



REPUBLIC OF KENYA



KENYA LAW
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**JKK v Republic (Criminal Appeal E053 of 2021)
[2023] KEHC 963 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CRIMINAL APPEAL E053 OF 2021
JWW MONG'ARE, J
FEBRUARY 16, 2023**

BETWEEN

JKK APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal from conviction and sentence of Hon. N. Wairimu in Eldoret
Chief Magistrate's Court Case No.280 of 2018 delivered on 14th September, 2020)*

JUDGMENT

1. 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 the December 7, 2018 in Turbo Sub-County within Uasin Gishu County being a male person caused his penis to penetrate the vagina of MB, a female person who was to his knowledge his grandmother. In the alternative, he was charged with the offence of committing an indecent act with an adult contrary to section 11(A) of the [Sexual Offences Act](#).
2. The Appellant pleaded not guilty and the matter proceeded to full hearing. The prosecution called four (4) witnesses and the accused was put on his defence. Upon considering the testimonies of the witnesses and the evidence adduced in court, the trial court convicted him of the main count and sentenced him to 10 years imprisonment.
3. Being aggrieved with the conviction and sentenced, he instituted this appeal vide a petition dated August 5, 2021 premised on the following grounds;
 1. That the learned trial magistrate erred in law and in fact in failing to comply with section 200 of the [Criminal Procedure Code](#).
 2. That the learned trial magistrate erred in law and in fact in failing to comply with sections 211 and 213 of the Criminal Procedure Code.



3. That the learned trial magistrate erred in law and fact in failing to draw on adverse interference against prosecution over failure to call vital prosecution witnesses as laid down in *Bukenya v Uganda* (1972) EA 549.
4. That the learned trial magistrate erred in law and fact in failing to find that no medical evidence of the required standard existed to convict the Appellant for the offence of incest.
5. That the learned trial magistrate erred in law and fact in failing to find that penetration of the victim was not established to the required proof beyond reasonable and no satisfactory medical evidence was tendered by the prosecution to prove the fact of penetration of the victim.
6. That the learned magistrate erred in law and in fact in failing to comply with the provision of article 50(2)(g) and (h) of the *Constitution* of Kenya; by prior to the trial commencing informing the Appellant of the right to choose to be represented by an advocate and to be considered for the assignment of one at the expense of the state considering that the matter was complex and the gravity of the prescribed sentence that was life imprisonment and having regard to consideration of substantial injustice resulting to the Appellant.

The parties filed submissions on the appeal.

Appellant's Case

4. Although the Appellant filed an appeal challenging both conviction and sentence, he submitted on sentence. He stated that he is remorseful and seeks forgiveness. He urged that he is a first offender and urged the court to consider the time spent in remand as per the provisions of section 333(2) of the Criminal Procedure Code in reducing his sentence. He cited the case of *Petitions 97 of 2021 at Mombasa* and *Petition E17 of 2021 at Machakos* and urged the court to consider that mandatory sentences were declared unconstitutional. He referenced the judiciary sentencing policy guidelines and prayed the court allow his appeal against the sentence.

Respondent's Case

5. Learned prosecution counsel for the Respondent opposed the appeal. She submitted both in opposition to the appeal on conviction and as well as on sentence. She stated that at the time the matter was taken over by Hon Wairimu, trial magistrate, the record reveals that no witness had testified at the time and therefore section 200 of the Criminal Procedure Code would not apply to the case. She further cited section 143 of the *Evidence Act* and submitted that the prosecution called all the crucial witnesses who testified to the events leading to the commission of the offence. It was her position that the Appellant had not demonstrated how the prosecution had influenced the failure to witnesses not being called.
6. Learned counsel for the Respondent submitted that the offence of incest was proved to the required standard and that the evidence provided by the witnesses was enough to prove the same. Counsel submitted that all the elements of the offence of incest were proved and this included establishing that; the appellant had knowledge that the person to whom he committed the sexual act was a relative being his grandmother. The element of there being penetration/or indecent act was established by the testimony of the complainant and the medical personnel who produced the medical report. She urged the court to uphold the conviction and sentence.



Analysis And Determination

7. As the first appellate Court, I am duty bound to re-evaluate and reconsider all the evidence adduced during the hearing afresh and come to my own conclusions about all the elements of the crimes charged. See *Okeno v Republic* [1973] EA 32; *Pandya vs R* (1957) EA 336, *Ruwala vs R* (1957) EA 570.
8. At the onset, it is important to note that the Appellant did not submit on the appeal against conviction. He instead submitted that he was remorseful and sought forgiveness. This means that he was conceding to his conviction. However, as he had originally appealed against the sentence and the conviction in his petition, the court shall consider the same.
 - a. Whether the offence was proved to the required standard
 - b. Whether the trial magistrate complied with Section 200 of the Criminal Procedure Code
 - c. Whether the sentence was harsh/excessive

Whether the offence was proved to the required standard

9. Section 20(1) of the *Sexual Offences Act* provides:

' 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:
10. The elements of the offence of incest are; Penetration Knowledge that the female person is his relative. I note from the court record that PW1 testified that the Appellant raped her and the same was corroborated by the evidence of PW2 and PW3. The medical evidence adduced proved there was penetration and the Appellant was identified as the perpetrator by the complainant who was personally known to her. I have considered the evidence and the testimony of the witnesses and find that the same were consistent and credible. In the premises, I am satisfied that the offence was proved to the required standard.

Whether the trial magistrate complied with Section 200 of the Criminal Procedure Code

11. Section 200 of the Criminal Procedure code provides;

' 200. (1) Subject to sub-section (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may —

 - (a) Deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - (b) Where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or re-summon the witnesses and recommence the trial.

(2) .



(3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be re-summoned and re-heard and the succeeding magistrate shall inform the accused person of that right.

(4) .'

12. I have perused the record of Appeal and I note that when Hon N Wairimu took over the hearing of the case, no witness had testified. No evidence had been recorded by her predecessor and therefore there was no witness to be recalled. I find that there was no need to comply with section 200 of the Criminal Procedure Code in the circumstances.

Whether the sentence was harsh/excessive

13. The punishment prescribed for the offence of incest is a minimum mandatory sentence of 10 years imprisonment. In Mombasa High Court *Constitutional Petition No 97 of 2021 – Edwin Wachira and 2 others vs Republic* Hon Mativo J, when declaring that courts should have unfettered discretion in sentencing held as follows;

'For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence.'

14. The import therefore is that courts are allowed to use their discretion and determine the appropriate sentences. Upon considering the circumstances of the case, the mitigation of the appellant and the submissions of the parties I am satisfied that the trial magistrate exercised her discretion judiciously and I find no reason to disturb the sentence. The appeal is hereby dismissed.

DATED, DELIVERED AND SIGNED AT ELDORET ON THIS 16TH DAY OF FEBRUARY 2023

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J.W.W.MONGARE

JUDGE

Judgment delivered virtually in the presence of;

- 1. Appellant is Present
- 2. Ms Anguria holding brief for Ms okok- Prosecution Counsel
- 3. Loyanae- Court Assistant.**

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J.W.W.MONGARE

JUDGE

