GBK v Republic (Criminal Appeal E004 of 2024)
[2025] KECA 928 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 928 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL E004 OF 2024

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MARCH 7, 2025

BETWEEN

GBK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Malindi (Kiarie Waweru Kiarie, J.) delivered on 24th October 2023 in Criminal Appeal No. E013 of 2022)

JUDGMENT

1. The appellant, GBK, was convicted by the Chief Magistrate's Court at Malindi (Hon. Chepseba, CM) for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. It was alleged that on the 15th day of August 2019 at Chamari Location within Kilifi County, the appellant unlawfully caused his penis to penetrate into the vagina of MGB, a girl aged 11 years and who, to his knowledge, was his daughter.

2. Alternatively, the appellant was charged with the offence of committing an indecent act contrary to section 11(1) of the *Sexual Offences Act* in that he allegedly touched the vagina of MGB, a child of 11 years, by using his penis.

3. The appellant pleaded not guilty to both charges. A trial ensued, which resulted in his conviction for the main charge. He was sentenced to life imprisonment.

4. Dissatisfied by the Judgment of the trial court, the appellant appealed to the High Court at Mombasa (Waweru, J), which court upheld both the conviction and sentence. Further dissatisfied, he has now come to this Court on a second and perhaps the last appeal.

5. To prove its case, the prosecution called 4 witnesses. PW1, MCB recorded as MB was the complainant who, after a voire dire examination, gave her evidence under affirmation. She was 13 years old as at the

time she testified. Her testimony was that she lived with her father, grandmother and her father's uncle; that on 15th August 2019, while in the company of her brothers, they went to feed the goats in the field; that her father, the appellant, called her while they were in the field and asked that the persons whom she was with, namely Benja, Ken and another (a cousin) go home; that she and the appellant remained behind; that the appellant asked her to remove her clothes and to lie down in a bush; that the appellant then sexually assaulted her by inserting his penis into her vagina; and that he then asked her to go home.

6. PW1 went home and confided in her aunt, R, what had transpired, and who then called PW1's grandmother and informed her what PW1 had told her; that PW1 was at this point bleeding from her vagina; that her grandmother took her to a hospital in Chamari and later to Malindi General Hospital; and that this was the first sexual encounter with the appellant. PW1 identified in court the hospital treatment notes, a laboratory request form and a medical examination report (P3 form).

7. PW2, HBK, the complainant's grandmother, testified that she had lived with PW1 since she was 3 years old as her mother left the matrimonial home; that, on 15th August 2019, she was called by her daughter one R, who told her that PW1 was sick and was bleeding from her private parts; that she gave instructions that PW1 be taken to hospital; that she followed them in hospital; that the doctor explained that the bleeding was as a result of a sexual assault; and that PW1 had disclosed that it was the appellant who had assaulted her.

8. PW3, CPL Miriam Hussein from Malindi Police Station, Child Protection Department was the investigating officer who summoned up the prosecution's case. In addition, she testified that, on 16th August 2019, she was called from Malindi District Hospital and informed of a man who had defiled his daughter; that, together with PC Bakuna and other police officers, they went to Malindi sub-district Hospital where they arrested the appellant and escorted him to Malindi Police Station; that, later, she went back to the hospital to visit PW1 who was recovering after a surgery arising from the assault; and that PW1's age was assessed on 19th August 2019 to be 11 years. PW3 identified in court PW1's treatment notes, the discharge summary, the laboratory test sheets, and further adduced in evidence the age assessment report.

9. PW4, Mr. Moses Rimba, a Clinical Officer at Malindi sub- county Hospital, produced the medical reports, namely the treatment notes, P3 form and the admission and discharge summaries on behalf of Dr. Ibrahim, who had filled them. He also identified the age assessment report. The P3 form indicated that the complainant was referred from Chamari Dispensary while bleeding from the vagina due to defilement. PW4 testified that the vagina tear necessitated that the complainant undergoes a surgery; and that, according to Dr. Ibrahim, he was of the opinion that there was vaginal penetration.

10. At the close of the prosecution case, the trial court ruled that the appellant had a case to answer and was accordingly put on his defence. He gave a sworn statement of defence in which he denied committing the offence. In his defence, he stated that, on 15th August 2019, he left home at 8.00 a.m. and went to the farm where he stayed until 1.00 p.m.; that he then met his sister who told him that his child, the complainant, was at the dispensary; that he then headed there and found the complainant vomiting; that they were advised to take her to Malindi Hospital where they reached at around 11.00 p.m., and she was admitted; that he then went to Zabebe where he spent the night; that, the following day, he went back to the hospital where he was arrested together with his brother.

11. In cross examination, he admitted that the complainant was his daughter, and that he has four other children.

12. After considering the prosecution's case, the appellant's defence and the documentary evidence presented at the hearing, the learned trial Magistrate was satisfied that the prosecution had properly

discharged its burden of proof, beyond reasonable doubt, and found the appellant guilty and convicted him under section 215 of the Criminal *Penal Code*. The trial court sentenced the appellant to life imprisonment.

13. Dissatisfied with both the conviction and sentence, the appellant appealed to the High Court where he complained: that the trial proceeded without him being furnished with witness statements; that the voire dire examination conducted on the complainant was not unequivocal; that his mitigation was not considered as required by sections 216 and 329 of the *Criminal Procedure Code*; and that the pre-sentence report was not considered before meting out the sentence.

14. On the question as to whether the appellant was supplied with copies of prosecution witnesses' statements, the learned Judge, whilst referring to Article 50(2) (c), (j) & (k) of the *Constitution* which provides for the right to a fair trial, observed that the court record did not indicate whether the appellant was supplied with copies of the written statements; that, however, at the commencement of the hearing on 1st October 2019, the appellant indicated that he was ready to proceed; and that the appellant did not complain that he had not been supplied with the statements and, therefore, he was estopped from alleging that he was prejudiced on account of failure to be supplied with the statements.

15. On the question as to whether the offence of incest was proved, the learned Judge referred to section 20(1) of the *Sexual Offences Act* with respect to the ingredients of the offence of incest that the prosecution was required to establish. Specifically, the learned Judge was satisfied that the complainant was defiled as penetration was supported by the medical evidence adduced by PW4; that, at the time when the complainant was admitted in hospital on 16th August 2019, she was bleeding from her vagina, and that the medical examination confirmed that she was defiled; and that, consequently, the appellant's defence was found to be without merit.

16. Applying the proviso to section 124 of the *Evidence Act*, the learned Judge concluded that the evidence tendered by the prosecution linked the appellant to the offence, and the appellant's conviction was upheld.

17. On the sentence, the first appellate court held that it was not persuaded that there were any plausible reasons that would warrant it to interfere with the sentence meted out by the trial court. Accordingly, the appeal was dismissed in its entirety.

18. In this appeal, the grounds of appeal raised are that the learned Judge erred in law: by failing to consider that the appellant's right to a fair trial was violated; by holding that there was penetration; by failing to consider his alibi defence; by failing to find that his mitigation was not considered pursuant to sections 216 and 329 of the *Criminal Procedure Code*; and by failing to find that the mandatory life sentence meted out was manifestly harsh in the circumstances.

19. By dint of section 361(1)(a) of the *Criminal Procedure Code*, this Court concerns itself only with matters of law, the issues of fact having been settled in the two courts below. This Court explained its approach in a second appeal in the case of *Dzombo Mataza v Republic* (2014) KECA 831 (KLR) as follows:

> "As already stated, this is but a second appeal. Under the law we are only concerned with matters of law and not fact. Put differently, in a second appeal such as this one, matters of fact are for the trial court and the first appellate court...By dint of the provisions of section 361(1)(a) of the *Criminal Procedure Code* our jurisdiction does not allow us to consider matters of fact unless it be shown that the two courts below considered matters that should

not have been considered or failed to consider matters that they should have considered or that looking at the evidence they were plainly wrong."

20. We heard this appeal virtually on 23rd October 2024. The appellant appeared in person while learned State Counsel Ms. Ongeti appeared for the respondent. In support of his appeal, the appellant filed written submissions dated 4th October 2024 which he opted to entirely rely on without further highlighting them. On her part, Ms. Valerie Ongeti highlighted the respondent's submissions dated 18th December 2024.

21. In his submissions, the appellant solely addressed the issue of the sentence meted out to him. He took issue with the life sentence which he submitted was harsh and excessive in the circumstances. Whilst referring to, among others, the cases of *Kichanjele S/O Ndamungu v Republic* 195 8 EACA 64 and *Opoya v Uganda* (1967) EA 752 he submitted that, where the phrase 'liable to' in sentences is used, it should be interpreted to mean that the trial court can exercise its discretion in meting out the sentence prescribed as opposed to interpreting it to mean that the sentence therein is a mandatory sentence.

22. The appellant further relied on the High Court's decision of *DWM v Republic* (2016) eKLR where it was held that the use of the words 'shall be liable to' ... imprisonment under section 20 (1) of the *Sexual Offences Act* gives room for exercise of judicial discretion while meting out the sentence. Further reference was made to Constitutional Petition No. 97 of 2021 *Edwin Wachira & 9 Others v Republic* and *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where both courts, taking cue from the Supreme Court decision of *Francis Karioko Muruatetu & Another v Republic* (2017) eKLR set aside the mandatory sentences passed and commuted them to non-mandatory sentences.

23. The appellant contended, therefore, that the life imprisonment sentence imposed on him was harsh and excessive in the circumstances and we ought to substitute it therefor with a more lenient one.

24. Learned counsel Ms. Ongeti submitted that the prosecution proved the offence of incest beyond reasonable doubt; that all the ingredients necessary for proof of the offence were established, namely that the appellant was a relative to the complainant; that there was penetration; that the perpetrator was positively identified; and that the age of the victim was established to be below 18 years.

25. As regards the relationship between the complainant and the appellant, counsel submitted that it was not disputed that the appellant was the father to the complainant and that, consequently, the degree of consanguinity contemplated under section 20 of the *Sexual Offences Act* was established. As regards penetration, counsel contended that, apart from the complainant's own evidence of what happened between her and the appellant, PW4, the Clinical Officer from Malindi sub-district Hospital, produced the medical reports, which confirmed that, indeed, the complainant had been defiled. On the identity of the perpetrator, apart from the relationship the complainant and the appellant had, the offence was committed in broad daylight, hence the issue of mistaken identity would not occur.

26. As regards the sentence, it was submitted that section 20(1) of the *Sexual Offences Act* sets the mandatory minimum sentence as 10 years; that the learned trial Magistrate properly applied his mind in imposing a life imprisonment sentence; that the first appellate court found no justification to interfere with it; and that, even in this appeal, it has not been demonstrated why, as an appellate court, we should interfere with the sentence meted out on the appellant.

Counsel referred to the case of *Wanjema v Republic* (1971) EA, 493 where general principles upon which a first appellate court can interfere with a sentence meted out by a trial court were enunciated. On this score, we were urged not to interfere with the sentence imposed on the appellant and as affirmed by the High Court.

27. In summary, Ms. Ongeti urged us to dismiss the appeal in its entirety.

28. We have considered the record of appeal, the submissions by both the appellant and the respondent, the decisions cited by the parties and the law.

29. From the outset, we wish to observe that, although the appellant's submissions only attacked the impropriety of the life sentence imposed on him, his grounds of appeal challenge both the conviction and sentence. Accordingly, we shall consider the merit or otherwise of both the conviction and sentence. In this respect, the issues that fall for our determination are: whether the appellant's right to a fair trial was violated; whether the case was proved beyond reasonable doubt and the propriety of the life sentence.

30. On the first issue as to whether the appellant's rights to a fair trial were violated, the appellant just made a bare ground of appeal that his right to a fair trial was violated, without specifying the law under which the violation occurred or the reasons for his contention. As noted above, he did not also submit on this ground. We discern from the Judgment of the High Court that he complained before that court of breach of Article 50(2) (c), (j) & (k) of the *Constitution*. The provisions speak to the right: '(c) to have adequate time and facilities to prepare a defence; (j)to be informed in advance of the evidence the prosecution intends to rely on, and have reasonable access to that evidence; and (k) to adduce and challenge evidence.'

31. On the part of the Court, we underscore the importance of observance of the right to a fair trial, being a right that cannot be derogated. A violation of the right to a fair trial tramples on criminal justice system because, a mere screw means that an accused may never experience freedom in his life. We say so because when an accused is facing a criminal trial, he stares at incarceration in jail, which can turn out to be a life imprisonment; at the worst, he/she can be executed if death sentence is the penalty. It is more worrisome for those who are unrepresented and not able to articulate their cases properly. That is why, when an accused person endeavours to complain of a violation of any of his rights to a fair trial, the trial court must take that complaint seriously and address it on the spot.

32. We do not say this in vain. Failure to have an accused person access the evidence which the prosecution will rely on in a trial means that he would not be afforded a fair-playing platform on which he can challenge that evidence. Simply put, he would be prejudiced during the trial, the result of which may, in the end, curtail his fundamental freedom. The Supreme Court of India in *Rattriram v State of M.P.* (2012) 4 SCC 516 in a three-judge bench said:

> " Fundamentally, a fair trial and impartial trial has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism."

33. The Court further said:

> "Decidedly, there has to be fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused..."

34. The High Court sitting at Kajiado in *Alfred Nyandieka v Director of Public Prosecutions & 2 others* (2020) eKLR, Mwita, J while holding that the respondents therein had not exercised their mandate in accord with the *Constitution* in arresting, charging and prosecuting the petitioner noted:

> "62. In *Jago v District Court* (NSW) [1989] HCA 46 (1989) 168 CLR 23(12 October 1989), Deane, J stated at 56-57 that:
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> > 'It is fundamental to the legal system that an accused be given a fair trial according to the law. The accused has 'a right not to be tried unfairly or as an immunity against conviction otherwise than after a fair trial.'"

35. As clearly noted by the learned Judge, when the appellant was in court and the trial was ready to proceed on 1st October 2019, he did not indicate to the trial Magistrate that he was not ready to proceed. It is also on record that he neither complained to the court that he had not been furnished with prosecution witnesses' statements or any other document or evidence that would have enabled him to proceed with the trial or mount a defence to counter the prosecution's case. Therefore, just as was noted by the learned Judge that it was too late in the day to make this complaint, we are equally of the view that the appellant has no basis on which to complain that his right to a fair trial was violated at this point in time. We add that the learned Judge aptly considered his complaint in this regard, and it is thus not factual, as he asserts, that this complaint was ignored by the Judge.

36. Notably, neither at first appeal nor in this second appeal are courts able to call evidence so as to come to the appellant's rescue. It is at the trial that evidence is recorded and complaints of this magnitude are raised so that it remains on record as to what steps the trial court took to ensure that an accused person's right to a fair trial is not violated. There being no record that he complained that he was not furnished with necessary evidence that would have enabled him to prepare for the trial, we can only conclude that this ground of appeal is unmeritorious and we accordingly dismiss it.

37. We now turn to the issue as to whether the offence of incest was proved beyond reasonable doubt. The appellant was charged with the offence of incest. Section 20(1) of the *Sexual Offences Act* Cap 63A provides for the offence of incest by male persons 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."

38. From the foregoing definition of the offence of incest, the requisite elements which the prosecution needed to prove are: sexual gender of the victim; the consanguinity relationship between the victim and the perpetrator; the act of penetration or indecent act; and the age of the victim. The undisputed facts are that the complainant was a female child and that the appellant was the father to the complainant.

39. On a proper consideration of the complainant's evidence, one cannot fail to be impressed with the comprehensive details of the account of the events that transpired on the material date. The appellant meticulously calculated the opportune day and time when the complainant with her siblings would

be in the field grazing goats for him to execute a plan he had perhaps contemplated for a period of time. He sent the complainant's siblings home and used the opportunity to viciously defile his own daughter. PW2, the grandmother to the complainant, corroborated the complainant's evidence as she testified that it was reported to her that the complainant was bleeding from her vagina. Indeed, she followed the complainant to hospital where she confirmed this fact. The medical reports produced by PW4 significantly supported the complainant's version of events. They confirmed that there was penetration, so much so that it necessitated the admission in hospital of the complainant for purposes of a reconstructive surgery since the vagina tore. We then find and hold that the prosecution proved that penetration occurred.

40. The age of the complainant was established by way of an age assessment that was done at Malindi sub-district Hospital. The age assessment report adduced in evidence by PW3 confirmed that she was 11 years old as at the time of the incident.

41. We also make the same conclusion as regards the issue of identification of the perpetrator. This was well dispensed with by both the trial court and the first appellate court. We only add that the offence having been committed in broad daylight, there was no chance of a mistaken identification of the perpetrator.

42. In the result, we are unable to fault the concurrent findings of the two courts below that the prosecution proved the offence of incest beyond reasonable doubt. We accordingly uphold the conviction of the appellant.

43. Finally, on the issue of sentence, the appellant submitted that the life sentence is not only harsh, but that it is also unconstitutional, and that we should substitute it for a more lenient one. We have cited the provisions of section 20(1) of the *Sexual Offences Act*. It sets a minimum mandatory penalty of ten (10) years imprisonment, and in its proviso, provides that the sentence can be enhanced to life imprisonment if the victim is under the age of 18 years.

44. The learned Judge, whilst citing the case of *Nilson v Republic* (1970) EA, 599, considered the factors that would warrant a first appellate court to interfere with a sentence passed by a trial court. And, in upholding the sentence, he had this to say:

> "In the instant case, the victim was aged 11 years at the time of the offence. In the circumstances of this case, I have no reason on the record to persuade me to interfere with the sentence meted out by the trial."

45. Can this court then interfere with the sentence on account that it is too harsh and unconstitutional? Section 361(1) (a) of the *Criminal Procedure Code* is the guiding torch. It states:

    1. A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section-

        a. On a matter of fact, and severity of sentence is a matter of fact;

        b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence.

46. It follows therefore that, unless the sentence is illegal, the mere fact that it is severe is not sufficient to warrant our interference with the concurrent findings of fact by the two courts below. The severity of a sentence is a matter of fact, which bars us from stepping into that arena. We can only interfere with a matter of fact in a decision of the first appellate court if it is shown that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider

matters they should have considered or that, looking at the evidence as a whole, they were plainly wrong in their decision. See *Njoroge v Republic* [1982] KLE 388.

47. That aside, the Supreme Court in the case of *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) (12 July 2024) pronounced itself on the application of mandatory minimum sentences provided for under the *Sexual Offences Act*. It stated:

> " 49. The Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case such omissions or commissions would be treated as matters of law. Consequently, the respondent's appeal on the ground that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction.
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> 69. 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. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

48. It is all clear then that we are divested of jurisdiction to interfere with the sentence meted by the trial court and upheld by the first appellate court. However, it would be remise of us to pen off without mentioning that it is disheartening that the appellant, the father of the victim found it in his heart and mind to viciously attack his own daughter to the extent that she had to undergo reconstructive surgery. Instead of being the shield and protector of his children, he turned himself into a beast. This amounted to abhorrent behaviour that cannot be condoned. In the circumstances of this case, the life imprisonment serves the objective not only of deterrence, but also of retribution and denunciation.

49. In the end, we find no merit in the appellant's appeal. We hereby uphold the Judgment of the High Court at Malindi (Waweru, J) dated 24th October 2023 and dismiss the appeal in its entirety.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2025.

A.K MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR