TIL v Republic (Criminal Appeal 210 of 2018)
[2025] KECA 41 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 41 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 210 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 17, 2025

BETWEEN

TIL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kakamega (Majanja, J.) dated 4th April, 2013 in HCCRA No. 218 of 2013)

JUDGMENT

1. The appellant, TIL, was the accused person in the trial before the Chief Magistrate's Court at Kakamega in Criminal Case No. S.O. 56 of 2012. He was charged with two counts of the offence of incest contrary to section 20(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the night of 11th and 12th August, 2012, at Kakamega East District, within Western Province, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of O.S. and P.M aged 8 years and 6 years respectively, who were to his knowledge, his daughters.

2. The appellant also faced two alternative counts of the charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant on the two main counts of incest and sentenced him to two concurrent life sentences. He made no findings on the two alternative charges on the ground that the two main counts had been proven.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

5. The High Court (D.S. Majanja, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 4th April, 2018.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised three (3) grounds in his Supplementary Memorandum of Appeal, which are that:

    1. The learned trial magistrate erred in law by acting on the wrong principles of the law and upheld an unlawful sentence, as the proviso under section 20(1) of the *Sexual Offences Act* No. 3 of 2006 provides for a sentence of 10 years up to life imprisonment. Therefore, life imprisonment is not a mandatory sentence.

    2. The learned trial magistrate erred in law and fact by awarding life imprisonment to the appellant but failed to note that the age of the complainants was not fully proved and penetration was not proved.

    3. The learned trial magistrate erred in law and fact to note that the appellant was not accorded fair hearing since the prosecution did not provide him with the witness statements prior to the commencement of the hearing of the case.

7. Consequently, he prayed for a re-evaluation of the whole evidence tendered on matters of law and fact and an independent finding on both conviction and sentence. He also prayed that the conviction be quashed, sentenced imposed be set aside and he be set at liberty.

8. A summary of the evidence that emerged at the trial through five(5) prosecution witnesses, which was subjected to a fresh review and scrutiny by the High Court, is as follows.

9. On 12th August, 2012, JAT, a village elder, who testified as PW1, was attending a funeral service at Virembe sub location when two children (complainants), who appeared to be lost, were brought to her by one, L. She made two announcements for the parents of the children to collect them but nobody claimed them. Since it was late, she took them to her house and informed the assistant chief. Later that night, she spoke to the complainants who revealed that they had run away from home since their father had been sexually assaulting them. They also informed her that their father had beaten their mother who had left the home and they did not know where she was.

10. The following day she took the complainants to the assistant chief who advised her to take them to hospital as they had a fever and were also jigger infested. The matter was reported at the police station and they were later taken to hospital for examination and treatment.

11. testified as PW2. After voire dire and with the help of PW1, who acted as an intermediary, she gave graphic details about how her father went to the house they used to sleep in, picked her up and took her to his room. While there, he showed her his “thing” which was inside his trousers which “he used to put in [her] thing”. She said she felt pain – and that it was the first time the appellant had done that.

12. O.D. testified as PW3. After voire dire and with the help of PW1, who acted as an intermediary, her testimony about the appellant was as follows:

> “.....My father did bad things to me. He carried me and did bad things to me in his house. He removed his thing from his underpants and put here between my legs. He lifted my clothes and did there bad things. He put his thing into mine here (points at area between her legs). It happened twice. I did not tell anyone. .....also told me. We do not have grandparents. We have aunt E. I told her. She did not respond. Our father told us to leave home and go to our

home. We met this old lady (PW1) on the way. We went to hospital. I was given medicine. I also went to police station."

13. Patrick Mambiri, the Senior Clinical Officer at Kakamega Provincial Hospital was PW4. He testified that O.S. and P.M. were taken for medical examination by community health workers on 14th August, 2012, on the claim that they had been defiled by their father on unknown dates. Upon examination, it was found that the hymen of O.S. was missing; her labia majora was inflamed; there was a foul-smelling discharge from her vagina and when samples of her blood and urine were analyzed, she was found to have contracted gonorrhea. On the other hand, P.M. seemed to have suffered physical injuries and had ringworms (a sign of being unkempt). She also had pus cells which indicated the possibility of a urinary tract infection.

14. PW4 also informed the court that an age assessment was done for both complainants. O.S. was found to be 8 years and P.M. was found to be 6 years old respectively. He produced their P3 forms and age assessment report as exhibits.

15. The last witness was Corporal Danson Mavasio. He testified that he arrested the appellant on 25th August, 2012, with the assistance of one officer Birgen who was the investigating officer. Thereafter, the complainants were taken to hospital for examination and treatment and the appellant was later charged with the offence of incest. He also told the court that during the time he gave his testimony, the investigation officer was sick.

16. When he was placed on his defence, the appellant gave sworn testimony and called no witnesses. He admitted that he was the father to the complainants but denied the charges against him. He testified that on the material day the complainants were found, they got lost and he tried to look for them to no avail. The following day, he started searching for them but later learned from PW1 that they had been found and taken to Kakamega. He insisted that the complainants had been coached to testify against him and that he was the one who was telling the truth.

17. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions.

18. First, the appellant contended that the two lower courts acted on the principle that life imprisonment was a mandatory sentence under section 20(1) of the SOA, which is not the case since the section provides that a trial court can award a sentence of not less than 10 years, which can be enhanced to life imprisonment. He relied on this Court's decision in M.K vs. Republic [2015] eKLR. He opined that the court clarified that the correct interpretation of the proviso in section 20 is that a person convicted of incest when the female victim is under the age of 18 years is liable to a term of imprisonment of between 10 years and life imprisonment. Thus, the appellant submitted that the learned trial magistrate erred when he sentenced him to life imprisonment as if that was the only applicable sentence for the offence in question.

19. Second, the appellant contended that the elements of incest were not proved. While he admitted that the prosecution proved the relationship between him and the complainants, he alleged that the elements of age and penetration were not proved. He argued that the prosecution did not produce birth certificates, school leaving certificates, or baptismal cards to prove their age. He also argued that the evidence of both complainants did not meet the definition of the term penetration as defined under the *Sexual Offences Act*. He cited Mark Oiruri vs. Republic (2013) eKLR in his aid.

20. He further contended that the evidence of PW4 did not prove penetration and neither did the evidence of PW2 and PW3. It was his argument that trial magistrate ought to have taken the testimonies of

PW2 and PW3 with caution since they are minors and they were not specific on when (time, date and month) they were defiled.

21. Lastly, the appellant alleged that he was not accorded a fair hearing since there is no indication that the trial magistrate ordered that he be supplied with the evidence that the prosecution relied on. He argued that during his first appeal, the learned judge made no comment on the same even though he raised the issue as ground one in his written submissions. In this regard, he contended that the two lower courts did not observe that the prosecution failed on its duty to provide him with the witness statements prior to the commencement of the hearing. He opined that since he was unrepresented during trial, it was the duty of the trial learned magistrate to ensure that his rights were protected in accordance with Article 50 of *the Constitution*. He placed reliance on Simon Githaka Malombe vs. Republic, Nyeri Criminal Appeal No. 314 of 2015 (2015) eKLR and MEM vs. Republic, Nakuru HCCRA No. 314 of 2015 (2018) eKLR.

22. Ms. Busienei represented the respondent in the appeal. She argued that contrary to the appellant's allegation with regard to the proviso under section 20(1) of the SOA, the High Court noted that the meaning of the word liable means that the sentence provided for is the maximum sentence and not mandatory sentence. Hence the trial court misdirected itself in holding that the life sentence was mandatory. Counsel also submitted that the High Court held that the life sentence imposed was commensurate with the mandatory sentence imposed under section 8(2) of the SOA and was, therefore, legal and proper. Further, counsel submitted that the fact that life sentence is not mandatory under the said proviso did not make it unlawful and each case is dependent on the circumstances thereof. As such, taking into account the circumstance of this case, the age of the complainants and the fact that PW2 was infected with gonorrhea, which is a life threatening disease, the life sentence imposed is legal and appropriate.

23. Second, counsel submitted that there was sufficient evidence to prove penetration as both complainants described how the appellant inserted his genital organs into their genital organs and even pointed towards their genital organs during the proceedings. She also made reference to section 124 of the *Evidence Act* which she said provided an exception in sexual offence cases and allows a trial court to convict an accused person, based on the evidence of the survivor without corroboration, but reasons thereof for believing such evidence has to be recorded; and in this case, the trial court recorded its reasons for believing that the complainants were telling the truth.

24. Ms Busienei further submitted that the complainants evidence was corroborated by the medical evidence of PW4 who also testified on the age of both complainants and produced age assessment reports.

25. Lastly, counsel dismissed the appellant's allegation that he was not supplied with witness statements and submitted that when the matter came up for hearing while he was out on bond, he never raised the issue of being supplied with witness statements; and neither did he raise the issue in his grounds during his first appeal.

26. This is a second appeal. Our jurisdiction is, therefore, limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts

below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

27. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions. In our view, the issues that fall for determination on this second appeal are whether the prosecution proved its case beyond reasonable doubt as required by the law; whether the appellant was accorded a fair hearing; and whether the sentence meted out was legal and appropriate.

28. As regards the first issue, the appellant alleged that the prosecution did not prove the element of penetration and age. We have summarized the testimonies of PW2 and PW3 above. It is our view that both lower courts comprehensively dealt with the element of penetration and reached concurrent findings of fact that based on the graphic, oral testimonies of the complainants as corroborated by the evidence of the clinical officer, PW4, the appellant had penetrated both complainants. Both courts found the testimonies of the complainants to be consistent and truthful. We have no basis for upsetting those concurrent findings of fact.

29. On the issue of age, PW4 produced age assessment reports for PW2 and PW3 who were found to be 8 years and 6 years old respectively. Additionally, during his defence, appellant also confirmed their ages as stated. He stated thus:

> " The 2 children are mine. ....is 8 years. ....is 6 years...."

These two pieces of evidence establish the ages of the appellants beyond reasonable doubt. There is no requirement in our law, as the appellant seems to think, that age in sexual offences cases can only be proved through the production of a birth certificate.

30. The appellant has also raised a due process complaint that he was not supplied with witness statements in order to prepare for his defence. First, we note that this issue was not raised before the High Court, and is being raised before us for the first time. As such, it has not been preserved for appeal and we lack the jurisdiction to consider it. See Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR).

31. Second, this ground would not succeed on its merits anyway. It is true that an accused person is entitled to witness statements and all other documents which the prosecution hopes to rely on in a criminal trial. This is by dint of Article 50(2)(j) of *the Constitution* which provides that an accused person has the right to be informed in advance, of the evidence the prosecution intends to rely on and to have reasonable access to it. However, an accused person has the minimal obligation to bring to the attention of the trial court that he has not been supplied with the witness statements or any other prosecution documents. See Hussein Khalid & 16 Others v Attorney General &2 Others eKLR – a Supreme Court decision.

32. We now turn to sentence. The appellant was sentenced under Section 20(1) of the *Sexual Offences Act* which provides 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 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."

33. In sentencing the appellant, the learned magistrate stated that "only one sentence is provided for." It is true that the trial court interpreted the phrase "liable to imprisonment for life" to mean that a sentence of life imprisonment was mandatory under that section. The learned Judge on first appeal corrected that misdirection. In doing so, the learned Judge pointed out that this Court has spoken on the issue in M.K. v Republic (Nrb Crim. Appeal No. 248 of 2014) [2015] eKLR. In that case, this Court held that the word "liable" in section 20(1) of the *Sexual Offences Act* means that the sentence is the maximum and not mandatory. However, the learned Magistrate reasoned that even though life imprisonment is not prescribed by statute, it was "commensurate with the mandatory sentence imposed when a person is convicted of defilement of a child below the age of 11 years under section 8(2) of the [Sexual Offences] Act [and that therefore] the life sentence was legal and proper."

34. We find no error in the learned Judge's treatment of the sentence. We would add that the circumstances here called for the maximum sentence to be imposed; and it was not an abuse of discretion for the trial court to have imposed the maximum sentence. The complainants were not only of very tender ages but there was evidence that the appellant had repeatedly committed the heinous act. He had infected at least one of them with gonorrhea while the other had urinary tract infection. The evidence on record showed that the appellant had subjected the complainants to truly inhumane conditions in addition to sexually abusing them: they were famished; and were jigger- infested. In short, the sentence imposed was eminently deserved. It was also lawful.

35. The upshot is that the appeal herein fails in its entirety and is hereby dismissed.

36. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar