JAA v Republic (Criminal Appeal 35 of 2018) [2025] KECA 826 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 826 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 35 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

JAA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya of Kenya at Naivasha (C. Meoli, J.) dated 20th February 2018 in CRA No. 124 of 2015)

JUDGMENT

1. JAA (the appellant), was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* (the Act). The particulars of the offence were that on 18th July 2013 at (Particulars withheld) within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of SK, (PW1), a child aged 15 years, knowing her to be his daughter. He faced an alternative count of committing an indecent act with a child, contrary to section 11(1) of the same Act. It was alleged that on 18th July 2013, he intentionally and unlawfully caused his penis to come into contact with the vagina of SK., (PW1), a child aged 15 years.

2. In the ensuing trial, the appellant pleaded not guilty to the charges and the matter proceeded to full hearing. The prosecution called a total of five witnesses who included the victim (PW1), her mother, (PW2) and PW3, the Clinical Officer. The complainant (PW1) testified that she was 15 years old and that she lived with the appellant and her mother (PW2) at Kari. It was her evidence that on 18th July 2013 while she was at the kitchen, the appellant came home drunk and called her to the main house, he took her to his bedroom, removed her panties and put his genitalia into her vagina and defiled her. Her mother, (PW2) found them in the act and asked her what they were doing and she told her that the appellant had defiled her. The following day, PW2 took her to the hospital and she was put on medication. On 19th July 2013, the incident was reported to the police. PW1 further testified that it was not the first time the appellant had defiled her, since he had defiled her in February the same year

when her mother was away in Nairobi and when her mother returned from Nairobi, she told her of the defilement but her mother kept quiet and never took her to hospital.

3. PW2 testified that she was married to the appellant for over ten years and they had brought up PW1 as their daughter, though the appellant was not her biological father. She stated that on 18th July 2013, she came home late after her husband failed to pick her using his bicycle, and on arrival to their one room house which is partitioned with a curtain, she found her husband on top of PW1. The appellant pulled off and she asked them thrice what they were doing in her bed. PW1 climbed down from the bed and picked her panties and headed to the kitchen. PW2 further testified that she followed PW1 to the kitchen and PW1 told her that the appellant found her in the kitchen and asked her to come into the main house, and upon entering the house, he forced himself on her, she resisted but the appellant picked her by force, removed her panties, applied Vaseline on her genitalia and on his genitalia and defiled her. She also testified that she consulted her neighbour who worked at Kari dispensary and she referred her to the District Hospital in Naivasha. PW2 also testified that PW1 had never told her of a similar incident before but remembered that sometime back, PW1 called her and informed her that the appellant wanted to do "tabia mbaya" to her and on being confronted, the appellant vehemently denied the allegations.

4. PW3, Jane Wambui Njoroge, a Clinical Officer attached to Naivasha District hospital produced the P3 form and the PRC form and referral notes from Dairy Training Institute on behalf of Clinical Officer Dorcas Osoro. She testified that PW1 was brought to the hospital accompanied by her mother who was visibly depressed. Upon examination, it was established that PW1 had stomach pains, had bruises on her labia majora, her hymen was torn and she had lacerations on her vagina although there was no discharge, spermatozoa or blood stains. After further examination, pus cells were present in her urine and she was found to be HIV positive. It was also established that both her parents were on HIV medication.

5. PW4, Audrey Cherono attached to Naivasha Police Station, testified that, on 19th July 2017, she received a report that the appellant had defiled his daughter the previous night; and on 22nd July 2013 the appellant was arrested.

6. In his unsworn defence, the appellant stated that he was arrested on 22nd July 2013 at around 9.30 am at work, handcuffed and taken to Naivasha police station. He called PW2 who came to the police station and told him that she had talked to the prosecutor and they had agreed to withdraw the case. He was adamant that he never defiled his daughter and that on the fateful day his bicycle had a problem and he got home at 9.30 pm and he had been in constant communication with his wife since he used to drop her home and his bicycle was broken, he advised her to take a motor bike home. The appellant stated that he realized that his wife was HIV positive even before they got married and she did not disclose to him that she was on anti-retroviral drugs, and, it was when he took PW1 to hospital because she was always a weakling that he discovered she was HIV Positive and that himself and PW2 were all HIV positive.

7. Upon considering the evidence, the trial Magistrate in a judgment delivered on 15th July 2015 convicted the appellant for the offence of incest and sentenced him to serve life imprisonment. Aggrieved by the said verdict, the appellant appealed to the High Court at Naivasha in High Court Criminal Appeal No. 124 of 2015. However, the first Appellate Court (Meoli J.), upon considering the appeal, by a Judgment dated dated 20th February 2018 upheld both the conviction and sentence of life imprisonment.

8. The appellant is now before this Court in this second appeal in which he seeks to overturn the High Court decision citing the following grounds in his amended grounds of appeal dated 13th February

2024: (a) the charge sheet was defective contrary to Article 50 (2) (b) of *the Constitution* and Sections 134 & 137 (a) (i), (b) (i) (ii) of the *Criminal Procedure Code*; (b) the sentence imposed upon him violates Articles 25 (a) 27, 28 and 29 (1) (f) of *the Constitution*; (c) his right to legal representation was violated contrary to Article 50 (2) (h) of *the Constitution* and Section 43 (1) of the *Legal Aid Act*; (d) he was denied the benefit of mitigation contrary to section 216 and 329 of the *Criminal Procedure Code*; (e) the court failed to appreciate that he was under the influence of alcohol at the material time, therefore, the decision violates Section 13 of the *Penal Code*.

9. In his written submissions in support of his appeal, the appellant maintained that the charge sheet was defective because it never disclosed relevant information linking his blood relationship with the complainant contrary to section 22(1) of the Sexual Offence Act, which violated his constitutional rights under Article 50 (2) (h) as read with section 134 and 137 (a) (i), (b) (i) (ii) of the *Criminal Procedure Code*.

10. Regarding the mandatory sentence of life imprisonment, the appellant maintained that the discretion of the trial court was curtailed by the law that creates the said sentence, therefore, the sentence is unconstitutional for robbing him his personal dignity, right to mitigation and rating him as an inferior human being undeserving equal treatment and protection of the law contrary Articles 27, 28 and 29 of *the Constitution*.

11. Submitting on the right of legal representation guaranteed under Article 50 (2) (h) of *the Constitution* and Section 43 (1) of the *Legal Aid Act*, the appellant maintained that he was never informed of his right to legal representation at the expense of the State yet it was evident that substantial injustice would otherwise result, therefore, his rights were violated. He cited the High Court decision in Joseph Kiema Philip v Republic [2019] KEHC 7989 (KLR) where Nyakundi, J. held that substantial injustice is occasioned where an accused person is charged with an offence which carries a severe sentence of life imprisonment if he is not accorded legal representation.

12. Lastly, the appellant contended that the two courts below failed to consider PW1's evidence that he was drunk when he committed the offence and pursuant to Section 13 (2) and (4) of the *Penal Code*, his drunkenness automatically neutralized the fact that he might have intended to commit the offence.

13. In opposition to the appeal, learned prosecution counsel for the respondent, Mr. Omutelema submitted that all the ingredients of the offence of incest, being: prohibited range of kinship; penetration; identification of the perpetrator; and the age of the complainant were proved to the required standard and pursuant to Section 124 of the *Evidence Act*, the trial court was satisfied that PW1, was telling the truth and the 1st appellate court made the same finding that the appellant was caught in flagrante delicto by PW2, therefore, his alibi was displaced by the prosecution evidence since it was established that the appellant had sexual intercourse with PW1 and infected her with HIV virus. Further, PW1's evidence was graphic and was never shaken in cross-examination.

14. Regarding sentence, Mr. Omutelema submitted that the appellant was allowed to present his mitigation before he was sentenced. His mitigation notwithstanding, in the circumstances of the case, the appellant deserved a severe sentence because of the aggravating circumstances of the case which includes deliberately infecting PW1 with the HIV virus yet he was in a position of trust being PW1's half-father.

15. This is a second appeal, therefore, this Court's jurisdiction is limited to consideration of matters of law only. This Court is bound by the concurrent findings of fact by the two courts below, and, it may only depart from such findings only if the findings are not based on any evidence, or that they are derived from a misapprehension of the evidence, or are plainly untenable. (See Karingo v Republic [1982] KLR 219 and Section 361 of the *Criminal Procedure Code*). Having considered the record, the

submissions and the law, the issues for determination are: (i) whether the charge sheet was defective; (ii) whether the appellant's right to legal representation at the expense of the State was violated; (iii) whether the appellant's right under section 13 of the *Penal Code* were violated, and, (iv) whether the sentence was harsh, excessive and unlawful.

16. The ingredients for the offence of incest are: (i) proof that the offender is a relative of the victim; (ii) proof of penetration or an indecent Act; (iii) identification of the perpetrator; and (iv) proof of the age of the victim.

17. Before examining the above ingredients, we will first address the appellant's argument that the charge sheet was defective. This assertion was premised on his contestation that the charge sheet stated that he was the complainant's father, which was not true. As a result of this incorrect information, he claims he was unable to defend himself on the test of his relationship with PW1, therefore, his rights to a fair trial guaranteed under Article 50 (2) (b) of *the Constitution* were violated. In determining this issue, we bear in mind that Section 134 of the *Criminal Procedure Code* provides as follows:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving information as to the nature of the offence charged.

18. The appellant's contestation as we understand it is not that the charge sheet did not contain a statement of the specific offence or offences with which he was charged with, or that it lacked necessary particulars to provide information as to the nature of the offence. Conversely, all that he is saying is that the charge sheet stated he is the father of the child, which he claims was not true. We have read the charge sheet. It was properly drawn and it conforms to the above provision. Importantly, the appellant's contestation that he is not PW1's father will be addressed in the next issue when discussing the test of relationship, which is whether PW1 and the appellant's relationship falls within the prohibited degrees contemplated under Section 20 (1) of the Act.

19. It is an essential ingredient of the offence that the prosecution establishes that the victim falls within the prohibited degrees stipulated in the above section. The Black's Law Dictionary 2nd Edition, defines incest as the crime of sexual intercourse or cohabitation between a man and woman who are related to each other within the degrees wherein marriage is prohibited by law. Section 20 (1) of the Act reads:

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.

20. A single act of intercourse between persons within the prohibited degree of relationship is sufficient to constitute the crime of incest. There is uncontroverted evidence that the appellant was married to PW2, but he is not the biological father of PW1. The drafters of the *Sexual Offences Act* were conscious about eventualities such as the fact that children can be born out of wedlock or where children are born within a marriage, but, after divorce, their parents re-marry and their children are adopted by the new

spouses or where married couples adopt children. To cover such eventualities,Parliament in its wisdom enacted Section 22 (1) and (3) of the Act which provides for test of relationship as follows:

> " 22. Test of relationship
>
> 1. In cases of the offence of incest, brother and sister includes half brother, half sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not.
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> (3) An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest."

21. There is uncontroverted evidence that the appellant was married to PW1's mother, and that he had taken her as his child, therefore the presumption created by sub-section (3) comes into play. There is nothing on record to show that the appellant rebutted this presumption. On the contrary, the evidence adduced leaves no doubt that the appellant had accepted PW1 as his child. Therefore, the appellant's argument that the complainant does not fall within the prohibited relationships is unsustainable. (See this Court's decision in AKK v *Republic (Criminal Appeal 41 of 2018)* [2021] KECA 15 (KLR) (23 September 2021)).

22. We now address the question whether penetration was proved.

    The word indecent act used in Section 20 (1) is defined in Section 2 of the Act as follows:

> " Indecent act means an unlawful intentional act which causes: -
>
> a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act of penetration.
>
> b) ....
>
> 'Act which causes penetration' means an act contemplated under this Act."

23. The prosecution bears the onus of proving that an "indecent act" or "act which causes penetration" has been committed in addition to proving the relationship between the accused and the complainant as well as the age of the complainant. In support of the "indecent act" and "act which causes penetration" is the evidence of the complainant, her mother (PW2) who found them in the act and the medical evidence. This is a case where the appellant was caught in the act by his wife (PW2). This fact was not disputed. PW1 gave a detailed account of how the appellant came home drunk and called her from the kitchen to the main house and put her in bed and defiled her. It was her testimony that this was not the first time. He had done it before. The evidence of PW1 and PW2 was supported by the medical evidence which was not challenged.

24. PW1 testified that the appellant defiled her in February when her mother was away in Nairobi and that he also came home on 18th July 2013 while drunk, summoned her to the main house and forced himself on her. PW2 testified that he found the appellant on top of PW1 in the act, PW1, on asking them what they were doing in her bed, PW1 climbed down from the bed picked her panties from the floor and headed to the Kitchen where PW2 followed her and confirmed that the appellant had defiled her. It is noteworthy that the evidence of defilement was corroborated by the medical evidence of PW4

who produced the P3 Form, PRC form and treatment notes which led to the conclusion that indeed PW1 was defiled since her hymen was broken, she had bruises on her labia majora and had laceration on her vagina.

25. It is also noteworthy that the trial court found PW1 to be a truthful witness and relied on section 124 of the *Evidence Act* and was persuaded that the act of penetration by the appellant was proved and convicted the appellant for the offence of incest. (See FMM v Republic (Criminal Appeal No. 58 of 2020) [2023] KECA 673). Just like the two courts below, we too are satisfied that penetration was proved to the required standard.

26. In fact, the appellant faults the two courts below for failing to appreciate that he was drunk at the material time, effectively admitting committing the indecent act with PW1 but raising the defence of intoxication. In other words, the appellant urges this Court to find that the defence of intoxication ought to have been up held. We find no reason to fault the two courts below for finding that an indecent act was proved.

27. The other ingredient is that the victim must be a female person who is to the knowledge of the assailant, his daughter, granddaughter, sister, mother, niece, aunt or grandmother. We have herein above stated that the complainant is the appellant's father, having married her mother. In fact, the appellant admits this relationship. It is also common ground that the complainant is a female person within the meaning of Section 20 (1) of the Act and that he knew her to be his daughter. These basic truths which are essential ingredients of the offence of incest were not contested at all.

28. Regarding the complainant's age, it was her evidence that she was 15 years old at the time of the incident. This evidence was corroborated by PW2, who produced her birth certificate indicating that she was 15 years old.

29. We now turn to the appellant's contention that his rights under Article 50 (2) (h) of Constitution were breached because he was not informed of his right to legal representation in accordance with Section 43 (1) of the *Legal Aid Act*. We note that the record is silent on whether the appellant was informed of his right to legal representation at the expense of the state since he was facing life imprisonment. Be that as it may, the record shows that on 23rd July 2013, he pleaded not guilty, and thereafter, hearing commenced on 4th April 2014, and the appellant cross-examined all the witnesses.

30. This Court in William Oongo Arunda (Hitherto referred to as Patrick Oduor Ochieng) v *Republic (Criminal Appeal No. 49 of 2020*) [2022] KECA 23 (KLR) held that the operative circumstance that triggers the necessity of legal representation in criminal proceedings is where substantial injustice would occur arising from the complexity and seriousness of the charge against the accused person, or the incapacity and inability of the accused person to participate in the trial. The court also noted that it should be standard practice in every criminal trial for the accused person to be informed, at the onset, of his right to legal representation since *the Constitution* demands it.

31. However, in the present appeal, the appellant did not raise the issue of legal representation either before the trial court or the first Appellate Court, and the record of the trial court shows that the appellant participated in the trial and cross-examined the witnesses, and it is not evident that he suffered substantial injustice. For these reasons, we do not find any merit in the appellant's argument's that his rights to a fair trial under Articles 50 (2) (g) and 50(2) (h) of *the Constitution* were violated. In any event, the appellant having failed to raise the issue of violation of his right to legal representation pursuant to Article 50 (2) (h) of *the Constitution* in his appeal before the High Court, he is precluded from addressing the said issue before this Court and we are therefore precluded from making a determination on the issue.

32. Similarly, regarding the alleged breach of Section 13 of the *Penal Code* by the two courts below, we have carefully considered the record, and we note that the appellant never raised a defence of intoxication in his unsworn statement. However, PW1 confirmed that the appellant was drunk that evening. Nevertheless, as the record shows, the issue of the appellant' intoxication was never considered by the trial court and/or the first appellate court, therefore, we are precluded from addressing the said issue in this appeal.

33. Regarding the appellant's challenge on the legality of the sentence imposed upon him by the trial magistrate and affirmed by the first Appellate Court, and his assertion that the mandatory nature of the life sentence denied him an opportunity to properly mitigate his sentence, having gone through the record, and having considered the appellant's undated grounds of appeal and amended grounds of appeal before the 1st Appellate Court, it is evident that the appellant never challenged the sentence before the two courts below. Therefore, this ground is also being urged before this Court for the first time.

34. The above notwithstanding, we note that before the trial court, the appellant was given an opportunity to mitigate and he informed the trial court that he was HIV positive and prayed for leniency since he was very sick and lived on drugs. As the record shows, the learned magistrate considered his mitigation and found that having considered the nature of the offence and the circumstances, the offence attracted a mandatory sentence under the law. Much as we appreciate that the legality of the sentence is a matter of law, the Supreme Court affirmed the lawfulness of the mandatory/minimum sentences in Petition No. E018 of 2023, Republic v Joshua Gichuki Mwangi & Others where it stated:

> "(57) In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities...
>
> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

35. Arising from our discussion and conclusions arrived at on all the issues discussed above, it is our finding that this appeal has no merits and it is hereby dismissed.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.