JMM v Republic (Criminal Appeal 107 of 2017)
[2025] KECA 557 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 557 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 107 OF 2017

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

MARCH 21, 2025

BETWEEN

JMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Nyeri (T.W. Cherere J), dated 13th July 2017 in HC. CRA No. 2 of 2017)

JUDGMENT

1. JMM, the appellant, was arraigned before the Senior Resident Magistrate's Court at Othaya on 25th September, 2015 to plead to the charge of incest contrary to Section 20(1) of the *Sexual Offences Act*.

2. The particulars of the charge were that on diverse dates between May 2013 and 18th September 2015 in Nyeri County, he intentionally caused his penis to penetrate the vagina of JNM, a child aged 11 years.

3. 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 *Sexual Offences Act*. The particulars of the charge alleged that on the same date and place, the appellant intentionally touched the vagina of JNM a child aged 11 years with his penis.

4. In brief, the evidence upon which the appellant was convicted was that of JNM (PW1), was a minor. In her sworn evidence, she testified that the appellant who was her father started to abuse her by caressing her body and putting his fingers in her vagina from 2013 when she was 9 years old and continued for 3 years up to when she reached class 5 when he started inserting his "thing of urinating" into her vagina. She did not report the abuse to her mother since the appellant had threatened to kill her. That the abuse continued until she could not take it anymore and she reported the matter to her pastor who in turn reported the matter to the Chief and the appellant was arrested. She was escorted to the Police Station where she reported the matter and was later taken to hospital where she was examined by a doctor.

5. Joseph Maina Waweru (PW2), a pastor at K.A.G. Church where JNM. used to fellowship told court that he recalled that on 20th September, 2015, JNM reported that her father had defiled her severally. He was perturbed and reported the matter to the area chief and also to the police, resulting in the appellant's arrest.

6. Ian Ngumo (PW3), a clinical officer testified that he examined JNM on 29th September 2015 and found her with fresh wounds around the inner and outer genitalia and that her hymen was broken but old. He stated that the child had a white discharge and that there was an infection. He said that the injuries were consistent with a history of continuous sexual abuse.

7. PMM (PW4), the child's mother told the court that JNM was born on 5th March, 2004 as shown by her certificate of birth. She stated that the appellant who was her husband was JNM's father. She told court that on 20th September 2015, JNM. reported that the appellant had defiled her for the last 3 years and that she had told the pastor and that she did not report to her because the appellant had threatened to kill her. She testified that she took JNM. to hospital and she was examined and issued with a P3 Form. She said appellant was a very violent man and they, as a family, were all afraid of him.

8. PW5 C.M., JNM's sister, aged 14 years and in class 8, recalled that from the time she was in class 4, their mother would work long hours and return home late. That while their mother was away, the appellant used to send her to go outside or to the kitchen at 8.00pm and he would remain with JNM in bed. She stated that JNM would later go to her crying and report that the appellant had done bad things to her. That they did not report the matter to their mother because they feared appellant who used to beat their mother.

9. No.8687364 PC. Rehema Majibu (PW6), testified that she was attached to Witima Police Station and was the investigating officer. She recalled that on 23rd September, 2015 at around 6.00a.m. she was informed that there was a case of incest. That she interrogated J.N.M. who told her that while she was in class 3, her father started inserting his fingers in her vagina and she later told the pastor as she had seen the appellant beating her mother and they used to fear him. She booked the report and started investigations. The appellant was subsequently charged with the offences presented before the trial court.

10. In his defence, the appellant testified on oath and denied the offence. In his testimony, he recalled that on 22nd September, 2015 at around 9.00p.m. he was home with his wife and that his child JNM came from church where she had gone for worship and she told them that the pastor who was praying for her had raped her and stolen her jacket.

11. In the end, the trial court was persuaded that the appellant had committed the offence, convicted him, and sentenced him to life imprisonment. The appellant being aggrieved by the judgment appealed against both conviction and sentence to the High Court and on determination of the appeal the High Court (T.W. Cherere, J.) on 19th July 2017 dismissed the appeal and upheld both the conviction and sentence.

12. It is that judgment that precipitated the appeal before us based on grounds, inter alia, that the learned Judge erred in law: by upholding a conviction that was based on inconsistent, contradictory and uncorroborated prosecution evidence; that the minor did not undergo voire dire examination as per the provisions of the Oaths and Statutory Declaration Act; by upholding a conviction that was not described under section 20(1) of the *Sexual Offences Act* as the complainant was a step-daughter and the said section does not provide for such relation; by failing to note that the charge sheet was fatally defective hence contravening section 134 and section 382 of the *Criminal Procedure Code*; and by failing to consider his defence hence contravening section 169(1) of the *Criminal Procedure Code*.

13. At the hearing of the appeal, the appellant appeared in person while learned counsel Mr. Naulikha, was on record for the State.

14. The appellant submitted that he was charged under the wrong section of the law being section 20(1) as read with section 22 (2)(a) and (b) of the *Sexual Offences Act* as he was JNM's step- father. He testified that the degree of relationship between the appellant and JNM does not fall within the definition of section 22(a) or (b) of the *Sexual Offences Act* hence making the conviction unsafe.

15. On the ground of the charge sheet being fatally defective, the appellant stated that there was variance between the charge sheet and the evidence tendered in court. It was submitted that during the trial, counsel admitted that the appellant was a step-father to JNM and as such this is a case of defilement and not incest.

16. He submitted that the entire evidence was not evaluated afresh resulting in prejudice for the reason that the High Court did not evaluate the entire evidence, facts and law as required under section 362 of the *Criminal Procedure Code* and section 329 of the *Evidence Act* as stipulated in Okeno -vs- R. [1972] EA 32 and as such the trial was unfair under Articles 25 (c) and 50 of the *Constitution*.

17. With regard to the mandatory sentence having been declared unconstitutional it was submitted that Julius Kitsao Manyeso - vs - Republic [2020]eKLR declared that life sentence is unconstitutional. He prayed that he be set at liberty.

18. In opposition to the appeal, it was submitted that the evidence on record was consistent and sufficient to prove the offence of sexual assault; that PW1's evidence was corroborated by the testimony of PW2, PW3, PW4 and PW5. Counsel submitted that there were no contradictions in the evidence adduced by the prosecution witnesses and that the evidence was consistent, cogent, reliable and devoid of any form of inconsistencies or contradictions.

19. It was submitted, further, that it was not true that the court did not conduct voire dire examination before taking the evidence of PW1 and that a perusal of the record shows that the same was done and hence that allegation is not factual and accurate.

20. In regard to the appellant's complaint that he was convicted for incest yet JNM was not his biological daughter and hence that the charge sheet was fatally defective, it was submitted that the child's mother testified that JNM was her second born child and that her father was the appellant who was also her husband. It was submitted that this issue was never raised by the appellant at the High Court. Counsel urged that the appellant is the biological father of JNM and he cannot purport to distance himself from her too late in the day, and that there was no evidence on record to demonstrate that in fact the appellant is not the biological or otherwise father of JNM.

21. With regards to the appellant's complaint that the prosecution case was pure hearsay, counsel maintained that the prosecution case was premised on solid foundation of direct, consistent, strong and extremely overwhelming evidence that has probative value.

22. It was submitted that the two courts below considered the appellant's defence but the same could not stand the tsunami created by the strong evidentiary waves that displaced and swept offshores the defence mounted by the appellant and that in the aftermath the appellant was left alone and exposed and overwhelmed by the prosecution evidence.

23. Further, that the sentence of life imprisonment as meted out by the trial court was neither punitive nor excessive. We were urged to uphold the findings of the two courts below with regard to conviction and sentence and proceed to dismiss the appeal in its entirety.

24. This being a second appeal, by dint of section 361 of the *Criminal Procedure Code*, we can only deal with matters of law. See M'riungu -vs- Republic [1983] KLR 455.

25. We have considered the appeal, submissions and the law. Based on the grounds of appeal and submissions, the appellant's grievances seem to be that he was wrongly convicted on a charge that was not proved and, in any event, it was defective; whether the alleged consanguineal relationship between the appellant and PW1 was within the parameters set by the law and lastly, whether the sentence imposed was harsh and excessive in the circumstances.

26. The appellant was charged with the offence of incest. To prove the offence, the prosecution had to demonstrate the relationship between the appellant and PW1 and that it fell under section 20(1) of the *Sexual Offences Act* which provides as follows:

> "(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."

27. Further, the prosecution is bound to prove the commission of an indecent act or an act that causes penetration with the victim. On the issue of penetration, from the record before us, it is clear that penetration was not challenged, even by the appellant, whose defence was that it was the pastor who had defiled the child. The child's evidence on penetration was also corroborated by the medical evidence adduced through the clinical officer. We shall not, therefore, belabor the point.

28. Section 2 of the *Sexual Offences Act* states that:

> "penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person."

29. Further, in John Irungu -vs- R. [2016]eKLR, the Court stated as follows:

> " Thus, for purposes of sexual assault, the penetration is not limited to penetration of genitals by genitals. It extends to penetration of the victim's genital organs by any part of the body of the perpetrator of the offence, or of any other person or even by objects manipulated for that purpose."

See also David Odanga Wanyama -vs- R. [2022]eKLR,

30. In the circumstances, we find that penetration was proved to the required legal standard of proof.

31. On the issue of the charge sheet being defective, it was submitted by the respondent that the appellant had not indicated the defect in the charge sheet. Having considered the record of the trial court in its entirety, it would appear that the defect the appellant was complaining about was his being charged with incest while he was not the child's biological father, but step-father. We note that the issue was not raised before the trial court and nor was it a ground of appeal before the High Court. The same cannot be raised here for the first time. We find no other defects in the charge sheet and as stated earlier,

the appellant did not point out any specific defects. In any event, minor defects if any, were curable under section 382 of the *Criminal Procedure Code*. This Court in Benard Ombuna -vs- Republic [2019]eKLR addressed the issue of a defective charge sheet in the following terms:

> In a nutshell, the test of whether a charge sheet is fatally defective is substantive rather than formalistic. Of relevance is whether a defect on the charge sheet prejudiced the appellant to the extent that he was not aware of or at least he was confused with respect to the nature of the charges preferred against him and as a result, he was not able to put up an appropriate defence."

This was not the case here. The appellant robustly defended the charge by challenging the evidence adduced against him by the prosecution witnesses. He was well conversant with the charge that he was facing. We discern no prejudice that he could have suffered in the course of the trial.

32. The sentence for incest is predicated upon the age of the complainant. If the complainant is an adult, that is over 18 years old, the court has discretion to mete out a sentence of imprisonment of any length but not being less than 10 years. If the complainant is under eighteen years of age, the court has discretion to mete a sentence of up to life imprisonment. See M.K. -vs- Republic [2015]eKLR. Given the foregoing, we are satisfied that the sentence imposed was not harsh and excessive as the minor was only eleven (11) years old.

33. However, given this Court's recent pronouncement on the indeterminate nature of the life sentence in Julius Kitsao Manyeso -vs- Republic (supra), we set aside the life imprisonment and substitute therefor, a sentence of 30 years imprisonment, which in our view is well deserved. The appeal against sentence succeeds only to that extent.

34. We find the appeal against conviction devoid of merit and the same is hereby dismissed.

DELIVERED AND DATED AT NYERI, THIS 21ST DAY OF MARCH, 2025.

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR