MHM v Republic (Criminal Appeal E027 of 2022)
[2023] KEHC 2310 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2310 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E027 OF 2022

FG MUGAMBI, J

MARCH 17, 2023

BETWEEN

MHM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence of Hon. S.A.Ogot, SRM dated 11th January 2022 in Sexual Offence Case No. 53 of 2019 in the Senior Resident Magistrate's Court Msambweni)

JUDGMENT

1. This as an appeal against the conviction and sentence of sixty-three (63) years' imprisonment for incest under Section 20(1) of the *Sexual Offences Act* No.3 of 2006. The particulars of the offence were that the appellant on diverse dates between the month of August and September, 2019 in Msambweni sub county sub county, within Kwale country, being a male person, intentionally and unlawfully caused his penis to penetrate the vagina of FMH a female aged 14 years who was, to his knowledge, his daughter.

2. The appeal on sentence is premised on the following related grounds:

    i. That the sentence of sixty-three (63) years was manifestly harsh and excessive.

    ii. That the learned trial magistrate erred in law and fact by failing to consider the mitigation of the appellant and failing to consider the probation report.

3. The role of this court in its appellate jurisdiction is to review all the evidence and to make its own conclusions being careful to note that it did not itself hear the testimony or see the demeanour of witnesses (*Okeno v R* [1972] EA 32).

4. FMH who testified as PW1 stated that she was 15 years of age. She used to live with her parents, a younger sister and a younger brother. She shared a mattress with her younger sister. She further testified that on different occasions her father would get to her bed because her sister was very young at the time,

remove her panty and have intercourse with her. She had reported this to her mother and grandmother who had not believed her. It was her further testimony that she found out that she was pregnant and her parents arranged for her to procure an abortion at Tiwi Hospital. While they were at the hospital waiting to procure the abortion, the police arrived and they were taken to Diani Police Station.

5. PW2 was Corporal Dickson Korir, the investigating officer in the incident. He interrogated FMH before escorting her and her parents from Diani Police Station to Msambweni Police Station. He also accompanied FMH to Msambweni Hospital and later for a DNA test. He also produced a copy of FMHs birth certificate which showed that she was born on 24th September 2005. PW3, Irene Mwaringa was the government analyst who carried out the DNA test. The DNA report which she produced, showed that that there were 99.99% or more chances that the appellant was the father to FMHs child.

6. PW4 was a clinical officer who produced the treatment notes and PRC on behalf of the medical doctor who examined FMH. PW5, Senior Sergent Emma Mututa, was the arresting officer. She states that she was tipped of an incest case where the parents to the victim were arranging for an abortion. She waylaid the appellant, his wife and FMH at Tiwi Hospital and sure enough arrested them before the abortion had been procured. It was her further testimony that when she interrogated him, the appellant admitted to the offence and asked for forgivemenss.

7. DW1, the accused, in a sworn statement, denied having committed the offence. He testified that the charges were a fabrication arising out of the fact that he had beaten FMH for going late to school without any good reason. FMH ran away from home to his in law's place and his in laws were the ones trying to get back at him through the fabricated charges.

8. The grounds of appeal are only based on the sentence. The appellant submits that the learned trial magistrate failed to take into account his defence and mitigation. I do however note that from the trial records, the learned trial magistrate was guided by the probation report and mitigation. It was the observation of the learned magistrate that the probation report was favourable to the appellant and showed that he was a person of good behaviour. She however went on to look at the circumstances of the offence in totality including the fact that the victim wants nothing to do with her home and him. The learned trial magistrate addressed herself to the discretion of the trial court in sentencing. It was for this reason that she did not impose the maximum life sentence or the minimum ten (10) years sentence as prescribed for this offence.

9. This court cannot overlook the fact that the appellant committed a heinous crime and occasioned trauma and suffering to a young girl who is his own blood. His actions clearly demonstrate that the young and vulnerable that are around him could be in jeopardy. Be that as it may, the principles upon which an appellate court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the Court of Appeal stated as follows:

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case" (*R - v- Shershowsky* (1912) CCA 28TLR 263).

10. An insight into what constitutes a manifestly excessive sentence was discussed by the same court in *Ali Abdalla Mwanza v Republic* [2018] eKLR. The appellant, a 36-year-old man had been sentenced to 40 years' imprisonment for murder. The court observed as follows:

> 'Considering the circumstances of the matter which is really the guiding principle in sentencing, we ask ourselves whether the sentence of 40 years is manifestly excessive bearing in mind the age of the appellant at the time of conviction... In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case it would appear manifestly excessive... In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction."

11. As such, in this case, whereas the applicant should pay for his crime, and act as a deterrent for such debauchery, I should also give the appellant an opportunity to be re-integrated back into society and be a productive citizen taking into account that he is in his 50s. The appeal is hereby allowed. The sentence of 63 years is substituted with a sentence of 25 years. The time the appellant spent in custody during trial be taken into consideration when computing his sentence as provided for in section 333(2) of the *Criminal Procedure Code* Cap 75.

SIGNED, DATED AND DELIVERED AT NAIROBI IN OPEN COURT (VIRTUALLY) THIS 17TH DAY OF MARCH2023

F. MUGAMBI

JUDGE