SOO v Republic (Criminal Appeal E012 of 2022)
[2023] KEHC 18977 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEHC 18977 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E012 OF 2022

RE ABURILI, J

JUNE 21, 2023

BETWEEN

SOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against conviction and sentence by the Hon. P.K Rugut rendered on the 19.12.2018 in the Principal Magistrate's Court at Tamu in Sexual Offences Case No. 20 of 2018)

JUDGMENT

Introduction

1. The appellant herein SOO was charged with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* the particulars being that on diverse dates from November 2017 to June 2018, at [Particulars Withheld] village within Muhoroni sub-county at Kisumu county, the appellant intentionally caused his penis to penetrate the vagina of VA a child aged 14 years who was his daughter.

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

3. After a full trial, the appellant was found guilty of the main charge and was sentenced to serve 15 years' imprisonment. Dissatisfied with the said conviction and sentence, the appellant filed this appeal *vide* his petition of appeal filed on the March 23, 2022 raising the following grounds of appeal:

    i. That the trial court failed to observe that the investigation tendered was shoddy.

    ii. That the trial court failed to observe that the prosecution evidence was full of contradictions hence unsafe to base a conviction upon.

iii. That the trial court failed to consider that the sentence imposed was against the weight of the evidence adduced.

iv. That the trial court failed to appreciate that the sentence imposed was unconstitutional due to its mandatory nature.

v. That I be served with the certified copy of the trial records to enable us erect more grounds of appeal.

4. The appeal was canvassed by way of submissions.

The Appellant's Submissions

5. The appellant who was self-represented submitted that the complainant who testified as PW1 was compromised and was being used by the mother to frame him and thus her testimony was unbelievable and ought to be rejected.

6. It was submitted that the medical examination report did not corroborate the complainant's testimony which indicated that the investigations carried out were speculative with nothing concrete in support and thus could not sustain his conviction and sentence of 15 years.

The Respondent's Submissions

7. The respondent represented by the Office of the Director of Public Prosecutions submitted that the prosecution had its case against the appellant beyond reasonable doubt. It was submitted that the age of the complainant was proved to be 14 years, that penetration was proven through the complainant's testimony that was corroborated by the medical evidence on record and that the identity of the perpetrator was also proven as the appellant was the complainant's father as evidenced from the birth certificate produced as an exhibit.

8. It was further submitted on behalf of the respondent that there were no inconsistencies in the prosecution's case.

9. On the sentence meted out on the appellant, it was submitted that the trial court sentenced the appellant as provided for in section 20 (1) of the *Sexual Offences Act* and that there was no reason why this court should interfere with the trial court's discretion on sentencing. The respondent relied on the case of *Ogola s/o Owuor v Republic* [1954] EACA 270 where the court stated interalia that an appellate court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors.

Analysis of Evidence Before The Trial Court

10. The prosecution called 5 witnesses in support of the charge against the appellant. PW1, the complainant testified that she was aged 14 years old and that in November 2017, she went to her father's home in Mariwa having left her grandmother's home. She stated that she slept in her uncle's house twice then went to her father's house.

11. It was the complainant's testimony that the appellant started touching and sleeping with her but did not do anything as she was on her menstrual cycle. She further testified that after menstruating, the appellant started having sex with her, by climbing on top of her then inserting "his thing for urinating and putting it where I urinate." It was her testimony that the appellant did this daily until May 2018 when she reported to her teacher Madam H.

12. The complainant testified that the teacher took her to the police station in Muhoroni and that when her father, the appellant, heard that she was in hospital, he burned all her things including books.

13. In cross-examination, the complainant stated that the appellant threatened her not to tell anybody or he would take her to the police to be beaten. She further stated that the appellant stated that he would sleep with her to the exclusion of other men. She denied that the appellant had been framed because he had refused to pay dowry. She admitted that she had been found with a boy named R.

14. In re-examination, the complainant reiterated that the appellant threatened her not to tell anybody. It was her testimony that R was her boyfriend and that he was a good friend who provided her with school items.

15. PW2, HAO, a teacher from [particulars withheld] Primary School testified that on the May 28, 2018 at 4pm while at the school, she saw one of the pupils, the complainant, behaving differently from her peers, so she took her aside and spoke to her and that is when the complainant revealed to her that her father, whom she knew, did bad manners to her and so, PW2 advised the complainant to keep away from the appellant.

16. It was PW2's testimony that the complainant informed her that as she had kept off, th appellant got harsh and mistreated her and that she eventually took the complainant to Muhoroni District Hospital then to Muhoroni Police Post.

17. In cross-examination, PW2 testified that she couldn't do more than interrogating the complainant, taking her to the hospital and reporting to the police.

18. PW3, Francis Owuor testified that he was informed by a teacher from [Particulars Withheld] Primary School that the complainant was bleeding from her private parts and that she had been defiled. It was his testimony that he had heard that the appellant was living with his daughter as his wife.

19. In cross-examination, PW3 stated that the appellant had absconded and so it took them 3 weeks to go to the Police station. He further stated that he learnt from the villagers that the appellant did not want anyone to communicate with the complainant and so he used to escort her to school and back.

20. PW4, Jared Okoth Olala, a clinical officer at Muhoroni sub-county Hospital testified that he examined both the complainant and the appellant.

21. It was his testimony that on vaginal examination of the complainant, it revealed that the hymen was not intact and that no sperms were seen. He further testified that he carried out an age assessment on the complainant and established that she was 14 years old. PW4 produced the complainant's P3 form as PEx1 and her treatment notes as PEx2.

22. PW4 testified that on the September 6, 2018, the appellant was taken to the hospital for medication as he claimed he was diabetic but on examination, he found that the appellant was normal and that the appellant was treated for normal body pain. He further testified that the appellant was not examined for the offence.

23. PW5 No 98211 PC (W) Damaris Mugano testified that he received the complainant's report that since November 2017, her father had been defiling her and threatened not to pay her fees if she told anyone. She testified that she issued her with a P3 form and escorted her to hospital for examination. PW5 testified that the appellant was arrested by the public.

24. It was her testimony that the complainant informed them that she slept with her father in the bedroom as her brother slept in the sitting room and that when the appellant defiled her he would switch the

radio on with a high volume or during rainy season and that at times, the appellant would send her brother away to their grandmother's.

25. In cross-examination, PW5 reiterated her testimony and denied that the complainant framed the appellant because of her mother. She further faulted the sleeping arrangement of the complainant sharing a room with the appellant as her brother slept in the sitting room. In re-examination, PW5 reiterated that she found the sleeping arrangement unusual.

26. In his defence, the appellant gave a sworn testimony saying that he was framed by his wife as he had not paid dowry so that she could take away the children. He testified that the complainant's mother coached her on what to say in court. He stated that he was away when the alleged offence took place.

27. DW1 HO, the appellant's son stated that he did not know anything about the charges.

The Role of this Court

28. This being a first appeal, this court has the duty to re-evaluate and analyze the evidence in detail and come up with its own independent conclusions while bearing in mind that it neither saw the witnesses nor heard their testimonies as to their demeanour. This duty was stated by the Court of Appeal in the case of *Mark Oiruri Mose v Republic* [2013] eKLR, in the following words:

> " ...It has been said over and over again that the first appellate court has the duty to revisit the evidence tendered before the trial court, afresh analyse it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that..."

Determination

29. I have considered the appellant's grounds of appeal, the evidence adduced before the trial court as well as the submissions and the applicable law in this appeal. The issues for determination are:

    a. Whether the prosecution's case against the appellant was proved beyond reasonable doubt and

    b. Whether the sentence imposed on the appellant was excessive and harsh.

Whether the prosecution proved its case against the appellant beyond reasonable doubt

30. Section 20 of the *Sexual Offences Act* deals with incest by males. The section provides that:

> " incest by male persons
>
> 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 causes penetration or the indecent act was obtained with the consent of the female person.

(2) If any male person attempts to commit the offence specified in subsection (1), he is guilty of an offence of attempted incest and is liable upon conviction to a term of imprisonment of not less than ten years.

(3) Upon conviction in any court of any male person for an offence under this section, or of an attempt to commit such an offence, it shall be within the power of the court to issue orders referred to as "section 114 orders" under the Children's Act and in addition divest the offender of all authority over such female, remove the offender from such guardianship and in such case to appoint any person or persons to be the guardian or guardians of any such female during her minority or less period."

31. To establish a case under the above section, the prosecution must prove the elements of the offence which are:

1. An indecent act or an act that causes penetration;

2. The victim must be a female person who is related to the perpetrator in the degrees set out in section 22 of the Act.

32. Section 22 provides that:

"(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 lawful wedlock or not.

(2) .....

(3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

(4) In cases where the accused person is a person living with the complainant in the same house or is a parent or guardian of the complainant, the court may give an order removing the accused person from the house until the matter is determined and the court may also give an order classifying such a child as a child in need of care and protection and may give further orders under the *Children Act* (No 8 of 2001)."

33. An Indecent act is defined under section 2 of the *Sexual Offences act* as:

"indecent act" means an unlawful intentional act which causes:-

a. any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration;

b. exposure or display of any pornographic material to any person against his or her will."

34. On the other hand, penetration is defined under section 2 of the *Sexual Offences Act* to mean:'the partial or complete insertion of the genital organs of a person into the genital organs of another person."

35. On proof of age, there is overwhelming evidence on record that the complainant was aged 14 years old. The complainant testified that she was 14 years old, PW4, the clinical officer also testified that he carried out an age assessment on the complainant and established that she was 14 years old and finally PW5 produced a copy of the complainant's birth certificate as PEx3 that showed that the complainant was born on the April 10, 2004 thus making her 14 years as at June 2018.

36. On penetration, the complainant testified that the appellant defiled her several times from November 2017 to May 2018. The complainant testified that the appellant would climb on top of her and insert his "thing for urinating into where she urinates." The complainant did not waiver in her testimony even under cross-examination.

37. On whether this evidence of penetration was corroborated, section 124 of the *Evidence Act* Laws of Kenya provides that:

> " Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act*, where evidence of alleged 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 material evidence in support thereof implicating him. Provided that where in a criminal case involving a sexual offence, where 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 reason to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

38. Despite the provisions of section 124 of the *Evidence Act*, the complainant's testimony remained unchallenged and was corroborated by PW4 JOO who examined the complainant and found that her hymen was broken as contained in PEx 1, the P3 form he produced on behalf of his colleague who had examined the complainant and filled the same.

39. In his defence, the appellant denied committing the offence and stated that his wife was framing him for failing to pay dowry and that she had trained the complainant on what to say in court.

40. PW1 identified the perpetrator as the father, and there was no contrary evidence that the appellant was the complainant's father, hence he fitted in the description under section 22 (1) of the *Sexual Offences Act*..

41. There is no evidence on record to suggest why PW1, a child could have framed the appellant with such a serious offence and given such candid details of the incident. I have no reason to fault the trial court's conclusion that PW1 was a truthful witness. She gave her evidence on oath and was subjected to cross examination and her testimony was not shaken.

42. Although the appellant was under no duty to adduce any evidence to challenge the prosecution's case, or to give self-incriminating evidence, as t was in his right to remain silent and leave it to court to determine whether the prosecution had proved its case against him beyond reasonable doubt, weighing the prosecution's case against the appellant's defence that he was away at work on the night of the offence, I find the evidence adduced by the prosecution to be overwhelming. I thus agree with the trial court's finding that the appellant was the perpetrator of the offence that caused penetration of PW1.

43. I further find that the investigations carried out were not shoddy as alleged by the appellant as is evident from the evidence adduced by the prosecution before the trial court and revisited by this court. The said evidence was in my view, sufficient to sustain the conviction of the appellant's.

44. I thus find that the prosecution proved its case against the appellant herein beyond reasonable doubt.

Whether The Sentence Imposed On The Appellant Was Excessive And Harsh

45. The offence of incest is provided for in section 20(1) of the *sexual Offences Act* as follows:

> " 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 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."

46. From the above provision, it is clear that the sentence for incest, upon conviction, is dependent on the age of the complainant. If the complainant is an adult, that is over eighteen years old, the court has discretion to mete a sentence of imprisonment of any length not being less than ten years. If the complainant is under eighteen years of age the court has discretion to mete a sentence of up to life imprisonment.

47. The Court of Appeal interpreted section 20(1) of the *Sexual Offences Act* in the case of *M. K v Republic* (Nbi) criminal appeal No 248 of 2014 (CA)(2015) eKLR as follows:

> " 17. In the instant case, the appellant was charged with an offence under section 20(1) of the *Sexual Offences Act*. This section provides for a minimum term of 10 years imprisonment. However, the proviso to section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment".
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> 18. The first observation to note is that the phrase "not less than" has not been used in the proviso to section 20(1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
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> 19. What does "shall be liable" mean in law". The court of Appeal for East Africa in the case of *Opoya v Uganda*(1967) EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The court held that in construction of penal laws, the words "shall be liable on conviction to

suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or imprisonment."

48. In the *Opoya case* (supra), the court further interpreted the phrase "shall be liable to" as used in penal statutes as follows:

> " It seems to us beyond argument the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see fit to impose it."

49. From the above interpretation of the phrase "shall be liable", it can be construed that the life imprisonment sentence under section 20(1) of the *Sexual Offences Act* is not mandatory. It is also not the minimum sentence that can be imposed. What this means is that the convict can be sentenced to a period between 10 years up to life imprisonment when the victim is below 18 years old.

50. The appellant herein was sentenced to imprisonment for a period of 15 years in prison. This court is therefore called upon to determine whether the trial court acted on the correct principles of law in meting out the sentence.

51. I note that in mitigation, the appellant stated that his children would suffer and that the complainant would miss out on her studies. The appellant was in no way sorry for committing the offence.

52. I have considered the nature of the offence and in my view, this court cannot overlook the fact that the appellant has committed a heinous crime and occasioned trauma and suffering to a young girl who looked up to him for protection. The appellant betrayed the complainant's trust.

53. 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 v 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)."

54. In the case of *Wanjema v R* [1971] EA 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court in view of plain error of omnibus sentence and the illegality of the sentence. Therefore, in view of the above analysis, it is my view that the trial court considered the correct principles in imposing the appellant's sentence.

55. The upshot of the above is that I find the conviction of the appellant to be sound and safe. I uphold it. I further find that the sentence imposed on the appellant was not harsh or excessive and that the trial court exercised discretion taking into account mitigation and all circumstances of the offence. I find no reason to interfere with that lawful sentence. I uphold the same.

56. In the end, I find this appeal against conviction to be devoid of any merit. It is hereby dismissed.

57. This file is closed. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF JUNE, 2023

R.E. ABURILI

JUDGE