PKK v Republic (Criminal Appeal 61 of 2018)
[2025] KECA 137 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 137 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 61 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

FEBRUARY 7, 2025

BETWEEN

PKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kericho (Mumbi Ngugi, J.) dated 25th September 2018 in HCCR Case No. 37 OF 2015)

JUDGMENT

1. PKK, (the appellant), 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 24th April 2014 in Kipkelion, within Kericho County, he intentionally and unlawfully caused his penis to penetrate the vagina of his niece AC a child aged 6 years. The prosecution case stood on the testimony of 5 witnesses, namely; PW1, the complainant's mother, PW2, (the complainant), PW3, (the complainant's grandfather), PW4, (the Clinical Officer), and PW5, (the Investigating Officer). The defence case rested on his sworn testimony. He did not call any witnesses.

2. After analyzing both the prosecution and the defence case, the trial court was satisfied that the offence incest of was proved to the required standard, convicted the appellant and after considering his mitigation, sentenced him to serve life imprisonment.

3. The appellant appealed to the High Court of Kenya at Kericho in Criminal Appeal No. 37 of 2025 challenging both his conviction and sentence. After hearing the appeal, Mumbi Ngugi, J. (as she then was) in the impugned judgment dated 25th September 2018 upheld both the conviction and sentence. Undeterred, the appellant is before this Court seeking to overturn both his conviction and sentence, citing four grounds in his self-drawn supplementary grounds of appeal and submissions dated 25th September 2024.

4. In summary, the appellant's grounds are:

   (a) the learned judge acted on the wrong principles of law and imposed an unlawful sentence contrary to the proviso to section 20 (1) of the *Sexual Offences Act* which uses the words "shall be liable to imprisonment for life," which means that the sentence stipulated is not mandatory but maximum;

   (b) the elements of the offence of incest were not proved;

   (c) he was not accorded a fair hearing; and,

   (d) his defence was not properly considered.

5. When this appeal came up for virtual hearing before us on 27th September 2024, the appellant appeared in person while learned counsel Mr. Omutelema appeared for the respondent. Both parties relied on their respective written submissions. The appellant's submissions are dated 25th September 2024 while the respondent's submissions are dated 18th November 2024.

6. In support of his appeal, the appellant faulted the learned trial magistrate for wrongly imposing on him a life sentence without considering the circumstances of the offence and for failing to appreciate that under Section 20 (1) of the *Sexual Offences Act*, life sentence is not a minimum mandatory sentence. Further, the learned Magistrate failed to appreciate that even though the victim was of tender years, the appellant was only 18 years old at the material time and he was therefore entitled to a lesser sentence. In support of his submissions the appellant cited the case of *MK v Republic* [2015] eKLR in which the Court of Appeal held that section 20 (1) of the *Sexual Offences Act* stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life between 10 years and life imprisonment and that the court imposed a jail term of 20 years.

7. As to whether the offence of incest was proved to the required standard, the appellant submitted that even though the relationship, identification and age were proved, penetration was not proved because PW4 told the court that upon examining PW2, he found no bruises, the hymen was missing, there were numerous puss cells suggestive of sexually transmitted infection, but there were no signs of penetration. To buttress his submission the appellant cited this Court's holding in *P.K.W. v Rep* [2012] eKLR that the absence of the hymen is not proof of defilement.

8. Submitting on the ground that he was not accorded a fair hearing contrary to Article 25 (c), 27 (1) (2) and 50 (2) (a) (b) & (c) of the *Constitution*, the appellant maintained that he was prejudiced since he was young and illiterate and he was not supplied with witness statements as required by the law.

9. Learned counsel for the respondent Mr. Omutelema opposed the appeal. As to whether penetration was proved, he submitted that PW2 stated that the appellant did bad manners to her, while PW4 examined her and found that she had been defiled since there was no hymen and there were numerous pus cells suggestive of a sexually transmitted infection. He submitted that both the trial court and the 1st appellate court were satisfied by the said evidence. Furthermore, the trial court found that the victim's evidence was credible and that her evidence was corroborated by PW4. Lastly, the trial Court considered the appellant's defence and found the same to be an afterthought.

10. Regarding sentence, Mr. Omutelema maintained that the appellant was allowed to present his mitigation before he was sentenced to life imprisonment as provided under the proviso to section 20 (1) of the *Sexual Offences Act*. Further, the said sentence was upheld by the 1st appellate court which held that obligated to mete out the sentence since it was legally provided for. It was his submission that the circumstances of the case called for the sentence because PW2 was aged 6 years at the material time and

she was vulnerable. Further, the appellant being the brother to PW2's father abused the responsibility and trust expected of him by defiling her. He also stressed that the defilement left the victim sickly, fearful and traumatized. Lastly, the appellant is not remorseful, therefore, the sentence ought to be upheld.

11. This is a second appeal, therefore, our jurisdiction is limited to consideration of matters of law as stipulated by Section 361 of the *Criminal Procedure Code*. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived by the two courts below unless such findings are based on no evidence. (See this Court's decisions in *Chemogong v R* [1984] KLR 611 and *Ogeto v R* [2004] KLR 14).

12. As stated herein above, above, the appellant in his submissions concedes that some elements of the offence were proved. In particular, he admits his relationship with the complainant, he does not dispute his identification nor does he contest the complainant's age. The only element of the offence he disputes is penetration. According to him, the evidence of PW3, shows that there was no penetration. He also argued that PW4 (the Clinical Officer) testified that upon examining the complainant, he noted that she had no bruises and she had no hymen, but here were numerous puss cells suggestive of sexually transmitted infection. He argued that PW4 was adamant that there were no signs of penetration from his examination.

13. This Court, on a second appeal, will not interfere with concurrent findings of fact of the two courts below unless it is satisfied that there was in fact no evidence at all to support the findings, or that the courts below wholly misunderstood the nature and effect of the evidence. This position was succinctly enunciated in *Kalameni v Republic* [2003] eKLR in which this Court stated:

> "We have said before, but it bears repeating, that on a second appeal, it is not the function of this Court to go into a fresh re-evaluation and re- assessment of the evidence to see if the findings of the lower courts are or are not supportable. This Court will not interfere with concurrent findings of fact unless it is satisfied that there was in fact no evidence at all to support the finding or that the two courts below wholly misunderstood the nature and effect of the evidence." See also *Aggrey Mbai Injaga vs Republic* [2014] eKLR and *Athanus Lijodi vs Republic* [2021] eKLR.

14. Both the trial court and the first appellate court were satisfied that the evidence established the complainant was defiled. PW1 who is the complainant's mother stated that the complainant had difficulties walking, and could only sleep on her stomach, and upon asking her, she told her that the appellant had defiled her. PW4, Mr. Weldon Mutai a clinical officer, upon examining the complainant noted that even though there were no visible injuries on the complainant's labia minora and majora, the complainant's hymen was absent and she had numerous pus cells suggestive of a sexually transmitted infection. His conclusion was that the complainant had been defiled. In the circumstances of this case, we do not think it, would be appropriate for us to go behind the concurrent findings of fact of the two courts on the issue under consideration. Although there are rare exceptions to this practice (in particular, where there has been an error of law in relation to the findings of fact), this case falls far short of coming within such an exception.

15. It is important to clarify that the practice of this Court (of not going behind the concurrent findings of facts of two lower courts) adds an additional hurdle for an appellant to overcome when appealing to this Court on a second appeal. To surmount this hurdle, an appellant in a second appeal to this Court must demonstrate that there was in fact no evidence at all to support the finding (s) or that the two courts below wholly misunderstood the nature and effect of the evidence. This is because the trial magistrate/judge, given his or her had the opportunity to see and hear witnesses firsthand, is likely to

be in the best position to make findings of fact. Where those findings of fact have been upheld by one appeal court, there is no reason to think that a second appeal court, looking at the facts - is more likely to be correct about the facts than the two courts below. In the circumstances, we find and hold that the evidence by the complainant was corroborated by PW4 and therefore, we find no basis upon which we can interfere with the findings of the courts below. Thus, we uphold the appellant's conviction for the offence of incest.

16. Regarding the submission that the trial court fell into error in holding that the life sentence was mandatory when the same was a maximum sentence, it is important to stress that as the law stands, severity of a sentence does not fall within the jurisdiction of this Court. However, the legality of a sentence is within our jurisdiction. The offence of incest is defined in section 20(1) of the *Sexual Offences Act* 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 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."

17. The question whether the above section prescribes a mandatory sentence of life imprisonment has been the subject of judicial construction by our superior courts. This Court in *M K v Republic* [2015] eKLR interpreted the above section in detail. We will profitably quote extensively from the said decision. It stated:

> " 14. There are two critical issues for us to consider and determine in this appeal. First is whether there is a minimum mandatory sentence of a term of life imprisonment in the proviso to Section 20 (1) of the *Sexual Offences Act*. Second whether the twenty (20) year term of imprisonment imposed by the trial court was illegal. We have considered the authorities cited by the appellant and it is our considered view that the authorities are not relevant to the determination of the two pertinent issues in this appeal. The appellant was charged with an offence under the *Sexual Offences Act* which prescribes the sentences to be meted out to persons convicted thereunder.
>
> 15. Readings of the diverse provisions of the *Sexual Offences Act* reveal that in most sections, a minimum sentence is provided for. For example, under Section 3 (3), a person guilty of the offence of rape is liable upon conviction to imprisonment for a term which shall not be less than ten years....; Section 4 of the *Act* stipulates that a person convicted of attempted rape is liable upon conviction for imprisonment for a term which shall not be less than five years..... Section 5 (2) of the *Act* provides that a person convicted of sexual assault shall be liable to imprisonment for a term of not less than ten years.... Section 8 (3) of the *Act* provides that a person convicted of defilement when the child is between the ages of twelve and fifteen years shall be liable to imprisonment for a term of not less than twenty years.

16. Our reading of the *Sexual Offences Act* shows that whenever a minimum sentence is imposed, the phrase not less than is used.

17. In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years imprisonment. However, the proviso to Section 20 (1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment?

18. The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.

19. What does "shall be liable" mean in law? The Court of Appeal for East Africa in the case of *Opoya v Uganda* [1967] EA 752 had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in construction of penal laws, the words "shall be liable on conviction to suffer death" provide a maximum sentence only; and the courts have discretion to impose sentences of death or of imprisonment. The Court cited with approval the dicta in *James v Young* 27 Ch. D. at p.655 where North J. said: "But when the words are not 'shall be forfeited' but 'shall be liable to be forfeited' it seems to me that what was intended was not that there should be an absolute forfeiture, but a liability to forfeiture, which might or might not be enforced".

    We consider such to be the correct approach to the construction of the words "shall be liable on conviction to suffer death: especially when contrasted with the words of s.184 which are "shall be sentenced to death".

20. On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.

21. 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.

22. Based on the foregoing interpretation, we are of the considered view that in the instant case, the learned judge erred in law in holding that the twenty (20) years term of imprisonment meted to the appellant by the trial court was an illegal sentence. We find that the twenty (20) years term of imprisonment was not an illegal sentence and was lawful in the context of the decision in *Opoya v Uganda* (1967) EA 752. It follows that the learned judge erred in correcting and or enhancing the sentence from 20 years to life imprisonment. We reiterate the principles in the case of *Ogolla s/o Owuor*, (1954) EACA 270 wherein the predecessor of this court stated:

> The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

23. We are of the considered view that the High Court misinterpreted the proviso to Section 20 (1) of the *Sexual Offences Act* and acted on wrong principles and overlooked the decision in *Opoya vUganda* (1967) EA 752.

18. While passing the life sentence, the learned magistrate stated "...the offence carries a mandatory sentence." The above observation by the learned magistrate was erroneous. As was stated by this Court in the above cited case, it is beyond argument that the phrase "shall be liable to" does not in its ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, the provision does not prescribe a mandatory penalty but it provides a maximum sentence and even after a conviction has been determined, the trial court might not see fit to impose the sentence provided because it has the discretion to pass an appropriate sentence depending on the peculiar facts and circumstances of the case.

19. The other important point to mention is that we have considered the record and carefully considered the appellant's undated petition of appeal before the High Court which appears in the Record of Appeal at page 35B and the submissions by the appellant before the High Court. It is noteworthy that the appellant in his appeal before the High Court did not complain about the trial court falling into error by holding that the life sentence was mandatory when the same was a maximum sentence. Therefore, the issue of the life sentence being equated as mandatory by the trial magistrate when the same was a maximum sentence was not an issue placed before the High Court for its determination. Accordingly, the first appellate court did not have the benefit of applying its mind on the said ground. Consequently, we are precluded from addressing the said issue in this appeal.

20. Even if the issue of sentence had been properly raised before us, we would have addressed our minds to the question whether there are aggravating circumstances in this case to justify the imposition of the maximum sentence provided by the law. The complainant was aged 6 years, therefore, she was vulnerable. The appellant is her uncle, and a person she could look upon for protection, not abuse. He abused the trust expected of him. He deserved no mercy, therefore, the sentence imposed was commensurate to the offence. This is the offence provided in the same statute for defilement of children of 6 years which was the age of the complainant.

21. On the appellant's contention that his rights under Article 25 (c), 27 (1) (2) and Article 50 (2) (a) (b) and (c) of the *Constitution* were breached because he was not supplied with the charge sheet and witness statements immediately after taking plea in court, the High Court found that there is no evidence that

the appellant raised the issue of the statement during his trial and that he was denied the statements. The record indicates that he was ready to proceed with the trial and was able to cross-examine the prosecution witnesses. In fact, when the matter came up for hearing on 10th September 2014, the appellant informed the court that he was ready and he did not raise the issue of the witness statements. The appellant's preparedness to proceed with the trial is displayed by his active cross examination of PW1 and PW5. Accordingly, just like the High Court, we are satisfied that the appellant was supplied with the witness statements prior to the commencement of the trial and that he was not prejudiced at all.

22. In the circumstances, we find that the appellant has not established any grounds upon which we can interfere with his conviction and sentence. Accordingly, we find this appeal to be without merit and dismiss it.

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

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

M. GACHOKA C. Arb, FCIArb

.....

JUDGE OF APPEAL

This is a true copy of the original.

Signed

DEPUTY REGISTRAR.