JMM v Office of the Director of Public Prosecution (Criminal Appeal E037 of 2021) [2023] KEHC 18682 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E037 OF 2021

PJO OTIENO, J

JUNE 16, 2023

BETWEEN

JMM ..... APPELLANT

AND

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTION ..... RESPONDENT

(Being an appeal from the conviction and sentence of T.A Odera (CM) in Mumias CM's Court Sexual Offence Case No. 17 of 2019 dated 15.9.2021)

JUDGMENT

1. The Appellant was arraigned before the Chief Magistrate at Mumias in Sexual Offences Case No. 17 of 2019 charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on diverse dates between March 2017 and 2nd June, 2019 at Mumias East Sub County within Kakamega County, the appellant being a male person intentionally caused his penis to penetrate the vagina of SNM a child aged 14 years whom he had knowledge was his granddaughter.

2. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006 whose particulars were given to be that on diverse dates between March 2017 and 2nd June, 2019 Mumias East Sub County within Kakamega County, the appellant being a male person intentionally and unlawfully touched the vagina of SNM a child aged 14 years with his hands.

3. The Appellant pleaded not guilty and the case thus proceeded to full trial at which the prosecution called a total of five (5) witnesses whose evidence is summarized as below.

4. PW1, the victim, was subjected to voire dire examination and upon the court being satisfied on her ability to tell truth she testified that she was 14 years old and a class six student at [Particulars Withheld]

primary School. She stated that on 2/6/2019 she was in school and experiencing pain in her vagina which she decided to report to the headmistress to whom she narrated how her grandfather, the appellant, had been having sexual intercourse with her. She recounted that the first time the appellant did 'tabia mbaya' to her was when her grandmother has sent her to pick unga from her house wherein she found the appellant in the sitting room watching television. She entered the bedroom and the appellant followed her, caressed her and squeezed her on his body. The second time the appellant had called her to his house to help her with ironing and when he sent her to the bedroom to get a shirt for him, he followed her, caressed her breasts and vagina and then had sexual intercourse with her. The third time they had gone to visit her great grandmother when the appellant pulled her to a sugar plantation and asked her to give it to him. She claimed that the appellant warned her not to tell anyone lest he would he would kill her.

5. On cross examination she stated that on 2/6/2019 the appellant 'raped' her when her grandmother had gone to hospital and that on 6/6/2019 she was not in school since she was being treated the entire term 2. On reexamination she stated that she was sick before she told her head teacher and that she started ailing when the appellant first defiled her.

6. PW2, father to the victim testified that on 6.6.19 at about 11AM his wife received a call from the complainant's school asking if they were aware that she was sick to which he responded that he was aware and that he had been taking her to hospital since the month of November of the previous year. They then took the complainant to a hospital in Shianda where he discovered that she was ailing from syphilis.

7. On cross examination he claimed that he had received reports that PW1 was having sexual relations with boys and denied knowledge of the complainant and her mother fabricating this case in order for her to be taken to a special school just like her big sister who heard earlier reported a rape case against her stepfather.

8. PW3 a former teacher of the complainant gave evidence that on 6/6/2019 she received a report from the guidance and counselling teacher that the complainant, a student, had complained that she was in pain and insects were coming out of her vagina. She then called her parents whom together they took her to hospital. On cross examination she stated that she came to know who the perpetrator was from the complainant's father.

9. PW4, the investigating officer testified that on 8/6/2019 he was at the Shianda Police Station when the complainant and her father walked in and made a report that on 2/6/2019 the appellant had called the complainant into his house to help him iron his clothes and then caressed her and inserted his fingers into her genitals. He then pulled her into his bedroom and had sexual intercourse with her. She tried to scream but then the appellant blocked her mouth and threatened her. Later in the evening she told her mother who did not react. When the schools opened on 6/6/2019 she told her head teacher who summoned her parents. He then arrested the appellant and escorted the complainant to Shianda Health Centre for medical examination where it was established that she had contracted a sexually transmitted disease. He later took her to Kakamega County Referral Hospital for age assessment where it was established that she was 14 years old. On cross examination he stated that the clinical officer informed him that the appellant also had a sexually transmitted disease.

10. PW5, a clinical officer at Lusheya Health Centre produced the treatment notes by a colleague called Brenda who had examined the complainant. She testified that the complainant had been examined at the hospital on 6/6/2019 and that she had a discharge secondary to a sexual assault. HIV, pregnancy and syphilis test came negative though her urine had proteins and pus cells and was thus put on antibiotics. She was again seen on 11/6/2019 with the same symptoms and it was established that she did not

take the medicine prescribed. Vaginal examination revealed that there was vaginal white foul smelling discharge and the hymen was broken, though it was not freshly broken.

11. On cross examination she stated that the pus cells and foul smelling discharge was a sign of a sexually transmitted disease. She further stated that pus cells were also found in the urine of the accused an indication that he most likely had gonorrhea. She refuted claims that she had knowledge that the appellant had disclosed to her colleague that he had an erection problem.

12. At the close of the prosecution's case, the Court ruled that a prima facie case had been established and the accused person was put on Defence.

13. The Defence called only one witness, the appellant, who testified that the complainant was his grandchild and that she wanted to go to a special school and her elder sister who had a similar case against her father had coached her to fabricate this case against him. He claimed that he was not able to have sex with any woman and was to go for an operation in the year 2014 but was unable to because of lack of money.

14. On cross examination he stated that he did not have any medical documents to show that he was sickly and could not have sex.

15. Judgment was subsequently delivered 15.09.2021 by which the accused person was convicted of the substantive charge and sentenced to life imprisonment.

16. Dissatisfied with the judgment of the trial court, the appellant has lodged an appeal by a petition of appeal filed in court on 21.09.2021 and later amended on 10/12/2022, enumerating the following three grounds: -

> "a) THAT the learned trial magistrate erred in law by acting on the wrong principles of the law and upheld an unlawful sentence. The proviso under section 20(1) of the *Sexual Offences Act* No. 3 of 2006 provides for sentence of 10 years up to life imprisonment. Life imprisonment is therefore not a mandatory sentence.
>
> b) THAT the learned trial magistrate erred in law and fact by imposing a life imprisonment upon the appellant but failed to note that age of the complainant was not fully proved and penetration was not proved.
>
> c) THAT the appellant's defence was not considered."

17. He therefore seeks that his conviction and sentence be quashed or the evidence be reevaluated a proper sentencing be meted.

18. The court directed that the appeal be canvassed by way of written submissions to which directive the parties have filed their respective submissions.

Appellants' Submissions

19. On the ground of sentencing, the appellant contends that section 20(1) of the *Sexual Offences Act*, does not prescribe life imprisonment as a mandatory sentence for the offence of incest where the victim is below 18 years old and places reliance on the court of appeal decision in MK v Republic (2015) eKLR where the court interpreted the section to mean that a court has the discretion whether or not to impose the maximum sentence of life imprisonment. It is then argued that the appellant ought to be given a sentence that is not below ten years but not life imprisonment.

20. The appellant contends that the age of the victim was not proved within the holding of the decisions of the court in Francis Omuroni Vs Uganda Court of Appeal in criminal Appeal No. 2 of 2000 and Kaingu Elias Kasomo v R in Malindi Court of Appeal Criminal Appeal No. 504 of 2010 since PW1 and PW5 testified that she was 15 years old while PW2 father to the victim testified that she was 14 years old and that no birth certificate, school leaving certificate or baptismal card was produced prove the age.

21. On the element of penetration, the appellant claims that it was not proved since it was the evidence of PW5 that the victim's hymen was not freshly broken and that the court ought to have taken the evidence of PW1 with caution since PW1 was a single witness who is a minor.

22. The appellant finally submits that his defence was not considered specifically his testimony that he was sick and could not have sex. It is then submitted that the burden of proving the falsity of the appellant's defence lay on the prosecution and cited the case of Victor Mwendwa Mulinge Vs Republic where the court of appeal said: -

> " It is trite law that the burden of proving the falsity, if at all, of an accused's defence of alibi lies on the prosecution; see KARANJA v REPUBLIC [1983] KLR 501."

23. On the sentence, the court was urged to find and hold that the interpretation of the proviso to section 20 of the *Sexual Offences Act* was that the court retains the discretion in sentencing and could imposing any term between 10 years and life imprisonment as the life sentence was not a mandatory sentence. Reliance was placed upon the decisions in M K v Republic (2015) eKLR.

24. The court was thus urged to upset both conviction in whole and only when that fails then the sentence be upset after the court carries out a full review of the evidence led at trial based on the decisions cited by the appellant.

Respondent's Submissions

25. For the Respondent submissions were offered that the age of the complainant was proved, beyond reasonable doubt, through the production of an age assessment report by PW4. On penetration, the respondent contends that this was also proved to the requisite standards by the complainant's testimony in which she stated that the appellant had sexual intercourse with her three times. It is additionally argued that the evidence of penetration can be deduced from the evidence of PW5 who said that the complainant had contracted a sexually transmitted disease, diagnosed as recurrent vaginitis, and that the appellant also had pus cells which indicated that he also had a sexually transmitted the same disease.

26. On the sentence imposed on the appellant, the respondent concedes that section 20(1) of the *Sexual Offences Act* gives the court discretion to sentence an accused up to life imprisonment and that the life imprisonment meted was just since the aggravating factors outweighed the mitigating factors. The respondent cited the decision in SOO v R (2021) eKLR in which the court observed: -

> " This is not one of those cases where the court can close its eyes to the offence and tamper justice with mercy. The appellant deserved a deterrent sentence. I find no fault with the sentence imposed on the appellant by the learned trial magistrate. Even the Francis Muruatetu decision did not say that maximum sentence is unconstitutional, such sentence can be meted out having regard to the circumstances of each case and mitigation. The appellant was given an opportunity to mitigate before he was sentenced. The trial magistrate did not say that her hands were tied in her sentencing remarks. She considered the

seriousness of the offence and the mitigations by the appellant before imposing the lawful sentence which is not unconstitutional as her discretion was not fettered or at all."

27. The respondent thus opposes the appeal and Prays that the same be dismissed on both limbs of conviction and sentence.

Issues for Determination

28. This court has, in its mandate on first appeal, considered the grounds of appeal, the proceedings in the record of the lower court and the submissions by the parties and discerns the following issues for determination: -

    a. Whether the element of the offence of incest, being the age of the victim and penetration were proved against the appellant beyond reasonable doubt?

    b. Whether the sentence meted was just and reasonable?

    c. Whether the evidence of the appellant was considered?

Analysis

Whether the two elements of the offence of incest, age and penetration, were proved against the appellant beyond reasonable doubt

29. Section 20(1) of the *Sexual Offences Act* defines the offence of incest by a male person to occur when one 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 and imposes the penalty to be 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.

30. The appellant contends that no birth certificate, school leaving certificate or baptismal card was produced to prove the age of the complainant hence the court was wrong in finding that the victim was 14 years' old. It is not the law that age of a victim be proved by only documents. Even the oral testimony of a parent is sufficient. The court of appeal in the case of Edwin Nyambaso Onsongo –Vs- Republic (2016) eKLR did lay the law in the matter when it held as follows: -

> "...the question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof."

31. It was the evidence of PW4 that since the complainant had no age documents, he escorted her to Kakamega County Referral Hospital for age assessment where it was established that she was 14 years of age and he produced the age assessment report which was marked as PEXH 3. An age assessment report is an opinion of an expert which even though is not binding upon the court, the court must have good reasons for disregarding same. In this matter, the trial court did anxiously consider the need to prove age as a critical element of the offence and rendered itself thus:

> "The complainant (PW1) stated that she was 14 years old at the material time and is supported by her age assessment report. (Pexh 3) and the evidence of her father PW2.i also saw PW1 during her evidence in court and on voire dire examination and I am satisfied

that she was approximately 14 years old. I find that the prosecution has proved beyond reasonable doubt that the complainant aged approximately 14 years old at the material time."

32. This court finds no fault with the determination by the trial court and for that reason finds that the age of the complainant was sufficiently proved by the evidence of PW1, 2 and 5.

33. On penetration, Section 2 of the Sexual Offence Act, the definition by the Act, make even partial penetration to be sufficient in commission of the offence. It can be proved by the evidence of the victim alone and that requires no corroboration in terms of section 124 of the *Evidence Act*.

34. It was the evidence of PW5 during cross examination that the pus cells and foul smelling discharge emanating from the complainant's vagina suggested that she had contracted a sexually transmitted disease. A test on the appellant also established him to suffer the same condition. It was thus the finding of the trier of facts, who also saw heard and observed the demeanor of the complainant that penetration was overwhelmingly proved. This court construes the use of the word overwhelmingly to demonstrate proof beyond reasonable doubt. As a first appellate court, even when bound to come to own conclusions, it ought not to interfere with findings of facts, unless there is disclosed misapprehension of such facts. Here the court finds the facts to fully support the charge hence no justification to interfere. It is therefore, the finding of the court that penetration was proved by the prosecution to the requisite standards.

Whether the sentence meted was just proportionate and reasonable

35. Section 20(1) of the *sexual offences act* prescribes a sentence of life imprisonment in a case of incest with a female child below the age of 18 years. In her judgement, the trial court in coming to the sentence did observe and wrote: -

> "I have considered the mitigation, the nature of the offence, the circumstances in which it happened, the prevalence, the law, accused is hereby sentenced to life imprisonment."

36. The appellant has argued, very strongly while relying on binding decisions of the court of appeal, and the court has no reason to depart from that well-trodden path, that the sentence of life imprisonment is not fashioned in mandatory terms. The court is in particular bound and guided by the Court of Appeal decision in MK's case (supra) where the meaning of the phrase "liable to" in section 20(1) of the *Sexual Offences Act* was determined mean that the sentence due is the maximum, not mandatory and was anything between 10 years and life imprisonment. The law thus gives the court the discretion to exercise.

37. Every time the court exercises its discretion, the law mandates that same be based upon reason. That is when it becomes judicial and not caprice or just whim. A reading of the decision on sentence does not reveal that the trial court found any aggravating circumstances to warrant the imposition of the severest of the sentence.

38. Every convict, is by the words of article 50(2)p, entitled to the least severe of the sentence prescribed. In this case, as said before, the trial court had a latitude of between 10 years and life sentence. There is no allusion to why the maximum was the most appropriate sentence. While the decision in SOO's case (supra) would be very persuasive on upholding the life sentence, there, there existed grave consequences of the offence being that the victim was a daughter and had been given the burden to be a mother at the tender age of 14 years.

39. The court finds that for failure to give reason for the ultimate maximum sentence, the court erred. Such error invites the mandate of the court to substitute a sentence it deems proportionate. This however not to underestimate the gravity of the offence. It simply involves the need to temper with the sentence with full appreciation that correction and rehabilitation are also goals of our penal system and that a combination of jail term and other sanctions may help a convict reintegrate into society and become a useful and productive citizen.

40. With such appreciation, the court does set aside the sentence, and taking into account the age of the appellant and he term so far served, and substitutes therefor a term of 10 years from the date the appellant was arraigned in court. It is hoped that during his term, he shall acquire a life skill to help participate in income generation and thus nation building.

Whether the defence evidence was considered

41. A perusal of the judgment of the trial court shows that the evidence of the appellants was fully considered. The trial judge says in part: -

> " The proceedings of the alleged "Busia rape" case was not produced for this court to see and compare the evidence there in with the one herein to support the allegation of coaching... I have evaluated the entire evidence on record and I find the defence has failed to displace prosecution's evidence which is overwhelming."

42. It thus cannot be true that the evidence of the accused person was not considered by the trial court. It was fully and duly considered but disbelieved.

43. Accordingly, for the reasons set out above, I find that the appeal on conviction is bereft of merit and is thus dismissed. However, the sentence is set aside and in its place substituted a jail term of 10 years computed from the date the accused was arraigned in court.

Dated, signed and delivered at Kakamega this 16th day of June 2023.

PATRICK J. O. OTIENO

JUDGE

In the presence of:-

The Appellant in person

Ms. Chala for the Respondent/State

Court Assistant: Polycap