed to observe that the witness evidence was inconsistent and uncorroborated.

iii. That the trial court erred in law and facts by failing to hold that his case was not proved beyond reasonable doubt.

iv. That the trial magistrate erred in law and in fact by convicting on manifestly insufficient prosecution evidence.

v. That the trial court erred in law and facts by failing to consider the appellant defense evidence.

vi. That the trial court erred in law and facts as it failed to hold that the evidence of identification and recognition was not conclusive.

vii. That the learned trial magistrate erred in law and facts by shifting the burden of prove from the prosecution backyard to the appellant when the evidence failed to link him to the offence.

4. This being the first appellate court, it behoves me to re-evaluate and analyse the evidence adduced in the trial court afresh for me to come up with an independent conclusion. In doing so, I must bear in mind that, unlike the trial court, I did not have the opportunity of observing the demeanour of the witnesses as they testified. See Okeno vs. Republic [1972] E.A 32.

5. At the trial court, the prosecution called 3 witnesses in support of their case.

6. The complainant testified and stated that on diverse dates between 2018 and 2019, when her mother had moved out of the matrimonial home, they were left behind with their father. Their father had then asked her and her sister to be sleeping in his bed and he asked them to remove their pants and sleep naked. He then inserted his penis into her vagina, it is her evidence that he repeatedly defiled her and her sister C and threatened to strangle them if they reported. That thereafter she fled to her grand mother's place and reported to her what transpired. Their aunt picked them and took them to hospital and thereafter reported to the police station.

7. The matter was investigated by PC Ramadhan and it was her evidence that the accused had been brought in by AP Officers together with his children who are complainants in the matter, she had then booked the report and escorted the minors to MTRH for treatment.

8. On further investigation she found out that the accused had separated with the wife and he took over custody of the minors where he had defiled both minors and on 10.02.2019 the minors fled to her aunt's place and reported to her what had transpired. She had then recovered the exhibits which included the minor's pant.

9. PW2 Dr. Lilian Taban from MTRH testified and stated that the minor herein had gone to the hospital in the company of police officers and was examined on 20.02.2019 at 10:00 A.M. where she narrated that she had been defiled by her father on several occasions.

10. Upon examination, the head and neck were normal, abdomen, chest and both limbs were normal, she also had an enlarged vagina with both healed and fresh hymenal tears, she also had tears on the posterior fourchettes which were healing. Basing on the injuries noted, the doctor had then formed an opinion that the minor herein had been defiled.

11. From the above prosecution evidence, the trial court concluded that the prosecution established a prima facie case and proceeded to put the Appellant on his defence.

12. The accused person gave sworn testimony and stated that he did not commit the said offence. He testified that he had been called by the headmaster to go to school and later came home with the children and left for work. On arriving in the evening, he did not find his children he later learnt that the children had been picked by two ladies. His brother then asked him why he had been defiling his

children, the children were escorted to hospital where the doctor had confirmed defilement and he was arrested and charged accordingly.

Findings And Determination.

13. In determining this appeal this court shall satisfy itself that the ingredients of the offence of incest were proved as so required in law; beyond reasonable doubt. I have carefully perused through the proceedings and the judgement of the trial court as well as the evidence on record before this court. The issues for determination in this appeal are:

    i. Whether the prosecution proved its case to the desired threshold;

    ii. Whether or not the sentence was excessive.

    The appellant was charged with and convicted on the main count of incest contrary to section 20(1) of the *sexual offences Act*. Section 20 (1) of the Act provides,

    > " Any male person who commits an indecent act or an act which caused 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 should 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".

    Section 22 provides the test of relationship. It provides,

    > 22 (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 wedlock or not.

    The accused does not deny being a father to the complainant but rather denies having committed the offence. I am satisfied that the complainant is related to the accused person.

    A major ingredient of the offence of defilement is that there must have been penetration. Penetration is defined in section 2 of the *sexual offences act* as

    Penetration means the partial or complete insertion of the genital organ of a person in the genital organ of another person.

    The penetration or act of sexual intercourse has therefore to be established to sustain a charge of defilement. In Bassita Hussein – VS – Uganda, Supreme Court criminal appeal No. 35 of 1995, the court stated,

    "The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence."

    The complainant in her evidence in court in explained what happened and the same was corroborated by the doctor who conducted examination and confirmed that indeed the complainant was defiled.

    The appellant in his submissions took issue with the fact that crucial witnesses were not called to testify. However, I am of the considered opinion that the element of penetration is central to the charge of

incest and the fact that the medical evidence adduced confirms that the complainant was defiled, there would be no need to call the other witnesses.

I have re-evaluated the evidence before the trial court and in my own analysis of the same I am satisfied that the trial magistrate properly considered the evidence adduced and correctly arrived at the conclusion that the appellant being a father of the complainant penetrated her genital organ and therefore committed an offence of incest contrary to section 20 (1) of the *sexual offences Act*. To this end, the appeal on conviction fails.

On sentence

14. Section 20 (1) of the *sexual offences act* has created 2 sentences. One to a general sentence which applies when the complainant is an adult; and a second one where the complainant is a minor. It provides – Any

> 20(1) where 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 the offence termed incest and is liable to imprisonment for a term not less than 10 years.
>
> Provided that if it is alleged on information or charge and proved that the female person is under the age of eighteen years accused shall be liable to imprisonment for life and it shall be immaterial that the act which caused penetration was obtained with the consent of the female person.

15. The age of the complainant in sexual offences at the time of the offence is significant. The evidence adduced in the present case is that the complainant was 8 years. PW3 escorted the minor for age assessment where the doctor had given an impression that the minor was less than 12 years. From the foregoing, I am convinced that the complainant was still below the age of majority.

16. The provision to section 20 (1) provides that accused person who has been convicted of an offence of incest where the victim is under 18 years; "Shall be liable to imprisonment for life"

    The provision in my considered opinion does not give a mandatory sentence but rather gives a maximum sentence. This is so because the words "shall be liable do not in their ordinary sense require the imposition of the stated penalty but merely expresses stated penalty which may be imposed at the discretion of the court

17. In the "Muruatetu Case", the Supreme Court outlined the following guidelines as being applicable when the Court was giving consideration to sentencing;

    " (a) age of the offender;

    (b) being a first offender;

    (c) whether the offender pleaded guilty;

    (d) character and record of the offender;

    (e) commission of the offence in response to gender-based violence;

    (f) remorsefulness of the offender;

    (g) the possibility of reform and social re-adaption of the offender;

(h) any other factor that the Court considers relevant."

18. The objectives of sentencing should be considered in totality. In this regard, section 10 of the *Sexual Offences Act* gives room for the exercise of judicial discretion.

19. Further, the sentencing objectives in Kenya have been captured in the Sentencing guidelines 2023 to be the following: -

i. Retribution: to punish the offender for his/her criminal conduct in a just manner.

ii. Deterrence: to deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

iii. Rehabilitation: to enable the offender reform from his/her criminal disposition and become a law abiding person.

iv. Restorative justice: to address the needs arising from the criminal conduct such as loss and damages.

v. Community protection: to protect the community by incapacitating the offender.

vi. Denunciation: to communicate the community's condemnation of the criminal conduct.

vii. Reconciliation: To mend the relationship between the offender, the victim and the community.

viii. Reintegration: To facilitate the re-entry of the offender into the society.

20. In order to determine whether a mandatory life imprisonment as per the Kenyan Constitution is unconstitutional one has delve into Art. 19, 20, 22, 24, 25 26, 27, 28, 29, & 50 of *the Constitution*. The analysis of these relevant provisions when critically analyzed as pertaining mandatory life imprisonment such a statutory provisions prima-facie are inconsistent with *the constitution*. The sentence of life imprisonment is thus a discretionary sentence pursuant to the Principles Julius Kitsao Manyeso and Philip Mueke Maingi (Supra) available for trial courts to impose should such a court belief that particular circumstances of a particular case warrant the imposition of such a sentence. One of the key predominant constitutional imperative which renders mandatory life imprisonment unconstitutional is traceable to Art. 25 (a) of *the constitution*. In that it is cruel, inhuman and degrading punishment. It removes from the convict all hope, expectation, optimistic of his or her release from prison for reason of it being served until the last natural breathe. Essentially, such a sentence takes away all the rights of a human being to sustain and maintain any desire to ever look forward to the enjoyment of the right to life in Art. 26 of *the constitution*. The court in the case of Tliynne, Wilson and Gunnell v Tlie United Kingdom 13 E.H.R.R 666 at 669 where it is stated. "that life sentence are imposed in circumstances where the offence is so grave that even if there is little risk of repetition it merits such a severe, contingence and life sentences are also imposed where the public require protection and must have protection even though the gravity of the offence may not be so serious because there is a very real risk or repletion.....But, however, relevant such considerations may be, there is no escape from the conclusion that an order deliberately incarcerating a citizen for the rest of his or her natural life severely impacts upon much of what is central to the enjoyment of life itself in any civilized community and can therefore only be upheld if it is demonstrably justified. In my view, it cannot be justified if it effectively amounts to a sense which locks the gate of the prison irreversibly for the offender without any prospect whatever or any lawful escape from that condition for the rest of his or her natural life and regardless of any circumstances which might subsequently arise. Such circumstances might include sociological and psychological re-evaluation of the character of the offender which might destroy the

previous fear tht his or her release after a few years might. Overtime I have come to appreciate that no criminal justice system for our country is perfect, leave alone the sentencing system at the end of a trial in which an offender is found guilty and convicted of the appropriate offender's charge. The courts are free to exercise discretion within the limits of the provisions in the statute and guidelines from jurisprudential decisions. Although that is the case, one must admit that on the face of it the facts of the case might appear similar or identical but the truth of the matter is there are clear characteristics or features which distinguish one homicide from another. It follows in greater detail the court to analyze different approaches based on the factual matrix of the case aimed at ensuring consistency and fairness in sentencing. In the instant case, the submissions placed before this court and the reasons in support at this sentencing stage on appeal it seems from the constitutional standpoint and the ratio decidendi in the authority cited the state of mandatory life imprisonment in Kenya is no longer good law. The court is therefore clothed with jurisdiction on appeal pursuant to the guidelines in the Benard Kimani Gacheru and Ogolla s/o Owuor (Supra) to review the sentence on record.

21. The trial court while sentencing the appellant considered the appellant's mitigation but still issued a maximum sentence. I believe that mitigation ought to count in sentencing. Judicial officers have the discretion to sentence an accused person based on the circumstances of a case. Therefore, in considering the objectives of sentencing in their totality and the circumstances of the case, I am inclined to interfere with the life sentence and substitute it with 30 years' imprisonment. The sentence shall run from the date of arrest i.e. 20th February, 2019.

22. The court in arriving at this decision, has taken into account the circumstances surrounding the incident, aggravating factors, mitigation and the objectives of sentencing.

23. In the upshot, the appeal partially succeeds on sentence whereas the order on conviction is affirmed.

DATED AND SIGNED AT ELDORET THIS 11TH DAY OF APRIL, 2024

In the Presenceof

Mr.Mugun for the stte.

Appellant

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R. NYAKUNDI

JUDGE