ZK v Republic (Criminal Appeal E017 of 2023)
[2024] KEHC 14733 (KLR) (21 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14733 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E017 OF 2023

RB NGETICH, J

NOVEMBER 21, 2024

BETWEEN

ZK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal arising from the original conviction and sentence in criminal case No. E059 of 2021 delivered on the 15th May,2023 by Hon. J. Wanjala (C.M) at Kabarnet Law Court)

JUDGMENT

1. The Appellant ZK was charged with the offence of Incest contrary to Section 20(1) of the *Sexual offences Act* No.3 of 2006. The particulars of the charge were that the appellant on diverse dates between 9th and 26th day of May,2021 at Baringo County willingly and unlawfully caused his penis to penetrate into the vagina of a girl aged 12 namely S.J who was to his knowledge his niece.

2. The Appellant faced an alternative charge of indecent Act with a girl contrary to section 11 of the *Sexual offences Act* No.3 of 2006. The particulars of the charge were that the applicant on diverse dates between 9th and 26th day of May,2021 at Baringo County willingly and unlawfully caused his penis to touch the vagina of a girl aged 12 years namely S.J in contravention to the said Act.

3. The Appellant pleaded not guilty on both counts and after full trial, he was convicted and sentenced to life imprisonment.

4. Being aggrieved by the decision of the trial court, the appellant has lodged a petition of Appeal citing the following grounds of appeal: -

    i. That I pleaded not guilty to the trial.

ii. That the trial court erred in both law and fact by failing to find that the evidence of penetration was not proved through s

iii. sufficient evidence.

iv. That the learned trial Magistrate erred in both law and fact by basing judgement on a defective charge sheet.

v. That the learned trial Magistrate erred in convicting me on uncorroborated evidence brought by the prosecution.

vi. That the trial court erred in both law and fact by imposing an illegal sentence.

5. The appellant humbly prays that his appeal be allowed, conviction quashed and he be set at liberty forthwith.

6. The Appeal proceeded by way of both oral and written submissions. The Appellant filed written submissions whereas the Respondent submitted orally in court.

Appellant's Submissions

7. The Appellant submits that the elements of the offence were not proved. That the ingredients for the offence of incest were set out by the court in the case of DMK vs Republic [2022] eKLR. He submits that the relationship between him and the appellant and his identification are not in issue as they were well known to each other. Further that age was also proved by birth certificate.

8. He however submits that penetration was not proved; that the evidence tendered in court did not prove that it is the appellant who penetrated PW's vagina as PW1`s evidence was not corroborated by any other evidence. That no one saw the appellant defile PW1 as PW2, PW3 and PW4 only gave statements that they were told by PW1. He submits that the learned trial magistrate ought to have treated such evidence as hearsay.

9. He also submits that the prosecution availed PW3 who is a clinical officer to corroborate PW1's evidence of penetration and submits that the trial magistrate wrongly relied on PW3's medical evidence to conclude that indeed PWI was defiled on ground that PW3 testified that PW1's hymen was broken.

10. That on pages 33, PW3 while under examination in chief stated in court that, upon examining PW1, the laboratory finding were that syphilis, pregnancy and hepatitis B tests were negative. That the urine was also normal. That PW3 further stated in court that the high vaginal swab showed numerous epithetical cells and few pus cells. That no spermatozoa were observed while HIV test was negative and the hymen was absent. He submits that from findings, there is no evidence to show that PW1's vagina was sexually penetrated and the trial magistrate acted in error by holding that penetration was proved because the hymen was broken.

11. On the issue of sentence, the Appellant submits that the life Sentence imposed against him for offence of defilement is unconstitutional and the court acted on the wrong principles of the law as Life imprisonment is not a mandatory sentence under section 20(1) of the *Sexual Offences Act* No 3 of 2006. That under section 20(1) of the Act, a trial magistrate can award a sentence of not less than 10 years but which can be enhanced to life imprisonment and is predicated on age of the victim. He relied on the Court of Appeal decision in M K v Republic [2015] eKLR and the Court of Appeal for East Africa in the case of Opova -v- Uganda (1967) EA 752.

12. That in the above case of Opoya Case (supra) the Court of Appeal for East Africa interpreted the legal meaning of the words "shall be liable" to mean on conviction to mean the court has discretion

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

13. And from the above interpretation, under the proviso to Section 20 (1) of the *sexual offences act*, the trial court has discretion to mete out a maximum term of life imprisonment and the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment. He relied on the case of M vs Republic (2017) eKLR where the victim of incest was 9 years old, the court followed the Court of Appeal decision in M.K vs Republic by setting aside the life imprisonment imposed by the lower court and replaced it with 15 years' imprisonment. That in M.K vs Republic the superior court set aside an enhanced sentence of life imprisonment and replaced it with the original sentence of 20 years imprisonment.

14. The Appellant prays that this court may be guided and find that the only sentence that can be awarded to the appellant is a sentence that is not below 10 years but that can be enhanced to life imprisonment.

Respondents Submissions

15. The Prosecution Counsel Ms. Ratemo submitted orally in court. She submitted that the state opposes the appeal and that the Appellant was charged with the offence of incest of a girl aged 12 years who to his knowledge was his niece and the prosecution was required to prove that penetration occurred, age of the victim and relationship between the victim and the accused.

16. She submitted that the prosecution called PW 1 who was the victim in order to prove the act of penetration and the relationship with the accused. She submitted that she narrated that the accused was her uncle being the brother of her mother and while she was sleeping, the accused went into her room, he talked to her and she recognized his voice. Then accused tied her mouth with a scarf, undressed her and inserted his thing in her thing. That she further narrated that she did not tell anyone about the first encounter with the accused and that she bled and did not go to school on the next day. That 2 days later, the accused went back to her bed and on this particular day, the victim was sleeping with her mother in the same bed. That the accused started touching her mother thinking it was her and her mother put on the phone torch light and the mother and the victim recognized the accused. She submitted that the mother confronted the accused asking him whether that's what she does to the victim and the child admitted that the accused had defiled her before. That she was taken to Baringo County Hospital where she was examined.

17. She submitted that PW2 the mother of the victim confirmed that she was shocked when the accused torched her at 3a.m and she confirmed that she identified the accused using light from the torch. Further, that PW 3 a clinical officer confirmed that he examined the minor and he confirmed that penetration took place due to numerous epithelial pus cells seen and absence of the hymen. That he produced the P3 Form and treatment chits as exhibits. He confirmed that the patient was 12 years old. She submit that the prosecution confirmed the act of defilement and the relationship between the accused and the minor was proved by the minor and PW 2. That a birth certificate was produced as exhibit 1 which confirmed date of birth as 3rd November,2009.

18. She submitted that the accused in his defence gave unsworn evidence and did not call any witness and according to him, he indicated that the intention was to finish him due to a grudge in 2019.

19. On the issue of sentence imposed by the lower court, they submit that the accused was sentenced to life imprisonment which is the mandatory minimum sentence provided under the *Sexual Offences Act* for the offence if the victim was below the age of 18 years. That the sentence imposed is within the parameters of the law. That the accused took advantage of the fact that the child was sleeping and if

it was not for the fact that the child was not sleeping alone, accused would not have been found out owing to the fact that he had threatened the victim before and the child being young. She prayed that the appeal be dismissed.

Rejoinder By Appellant

20. He submitted that PW 3 did not explain why there was no STI in the urine. That he did not respondent well in cross examination on the question. He prayed for the re-trial of this case.

Analysis And Determination

21. This being the first appellate court. I am expected to subject the entire evidence adduced before the trial court t fresh evaluation and analysis. This I do while bearing in mind the fact unlike the trial court, I did not have the opportunity the opportunity to hear the witnesses and observe their demeanour. The principles that apply in the first appellate court are set out in the case of Okeno Vs Republic [1972] EA 32 where it was stated as follows: -

> " The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala v. Republic [1957] EA 570.) It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, (See Peters v. Sunday Post, [1958] EA 424.)"

22. In view of the above, I have perused and considered evidence adduced before the trial court and wish t consider the following issues:-

    i. Whether the ingredients for the offence of incest were proved beyond reasonable doubt

    ii. Whether the sentence imposed against the appellant was harsh and excessive

(i) Whether the ingredients for the offence of incest were proved beyond reasonable doubt

23. The offence of incest is provided for under Section 20(1) of the *Sexual Offences Act* which provides: -

> " 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".

24. Section 22 defines the relationship between accused and victim as hereunder: -

> " 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."

25. From the foregoing, the ingredients for the offence of incest are as set out as hereunder: -

    a) Knowledge that the person is a relative;

    b) Penetration or indecent act.

c) Age of the victim

26. From the appellants grounds of appeal and submissions, he is not disputing relationship and age of the minor. He admitted that the child knew him and in respect to age, a birth certificate was produced in court. What is left for courts determination therefore under the first issue is whether penetration was proved beyond reasonable doubt. Section 2 of the *Sexual Offences Act* defines penetration as follows:-

> " .....the partial or complete insertion of the genital organs of a person into the genital organ of another person."

27. Pw1 testified that she was alone in the room when the accused entered the room, covered her mouth with a clothe undressed and defiled her. On the second encounter, the complainant was sleeping with her mother PW2 and the accused touched her mother thinking that it was her. The child's mother switched on her phone light and saw the accused and confronted him but he denied attempting to defile the child. The complainant then disclosed to her mother that the accused had defiled her and she was taken to hospital for examination and treatment. Examination of the complainant by the doctor pw3 revealed that high vaginal swab showed numerous epithetical cells and few pus cells, there was no spermatozoa and HIV test was negative and the hymen was absent. The doctor's evidence confirmed penetration.

28. On argument that that pw1's evidence was not corroborated, Section 124 of the *Evidence Act* which provides: -

> " Provided that where in a criminal case involving a sexual offence 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 reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

29. From the foregoing PW1's evidence does not require corroboration in light of Section 124 of the *Evidence Act* if the court find her credible witness. However, record herein show that the complainant's evidence was corroborated by the doctor's evidence and evidence of the complainant's mother pw2 who was sleeping with the complainant when the appellant attempted to defile her not knowing that she was sleeping with her mother.

(ii) Whether sentence imposed was harsh and excessive

30. The Appellant was sentenced to serve life imprisonment. The principles applicable in considering whether to interfere with the sentence of a trial court on appeal were enunciated in the case of Mbogo & Another vs. Shah (1968) 1 E.A. 93 thus:-

> " ...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice."

31. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte

blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

32. The offence of incest is provided for under Section 20(1) of the *Sexual Offences Act* which provides:-

> " 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".

33. In this case, the appellant was sentenced to life imprisonment. However, the court of appeal the Court of Appeal in Malindi Criminal Appeal No.12 of 2021 Between Julius Kitsao Manyeso vs Republic declared the sentence of life imprisonment to be unconstitutional, Justice Nyamweya, Lesiit and Odunga stated that it is unfair for a person to be behind bars until they die.

34. In view of change of jurisprudence in respect to life sentence, I am inclined to set aside life sentence imposed by the trial court and impose determinate sentence. While determining appropriate sentence herein, I take note of the fact that the child defiled was aged 12 years. The child was a niece to the appellant. Instead of offering protection to a child, the appellant took advantage of her vulnerability and sexually abused her robbing her of her dignity. The appellants beastly act against the child herein will have permanent negative impact on the child. The child suffered life lasting trauma. From the forgoing, I am inclined to impose deterrent sentence and proceed to impose sentence of 25 years imprisonment.

35. Final Orders:-

1. Appeal on conviction is hereby dismissed.
2. Appeal of sentence partly succeed.
3. Life sentence is set aside and replaced with 25 years' imprisonment.
4. The period served by appellant in remand and in prison, to be computed in the sentence.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 21ST DAY OF NOVEMBER 2024.

.....**.....**

RACHEL NGETICH

JUDGE

In the presence of**:**

* CA Elvis

* Ms. Ratemo for state present

* Appellant Present