JOO v Republic (Criminal Appeal 329 of 2019)
[2025] KECA 200 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 200 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 329 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

JOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisii (Majanja, J.) dated and delivered on 12th October, 2018 in HCCRA No. 62 of 2017)

JUDGMENT

1. The appellant, JOO, was the accused person before the Principal Magistrate's Court at Nyamira in Criminal Case No. 235 of 2015. He 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 offence were that on the 7th day of March, 2015, in Manga Sub County within Nyamira County, the appellant intentionally penetrated the vagina of CKO, who was to his knowledge his daughter, using his penis.

2. The appellant also faced with an alternative 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 of 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 and sentenced him to life imprisonment as provided for by the law.

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 12th October, 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 five (5) grounds – all aimed at his sentence. In summary, they are that the two lower courts erred by imposing and subsequently upholding a harsh sentence without considering the appellant's mitigation and prosecutor's comments on sentence as required under section 329 of the *Criminal Procedure Code*; and without taking into consideration that the appellant was a first offender whose rights are guaranteed under Article 27(1)(2) and 50(2) of *the Constitution* and therefore qualified for the benefit of the least severe sentence. Lastly, the appellant requested this Court to apply section 333(2) of the *Criminal Procedure Code* in computing his sentence.

7. 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. Mochama, learned prosecuting counsel, appeared for the respondent. Both parties relied on their written submissions.

8. The appellant argued that the trial court failed to consider his mitigation and that the first appellate court dismissed his appeal without reviewing his sentence, which he deemed inappropriate due to its mandatory nature. He contended that under the *Criminal Procedure Code*, all individuals should be treated equally and that both lower courts failed to call for a victim impact statement or apply relevant sections of the Code, thereby violating his rights and discriminating against him.

9. He further argued that while a life sentence was previously mandatory for his charge, current jurisprudence grants the trial court discretion in sentencing. He cited several cases which, he said, had found mandatory life sentences to be unconstitutional.

10. Lastly, the appellant urged the court to consider his status as a first offender, his mitigation, and the principle that human error should not result in lifelong condemnation. He requested for a reduced sentence, promising to reform if granted a second chance.

11. The State opposed the appeal and reminded this court of its duty as the second appellate court, which is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*, as was held in the case of Karingo vs. Republic [1982] KLR 213.

12. The prosecution argued that the trial court had, indeed, considered the appellant's mitigation before sentencing him, and the first appellate court upheld this decision. Given that the appellant, as the victim's father, had a duty to protect her but instead abused her, the court acted within its jurisdiction to safeguard the child, who was only five years old at the time. Her age was an aggravating factor, making the life sentence legal and appropriate. Additionally, the law under which he was charged remained unchanged, hence the appellant's argument about being entitled to a lesser sentence was inapplicable.

13. The prosecution further contended that the appellant was granted his constitutional rights during the trial and did not raise any complaints until after its conclusion, implying his satisfaction with the process. They argued that prosecution witnesses clearly presented their case, making a victim impact statement unnecessary. Since sections 216 and 329 of the *Criminal Procedure Code* are discretionary, the lower courts were not obligated to seek additional information in the form of Victim Impact Statements.

14. Finally, the prosecution urged the court to reject the appellant's request to consider section 333(2) of the *Criminal Procedure Code* in his sentencing. They maintained that the life imprisonment sentence was lawful and fair and had been properly upheld by the first appellate court.

15. We have considered the appeal and the grounds argued in support thereof, as well as the submissions of both parties. This being a second appeal, our mandate is 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. See Ogolla s/o Owuor (1954) EACA 270 and Wanjema vs. Republic [1971] E.A. 493.

16. As the appeal is on sentence only, a brief summary of the facts are that on the material day, the appellant met the minor, his daughter aged four (4) years old on the roadside and asked her to go home. Upon his arrival, he sent the minor's siblings out of the house took the minor to his bedroom, and told her to get on top of the bed. He then locked the door, removed her clothes and panties as well as his clothes, and in the words of the complainant, "did bad manners to me; did bad things to my private parts". She pointed at the area of her private parts as she testified. Later that day when her mother returned, she told her what happened.

17. The minor's mother, CKO (PW2), confirmed the minor's testimony and added that the appellant threatened to beat the minor if she told anyone. She then went and reported the matter to the village elder as she was afraid to confront her husband, who she said was violent and feared would beat her. She also testified that she examined the minor's private part and saw that she was bleeding. It was her testimony that the minor was four (4) years old at the time of the incident as she was born on 11th November, 2009. The minor was thereafter taken to hospital for medical examination which revealed that there was an attempt to defile her as there was partial penetration consistent with sexual assault. It showed that her hymen was intact but her genital area was tender; the labia majora was swollen and painful on touch; and there was blood discharge on the vaginal area. Afterwards, on the same day, the appellant was arrested and later arraigned in court.

18. The appellant was charged 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."

19. The appellant was sentenced to life imprisonment. However, he has faulted the two lower courts for imposing a harsh sentence without considering his mitigation and the fact that he was a first offender.

20. In M.K. v Republic (Nrb Crim. Appeal No. 248 of 2014)[2015] eKLR, 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. The Court held that:

> " Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. } in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that 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."

21. In the present case, the learned Magistrate did not explicitly state that the appellant deserved the maximum sentence provided under the law. However, in affirming the learned Magistrate's sentence, the learned Judge, on first appeal, stated:

> "Considering all the evidence, I am satisfied that the offence of incest was proved. The sentence of life imprisonment was within the law as the child was below eleven years consistent with section 8(2) of the [Sexual Offences) Act, it was warranted."

22. It would appear that both the learned magistrate and the learned Judge were aware that section 20(1) of the *Sexual Offences Act* did not impose a mandatory life imprisonment sentence but were of the view that the maximum sentence was deserved in this case.

23. We are of the same opinion. In this case, the complainant was four years old. She was the appellant's biological child. There was evidence that the appellant warned the survivor of dire consequences if she revealed what had happened. Indeed, the complainant's mother, the appellant's wife, was so terrified that she could not confront the appellant directly; instead, she reported to the village elder. Instead of protecting his young daughter, the appellant breached her trust in a most grotesque way. The childhood of the survivor is horribly betrayed. The maximum sentence is called for here as the circumstances paint the appellant as a danger to his family and the society. We will, therefore, leave the sentence undisturbed.

24. The result is that this appeal lacks merit and we dismiss it in its entirety.

25. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR