EKG alias C v Republic (Criminal Appeal 59 of 2022)
[2025] KECA 36 (KLR) (24 January 2025) (Judgment)

Neutral citation: [2025] KECA 36 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 59 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JANUARY 24, 2025

BETWEEN

EKG ALIAS C ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (S. J. Chitembwe, J.) delivered on 15th February 2017 in HCCRA No. 44 of 2014)

JUDGMENT

1. This is a second appeal from the judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 15th February 2017 in Malindi HC Criminal Appeal No. 44 of 2014 rendered in determination of the 1st appeal from the judgment of the lower court in Malindi CMC Criminal Case No. 40 of 2013 in which the appellant was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*, 2006 (the Act.) 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 Act, and whereupon he was convicted of the offence of incest and sentenced to life imprisonment.

2. The particulars of the offence were that, on diverse dates between 1st January 2013 and 18th October 2013 at [Particulars Withheld] within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MC who, to his knowledge, was his daughter aged 8 years.

3. The particulars of the alternative charge were that on the diverse dates and at the place aforesaid, the appellant intentionally and unlawfully touched the vagina of M.C, a child aged 8 years contrary to section 11(1) of the Act.

4. The appellant denied the charges whereupon the trial proceeded with the prosecution calling six (6) witnesses, including the complainant. However, the appellant did not call any witnesses in his defence.

5. The prosecution's case was that the appellant defiled the complainant (PW1) on diverse dates between the months of January and October 2013. PW1 gave unsworn evidence and testified that she was living with her father (the appellant) and uncle; that she shared a bed with her brother; that, on numerous occasions in the night, the appellant would remove PW1's brother from the bed, remove PW1's panty and "sleep on top of" her while threatening to cut her with a knife; that, when the appellant would lie on her, she would feel pain "in the place where she urinated with"; that weary of these repeat incidences, she moved to live with her grandmother on 18th October 2023; that, on that particular day, she revealed to her aunty LK (PW3) what the appellant was doing to her; that PW3 later disclosed that information to PW1's grandmother, LK (PW4); and that, thereafter, PW4 took her to hospital for medical examination.

6. PW3, a 15-year-old minor and an aunt to PW1, testified that, on 18th October 2023 at around 4pm, she found PW1 playing with her sibling one E; that, in the evening, E requested PW1 to accompany him back home to their father (the appellant); that PW1 immediately started crying and refused to leave with E; that, upon inquiry, PW1 revealed to PW4 that at night the appellant places E on another bed, sleeps with her on the same bed, "does bad things to her and shows her a knife"; that, on the very next day, the 19th of October 2023, PW3 informed PW1's grandmother (PW4) of the incidents.

7. PW4, the complainant's grandmother, testified that on 19th October 2023 on returning from work, PW3 immediately informed her that PW1 had refused to go home because the appellant was defiling her; that she summoned PW1, who restated what she had told PW3; that PW1 also stated that she as "tired of being defiled"; that, on the following day, she took PW1 to Gede Hospital for examination; that, on examination, PW1 was found to have been defiled and suffering from gonorrhea; and that she reported the matter at Watamu Police Station and thereafter escorted PW1 to Malindi Hospital for further examination.

8. It was PW4's further testimony that the appellant had separated with PW1's mother; that, after the separation, PW1, and her sibling (E) initially lived with her before the appellant came for them; and that PW1 and her sibling would occasionally stay at her home during the day and return to the appellant's home in the evening.

9. PW5, KW – the complainant's mother - testified that, on 18th October 2023, she received a call from her father, who informed her about PW1's defilement; that she travelled back home and took PW1 to Gede Hospital in the company of PW4; and that she reported the matter at Watamu Police Station and thereafter escorted PW1 to Malindi Hospital. PW5 further testified that she separated with the appellant in 2012; that she left her children with her mother (PW4); and that she was not aware that the appellant had taken custody of the children from PW4.

10. Ibrahim Abdullahi, PW2, a Senior Clinical Officer based at Malindi Hospital, examined the complainant on 23rd October 2013. PW2 testified that PW1 was initially treated at a Gede Hospital where she was treated with antibiotics and Post- Exposure Prophylaxis (PEP); and that, upon examination at Malindi Hospital, PW1 was found to have a broken hymen, injuries on the vaginal walls, a foul discharge from the vagina, pus cells in her urine, but that she was HIV Negative. PW2 produced the P3 form, treatment notes and a child welfare card in evidence before the trial court.

11. The arresting and investigation officer, PC Margaret Terenoi (PW6), who was then based at Watamu Police Station, received a report on 22nd October 2013 of the various incidents of the appellant's defilement of his daughter (the complainant) leading to his arrest and charge.

12. PW6 spoke to the complainant when she was produced at Watamu Police Station in the company of PW4 and PW5 and recorded her statement. It was PW6's testimony that, upon interrogating PW1,

she established that PW1's parents (the appellant and PW5) had separated; that PW1 was living with the appellant and her brother; that, during the day, PW1 and her sibling would go playing at their grandmother's place, but return to the appellant's home in the evening; that PW1 had been defiled by the appellant over a period of 10 months, but remained silent; that, on one particular night, the appellant defiled PW1 three times, forcing her to seek refuge at PW4's home the very next morning; and that PW1 eventually disclosed to PW3 what she was going through. PW6 further testified that, after recording PW1's statement, she escorted the complainant to Malindi Hospital for examination and immediately proceeded to the appellant's home in Gongoni where she arrested him.

13. When put to his defence, the appellant gave an unsworn statement and averred that he sent PW1 and her sibling to visit their grandmother and to get an axe; that only the sibling returned that evening; that the sibling informed the appellant that PW1 would return the following day on a Monday; that PW1 did not return; and that, on the following Thursday, he sent her sibling to go for her, but that he also failed to return. The appellant further stated that he went to PW1's grandmother's home and was informed that PW1 had been taken to hospital; and that he went back home and was later arrested by police officers, who did not inform him of the reason for his arrest.

14. In its judgment dated 6th August 2018, the trial court (L. Gicheha, SPM) found that the complainant's evidence was reliable and was well corroborated; that, from the circumstances of the case, being that the appellant was the only one living with the children, it was clear that the appellant was the only person who could have defiled the minor; that he threatened the child; and that the appellant's defence did not raise any reasonable doubt. The trial court was satisfied that the prosecution had proved its case beyond reasonable doubt and convicted the appellant for the offence of incest and sentenced him to life imprisonment in accordance with section 20(1) of the Act.

15. Dissatisfied by the conviction and sentence meted by the trial court, the appellant lodged an appeal in the High Court on the grounds that penetration was not proved; that the evidence of PW1 and PW5 contradicted each other; that the case was made up; that the prosecution did not prove its case as required by law; and that the trial court did not consider the appellant's defence.

16. In its judgment dated 15th February 2017, the High Court (Chitembwe, J.) found and held: that the doctor confirmed that PW1 was defiled; that the relationship between PW1 and the appellant was proved; that the appellant was not framed; that PW1's age was proved; that the prosecution had proved its case beyond reasonable doubt; that the conviction was safe; and that the defence did not raise any doubt or otherwise rebut the prosecution case. In the impugned judgment, the High Court upheld both the conviction and sentence meted on the appellant.

17. Aggrieved by that decision, the appellant moved to this Court on four grounds set out in his undated "Grounds of Appeal," namely that the learned Judge erred in law: in failing to consider the manifest contradictions in the prosecution case; by failing to find that the prosecution did not prove their case to the legal standards; by failing to take into account the appellant's mitigating factors; and by construing the relevant law as a mandatory maximum provision.

18. In addition to the grounds aforesaid, the appellant filed an undated "Supplementary Grounds of Appeal" containing five grounds, three of which are a repetition of some of the grounds originally advanced on appeal. The only additional grounds are that the learned Judge erred by failing to consider that the appellant was not supplied with witness statements during the trial contrary to Article 50(2)(j) of *the Constitution*; and by not considering that the medical evidence did not concur with the allegations made against the appellant.

19. In support of his 2nd appeal, the appellant filed undated written submissions citing 6 judicial authorities, namely: John Muendo Musau v Republic [2013] eKLR where this Court set out the legal

principles to be applied in plea taking in all criminal cases, arguing that these principles were not applied at his trial;

> Joseph Amos Owino v Republic [2009] eKLR and Republic v Amos Karuga Karatu [2008] KEHC 2543 (KLR) where both decisions championed for the protection of the fundamental rights and freedoms of accused persons, noting that a prosecution mounted in breach of the law is a violation of the rights of the accused and is therefore a nullity irrespective of the nature of the violation, and which was argued by the appellant in support of his allegation that he was denied access to witness statements at trial; Samuel Achieng Alego v Republic [2018] eKLR where G. V. Odunga, J. (as he then was) held that trial courts can decide cases one way or the other based on the demeanor of a witness, and that these courts "must point out what constituted the demeanour which influenced the trial Judge to make a favourable or unfavourable impression about the credibility of such a witness."; Bukenya & Others v Uganda [1972] E. A. 549 arguing that the prosecution is duty bound to make available all witnesses necessary to establish the truth; and Julius Kisau Manyeso v Republic [2023] eKLR, submitting that a sentence that is pre-determined by the relevant penal law leaves no space for the court to accommodate the mitigating circumstances and facts of each case. On the basis of his submissions, the appellant urges us that, in the unlikely event his conviction is confirmed, that his sentence is adjusted to allow him "re-join" his "loved ones soon."

20. Opposing the appeal, the Principal Prosecution Counsel, Ms. Vallerie Ongeti, filed written submissions and list of authorities dated 17th September 2024 citing 3 judicial authorities, namely:

> Moses Nato Raphael v Republic [2015] eKLR, submitting that this Court should consider matters of law only unless it be shown that the two courts below considered matters of fact that should not have been considered, or failed to consider matters that they should have considered, or that they were plainly wrong in looking at the evidence; SKM v Republic [2021] eKLR, submitting that the appellant was positively identified by the complainant; that the complainant knew the appellant very well as her father; that they lived together; and that the incidents of defilement took place repeatedly; and Wanjema v R (1971) EA 493, setting out the general principles upon which an appellate court may interfere with a sentence imposed by a trial court.

21. Counsel further submitted that she was aware of recent decisions by this Court revising maximum sentences to definite sentences. Taking that into consideration, learned counsel proposed a sentence of 40 years "which would be sufficient to accord the appellant time to reflect on his life." However, she did not cite any of the judicial decisions alluded to, which left her blanketing statement unsubstantiated.

22. Our mandate on a second appeal, as is the one before us, is confined to consideration of matters of law by dint of section 361 of the Criminal Procedure Code. In Karingo vs. Republic [1982] KLR 213, the Court stated:

> " A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence."

23. Having carefully considered the record of appeal, the impugned judgment, the respective submissions and the law, we find that this appeal stands or falls on our holding on only four (4) main issues of law raised in the appellant's Memorandum of Grounds of Appeal and the Supplementary Grounds of Appeal, namely:

(i) whether the appellant's right to fair trial guaranteed by Article 50(2) (j) of *the Constitution* was breached in that he was not supplied with the prosecution witness statements at the trial;

(ii) whether the prosecution had proved the ingredients of the offence of incest against him to the required standard, and whether the medical evidence was consistent with the charges leveled against him;

(iii) whether the prosecution evidence was marred by such serious contradictions as to render his conviction unsafe; and (iv) whether the sentence meted on him pursuant to section 20(1) of the Act was unlawful. The remaining grounds raise issues of evidence, which we cannot re-open on 2nd appeal to this Court, and for good reason.

24. In Adan Muraguri Mungara vs. Republic [2010] eKLR, this Court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court in the following terms:

> " As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below u nless such findings a re based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is b ad in law, thus entitling this Court to interfere." [Emphasis added]

25. Turning to the 1st issue as to whether the appellant's right to fair trial, which is guaranteed by Article 50(2) (j) of *the Constitution*, was breached, the appellant alleged that he was not supplied with the prosecution witness statements at the trial, an issue on which the Principal Prosecution Counsel did not submit.

26. Be that as it may, we hasten to observe that this issue is raised for the first time on second appeal before us. We find nothing on record to suggest that the provision of such witness statements was in issue at the trial or on first appeal to the High Court. In the circumstances, we decline to pronounce ourselves on this issue of law, which is raised for the first time on second appeal.

27. This Court has had occasion to consider the effect of raising an issue on second appeal to the Court for the first time. In Kenya Commercial Bank Ltd vs. Osede [1982] eKLR Hancox, JA. had this to say on the matter:

> " ...that where the right of appeal is statutory, it is to be confined to points of law raised before and decided by the trial judge."

28. In the same vein, Stephenson, LJ. echoed the words of Hancox, JA. in Kenya Commercial Bank Ltd vs. James Osede (ibid) in the following words:

> " It (has) been clear for nearly a century and perhaps
>
> more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject of argument and decision in the county court."

29. Several years later in Wachira vs. Ndanjeru (1987), KLR 252 this Court spoke to the bar when Platt, JA. observed as follows:

> " ...the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so would involve disputed facts which were not investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though evidence taken in that court supports the new case."

30. We find nothing to suggest that the issue in contention with regard to the provision to the appellant of prosecution witness statements at the trial was raised, investigated and tested in the two courts below. Accordingly, we reach the conclusion that nothing turns on this issue and, therefore, the 1st ground of appeal fails.

31. On the 2nd issue as to whether the prosecution had proved the ingredients of the offence of incest against him to the required standard, the appellant's case is that PW1 was not a credible witness; and that her brother with whom she shared a bed was not called to testify. In view of the foregoing, he urged us to find that the prosecution did not prove its case to the required standard, and that his conviction was unsustainable.

32. As to whether the medical evidence was consistent with the charges leveled against him, the appellant appeared to have abandoned this issue having made no submissions thereon.

33. On her part, learned counsel for the respondent submitted that the appellant's relationship with PW1 fell within the prohibited degree of consanguinity contemplated in sections 20 and 22 of the Act; that PW1's testimony on penetration was corroborated by the medical evidence of PW2; that PW1's age was proved by PW1's Child Health Card produced in evidence by PW2, and which indicated that she was born on 6th May 2005; that she was about 8 years-old at the time of the incident; that the appellant was positively identified as the perpetrator; and that it is not in doubt that PW1 knew the appellant as his father with whom she had lived. She urged us to find that the appeal had no merit and dismiss it.

34. We wish to point out right at the outset that the evidence led by the prosecution proved the charge of incest beyond reasonable doubt. Indeed, we find nothing, as did the High Court, to justify interference with the trial court's decision to convict the appellant, a decision rightly upheld on appeal to the High Court.

35. That said, it would be remiss of us, for the avoidance of doubt, not to pronounce ourselves on the ingredients of incest for which the appellant was rightly convicted. In this regard, section 20(1) of the Act reads:

> 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.

36. Addressing itself to the ingredients of the offence of incest, this Court at Nakuru in MGK vs. Republic [2020] eKLR held that:

> " 11. .... the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the categories stated under section 20(1) of the *Sexual Offences Act*. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply."

37. To our mind, all the ingredients of the offence were established at the trial and affirmed on 1st appeal to the High Court. Firstly, it was common ground that the complainant was the appellant's biological daughter, and we need not say more on this score. Secondly, the medical report confirmed the complainant's testimony that the appellant defiled her over a period of ten (10) or so months. In effect, the appellant committed an act which caused penetration to the complainant as confirmed by the P3 form and medical treatment notes, which established penetration. According to PW2, PW1 had a broken hymen, injuries on the vaginal walls, a foul discharge from the vagina and pus cells in her urine. Accordingly, PW1's evidence remained uncontroverted.

38. The term "penetration" is defined in section 2 of the Act as "partial or complete insertion of the genital organs of a person into the genital organs of another person." That is precisely what the appellant did to his daughter day after day, the evidence of which we need not re-evaluate. Suffice it to observe that the concurrent findings of the two lower courts that she was not a virgin; that her hymen was long broken; had injuries on the vaginal walls, a foul discharge from the vagina, pus cells in her urine and that she was likely defiled as a result of which she contracted gonorrhea.

39. The decision of the High Court of Kenya at Bomet in Sigei v Republic [2022] KEHC 3161 (KLR), quoting the Supreme Court of Uganda in Bassita vs. Uganda S.C. Criminal Appeal Number 35 of 1995, cannot escape our attention. As the High Court correctly observed:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually, the sexual intercourse is proved by the victims' own evidence and corroborated by the medical evidence or other evidence."

40. In view of the foregoing, we find no fault in the findings of the two courts below that the prosecution had proved the ingredients of incest, namely the age of the complainant, penetration, the relationship between the complainant and the perpetrator and the identification of the perpetrator. Likewise, the ground of appeal in this regard fails.

41. On the 3rd issue as to whether the prosecution evidence was marred by such serious contradictions as to render the appellant's conviction unsafe, the appellant relied on PW1's testimony to the effect that she shared a bed with her brother E but that, on cross-examination, she stated that she was alone and asleep. We reflect on this apparent discrepancy taking to mind the evidence on record that the appellant would come in at night, remove PW1's brother and then defile her. It could well be that, over the period of 10 months, there were times she would find herself alone when the appellant climbed onto her bed. To our mind, these varying circumstances can hardly be construed as contradictions or inconsistencies that would contradict or displace the prosecution evidence or raise any doubt to the appellant's benefit.

42. In Richard Munene vs. Republic [2018] eKLR, this Court stated with regard to contradiction or inconsistency in the evidence of the prosecution witness(es):

> "It is a settled principle of law however, that it is not e very trifling contradiction or inconsistency in the e vidence of the prosecution witness that will be fatal t o its case. It is only when such inconsistencies or c ontradictions are substantial and fundamental to t he main issues in question and thus necessarily c reates some doubt in the mind of the trial court that a n accused person will be entitled to benefit from it."
>
> [Emphasis ours]

43. In the same vein, the Court of Appeal of Tanzania addressed the issue of discrepancies In Dickson Elia Nsamba Shapwata & Another vs. The Republic [2008] TZCA 17 and stated:

> "In evaluating discrepancies, contradictions and omissions, i t is undesirable for a court to pick out s entences and consider them in isolation from the rest of the statements. The Court has to decide w hether inconsistencies and contradictions are m inor, or whether they go to the root of the matter."
>
> [Emphasis added]

44. Similarly, in Erick Onyango Ondeng' vs. Republic [2014] eKLR, this Court cited T wehangane Alfred vs. Uganda, [2003] UGCA 6 in which the Court of Appeal of Uganda stated:

> "With regard to contradictions in the prosecution's case the law as set out in numerous authorities is that grave contradictions unless satisfactorily explained will usually but not necessarily lead to the evidence of a witness being rejected. The court will ignore minor contradictions unless the court thinks that they point to deliberate untruthfulness or if they do not affect the main substance of the prosecution's case."

45. In conclusion, the appellant's contention that the prosecution evidence was marred by contradictions and inconsistencies does not hold and, accordingly, that ground of appeal fails.

46. Finally, we turn to the 4th and last issue as to whether the sentence meted on the appellant pursuant to section 20(1) of the Act merits interference by this Court. According to the appellant, his sentence should be treated as unconstitutional since the imposition by the trial court of the minimum sentence of life imprisonment as prescribed by the relevant penal law without any measure to consider the plight of his family, "which is now living in destitution". On the other hand, in the event that his conviction is upheld, he urges us to adjust his sentence to one that will see him "rejoin his loved ones".

47. On its part, the State recommended a reduced sentence of 40 years in the event that the Court was inclined to reconsider the decision of the two courts below in this regard, but provided no basis for this concession. Be that as it may, we are nonetheless enjoined to apply the law as is and as enunciated in the following binding authorities from which we find no reason to depart.

48. The Supreme Court in Muruatetu & another v Republic; Katiba Institute & 4 others [2021] KESC 31 (KLR) (Directions) directed that:

> "We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute."

49. We also take to mind the Supreme Court's decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others [2024] KESC 34 (KLR) where the Court held that:

> "66. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law."

50. On the authority of the afore-cited decisions, we find nothing to warrant interference with the sentence imposed on the appellant by the trial court and upheld by the High Court on appeal.

51. Having considered the record of appeal, the grounds on which it is anchored, the rival submissions of the appellant and of the Principal Prosecution Counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal fails and is hereby dismissed in its entirety. Accordingly, the judgment of the High Court of Kenya at Malindi (S. J. Chitembwe, J.) delivered on February 15, 2017 is hereby upheld. Those are our orders.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR