WN v Republic (Criminal Appeal 8 of 2017)
[2025] KECA 1526 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1526 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 8 OF 2017

MA WARSAME, JM MATIVO & JM NGUGI, JJA

OCTOBER 3, 2025

BETWEEN

WN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bomet (Muya, J.) dated 14th March, 2017 in HCCRA No. 28 of 2015)

JUDGMENT

1. The appellant, WR, was convicted by the Senior Principal Magistrate's Court at Bomet of two counts:
   (i) incest contrary to section 20(1) of the *Sexual Offences Act*, in which the complainant was a child aged four years; and
   (ii) deliberate transmission of HIV contrary to section 26(1)(a) of the same Act. He was sentenced to life imprisonment on count one and to fifteen years' imprisonment on count two, the sentences to run concurrently.
2. The prosecution called four witnesses. The complainant, a child of four years, was unable to testify fully due to her tender age but was observed to break down when asked about the incident.
3. PW2, the child's mother, testified that on returning from fetching firewood, she found the child walking abnormally. On inquiry, the child disclosed that the appellant—her paternal uncle—had "done bad things" to her. Upon examination, PW2 saw seminal discharge from her genitalia.
4. PW3, a clinical officer, examined the child and found her hymen broken with fresh lacerations and foul-smelling discharge. The child tested HIV positive, while both parents tested negative. PW3 recommended initiation of antiretroviral therapy.

5. PW4, the investigating officer, produced hospital records confirming the appellant was HIV positive and under treatment at Tenwek Hospital.

6. The relationship between the appellant and the child was not in dispute: the appellant is a brother to the complainant's father, thus falling within the prohibited degree under section 20(1).

7. In his defence, the appellant gave an unsworn statement alleging a grudge with the complainant's mother, but he did not substantiate its nature.

8. The trial court convicted the appellant on both counts. He was sentenced to life imprisonment on Count I (incest) and 15 years' imprisonment on Count II (deliberate transmission of HIV), the sentences to run concurrently.

9. On first appeal, the High Court (Muya, J.) re-evaluated the evidence, dismissed the grounds of appeal, and upheld both the conviction and sentence in a judgment delivered on 14th March 2017 in Bomet HCCRA No. 28 of 2015.

10. Before this Court, the appellant abandoned his appeal against conviction and pursued sentence only. His central argument is that the sentence of life imprisonment under section 20(1) of the *Sexual Offences Act* is not mandatory. He relied on jurisprudence interpreting the phrase "shall be liable to" as conferring discretion on sentencing courts, citing Opoya v Uganda [1967] EA 752. He urged that he is a first offender, has shown remorse, and deserves a determinate custodial term—preferably equivalent to the concurrent 15 years already imposed for Count II.

11. The respondent opposed the appeal. It maintained that both the trial court and the High Court were correct to impose life imprisonment, stressing the gravity of the offence — defilement of a 4-year-old child, aggravated by deliberate transmission of HIV. Relying on section 20(1), the respondent submitted that life imprisonment is the lawful penalty and not excessive. The respondent also invoked section 361 of the Criminal Procedure Code, which limits this Court's jurisdiction on a second appeal to matters of law only, and argued that severity of sentence is ordinarily a matter of fact.

12. This being a second appeal, our mandate is confined to matters of law only. Section 361(1) of the Criminal Procedure Code is explicit that the Court of Appeal shall not entertain appeals on matters of fact, and severity of sentence is generally a matter of fact. However, where the courts below have acted on a misapprehension of the law, or where the sentence imposed is illegal or based on wrong principles, this Court is entitled to intervene. (See Njoroge v Republic [1982] KLR 388; Karingo v Republic [1982] KLR 213).

13. The appellant contends that life imprisonment under section 20(1) is not a mandatory sentence, citing Opoya v Uganda [1967] EA 752 for the proposition that the phrase "shall be liable" connotes a maximum rather than a mandatory sentence. He urges that in his case, a determinate sentence of fifteen years (as imposed on the second count) would suffice, particularly given his status as a first offender and his plea for leniency. He invokes Article 50(2)(p) of *the Constitution* on the right to the least severe sentence.

14. The respondent maintains that both the trial court and the High Court correctly imposed life imprisonment, stressing that the victim was a four-year-old child, the appellant was a paternal uncle, and he deliberately transmitted HIV to her. The respondent submits that the aggravating factors justify life imprisonment and that the sentence is neither illegal nor excessive.

15. Section 20(1) of the *Sexual Offences Act* provides that a male person who commits incest with a female under eighteen years "shall be liable to imprisonment for life." As clarified in Opoya v Uganda [1967] EA 752, the phrase "shall be liable" prescribes the maximum penalty, not a mandatory sentence.

16. Recently, in TK v R [2025] KECA 41 (KLR) (17 January 2025), this Court stated:

> "The proviso to section 20(1) of the *Sexual Offences Act* does not create a mandatory life sentence;
>
> rather, it establishes life imprisonment as the maximum penalty, leaving the court with discretion to impose any sentence from the minimum of ten years upwards, depending on the circumstances."

17. We, therefore, correct the misapprehension by both the trial court and the High Court that life imprisonment was a mandatory sentence under section 20(1).

18. That error notwithstanding, we are satisfied that life imprisonment was the deserved sentence in this case. The complainant was a four-year-old child. The appellant, her paternal uncle and natural protector, committed the gravest betrayal of trust by repeatedly defiling her. Worse still, he was aware of his HIV-positive status and deliberately transmitted the infection to the child, a fact confirmed by medical evidence.

19. The offence of incest with a child under 11 years is in substance equivalent in seriousness to defilement under section 8(1) as read with section 8(2) of the *Sexual Offences Act*, where the prescribed sentence is life imprisonment. That parity reinforces the proportionality of the sentence imposed.

20. Sentencing in Kenya is guided by the Sentencing Policy Guidelines (2016) which underscores that sentencing is a discretionary judicial function, to be exercised in a manner that is fair, just, and proportionate. Sentences must reflect the seriousness of the offence, the culpability of the offender, and the harm caused to the victim.

21. Particularly pertinent is the part of the Guidelines, which lists aggravating factors that warrant the most severe sentences. It provides:

> "The sentence may be more severe where the offence was committed against a particularly vulnerable victim such as a child, an elderly person, or a person with disability; where there was abuse of a position of trust; or where the offender deliberately transmitted a terminal illness to the victim."

22. This case falls squarely within those aggravating factors: the victim was a child of four; the appellant was her paternal uncle, abusing a position of familial trust; and he deliberately transmitted HIV.

23. In applying those principles, the aggravating factors in this case far outweigh any mitigation. They include: the extremely young age of the victim; the familial relationship of trust grossly abused; and the deliberate transmission of HIV, causing lifelong harm. These circumstances, in our view, justify the maximum sentence available in law. Mitigating factors such as being a first offender or expressing remorse cannot, in these circumstances, displace the imperative of deterrence, denunciation, and protection of children.

24. We, therefore, conclude that, though not mandatory, life imprisonment was the proportionate and deserved sentence.

25. In the result, we find no merit in this appeal against sentence. The appeal is hereby dismissed in its entirety. The sentence of life imprisonment for the offence of incest, and the concurrent sentence of fifteen years' imprisonment for deliberate transmission of HIV, are upheld.

26. Those shall be the orders of the Court.

DATED AND DELIVERED AT NAKURU THIS 3RD DAY OF OCTOBER, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Signed

DEPUTY REGISTRAR