



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 64 OF 2018

NKK.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

1. The appellant was tried and convicted of the offence of **Incest contrary to Section 20(1) of The Sexual Offences Act No.3 of 2006** as captured in the Petition of Appeal. The appellant pleaded not guilty and trial commenced. The learned judge found him guilty, convicted him and sentenced him to life imprisonment. Being aggrieved by the conviction and sentence the appellant filed an appeal before this Court which is the subject for determination.

2. The matter came up before this Court on 30/9/2020 and the appellant indicated that he was convicted of defilement of a child of 15 years who also got pregnant. That there was no DNA but he was convicted. He was 41 years at the time of the offence. The girl was a child to his brother. The child he gave birth to is not his child (sic) the Petitioner's child. The girl is now married with other children. She is now 24 years old. He was not satisfied with the judgement and so he appealed but the record of appeal cannot be traced. The Petitioner urged the court to make a decision on his matter.

3. Mr. Fedha Counsel appearing for the DPP submitted that he did not have the record also; hat it is the court that is the custodian of all the documents and the Deputy Registry should be given more time to look for the record.

4. The court directed the Deputy Registry to look for the record and file an affidavit in the event the record cannot be found.

5. This matter has come up for mention for the purposes of confirming the availability of the lower court file/proceedings/record of appeal and the police file several times as indicated below:

a) 24/9/2018 the court noted that the Record of Appeal was not ready and directed the Executive Officer Kwale Law Courts to avail typed copies of the proceedings to enable the High Court Criminal Registry to compile the Record of Appeal.

b) 5/11/2018 the court ordered the Executive Officer Kwale Law Courts to avail typed and certified proceedings of the lower court case.

c) 29/1/2019 the court directed Executive Officer Kwale Law Courts to avail lower court proceedings duly typed.

d) 25/3/2019 the court directed the Executive Officer Kwale Law Courts to avail duly typed and certified proceedings.

e) On 1/7/2019 and 30/9/2019 the noted the executive Officer Kwale Law Courts is once again reminded to avail typed and certified copies of lower court proceedings.

f) On 18/11/2019 the court gave Executive Officer Kwale Law Court 30 days to avail typed and certified proceedings of the lower case and issued summons to the Executive Officer Kwale Courts to attend court on 10.2.2020 to explain his non-compliance if he would not have availed the said proceedings.

g) On 10/2/2020 Geoffrey Ongwae representing the Executive Officer Kwale Law Courts informed the court that they have not been able to retrieve the lower court file and asked for more time. The court issued to the Executive Officer Kwale Law Courts to attend court on 31.3.2020 if he will not have availed the lower court file duly typed proceedings within 30 days from now.

h) 21/5/2020 the court directed the Executive Officer Kwale Law Courts to avail the lower court file with typed and certified proceedings within 21 days failure to which summons shall issue for him to attend court on 25.6.2020 through Teams online

platform.

i) 23/7/2020 the court noted, **“in light of the letter dated 21.5.2020 addressed to the Presiding Judge Coast Region I hereby direct that the file be placed before the Presiding Judge Ogola, J on 29/7/2020 for him to give further directions on the way forward.”**

j) 29/7/2020 the presiding judge noted that the proceedings in this cannot be traced and directed the Deputy Registrar to swear an affidavit that the proceedings file cannot be traced to enable this court make appropriate orders.

k) On 30/9/2020 parties submitted as indicated in paragraph 2 above.

6. Mr. Fedha, learned counsel for the DPP submitted that there were still no proceedings in this matter. They have not been found. That the police have undertaken to look for police file from where we may be able to get copy judgement of the trial court and other proceedings. Counsel urged for more time. Counsel was granted 30 days to look for police file.

7. On 18/3/2021, Mr. Fedha submitted that they were not able to file a copy of police file and that they were not able to get a copy of the judgment of the lower court. Counsel sought court directions on how to proceed.

8. I have carefully considered this issue. The Constitution of Kenya 2010 Article 50 (1) ,50 (2)(q) and 50 (5)(b) provide:

50 (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

50 (2) every accused person has the right to a fair trial, which includes the right—

(q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.”

50 (5) an accused person -

(b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.

9. This matter has been pending in court since 2018 with no progress due to the fact that the entire record and file containing proceedings and the judgement of the lower court cannot be traced despite the search period having taken more than five years as indicated in the letter dated 21st July, 2020.

10. From the police records filed by the prosecution, the appellant herein was arrested on 27th March, 2011 and arraigned in court on 28th March, 2011. The appellant was tried, convicted and sentenced to life imprisonment on 28th /2/2012 as per the letter dated 21st July, 2020. Thus the appellant has been in jail for a period of 11 years.

11. Accordingly, it's my finding that the appellant has a right to fair trial which includes the right to appeal and holding him hostage due to the mistakes that are not of his making would amount to violation of his rights under the constitution.

12. In my view there is no likelihood that trial court's proceedings will ever be found. The Appellant has the right to appeal. If he cannot exercise this right then it is clear that his right to a fair trial would be breached. I am satisfied that this is a proper case in which to exercise the discretion of this Court to release the Appellant. Accordingly, the Appellant is hereby set free and released from prison unless otherwise he is lawfully withheld.

SIGNED AT MOMBASA THIS 30TH DAY OF SEPTEMBER, 2021.

E. K. OGOLA

JUDGE

DATED AND DELIVERED AT MOMBASA THIS 5TH DAY OF OCTOBER, 2021.

JOHN MATIVO

JUDGE