JH v Republic (Criminal Appeal 18 of 2019) [2024] KECA 228 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KECA 228 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 18 OF 2019

MSA MAKHANDIA, AK MURGOR & GV ODUNGA, JJA

MARCH 8, 2024

BETWEEN

JH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya (Nyakundi J.) dated 31st March, 2022 in Malindi HCCRA No. 111 of 2016)

JUDGMENT

1. The appellant was convicted for the offence of incest contrary to section 20 (1) of the *Sexual Offences Act* by the Senior Resident Magistrates' Court at Kilifi and sentenced to life imprisonment. His first appeal to the High Court against both conviction and sentence was unsuccessful, hence this second appeal.

2. The jurisdiction of this Court on a second appeal is well settled. In *Karani v Republic* [2010] 1 KLR 73, this Court expressed itself as follows on the issue:

> " This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the Superior Court on facts unless it is demonstrated 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, in which case such omission or commission would be treated as matters of law."

3. It is against that jurisdictional remit that we shall determine this appeal. However, before we do so we need to briefly examine the evidence that was tendered before the trial court and re-appraised by the High Court in reaching the impugned judgment.

4. The appellant as already stated was charged with the offence of incest by a male person contrary to section 20(1) of the *Sexual Offences Act*. The particulars being that on diverse dates between March, 2009 and 13th September, 2009 at Ganze in Kilifi District within Coast Province, the appellant intentionally and unlawfully caused penetration of his genital organ namely penis into the genital organ namely, vagina of ZJ a girl aged 17 years knowingly or having reasons to believe to be his daughter.

5. The facts of the case were that ZJ, PW1 was 17 years old at the time of the incident and used to live with her grandmother in Mtwapa area in Kilifi. According to her, sometimes in January 2009, the appellant who was her father took her back to their home at Ganze with the aim of finding out if she was still a virgin. After having forceful sex with her, he concluded that she was not. The appellant repeated the act four times on diverse dates despite her protestations. According to her, when the appellant tried the act for the fifth time, she ran to the Administration Police camp at Ganze where she reported to the District Officer (D.O) what had transpired. She also informed PW2, a brother to the appellant regarding the incidents on 13th September, 2009.

6. PW2 confirmed that PW1 was a biological daughter of the appellant. He stated that at around 5.00pm while fetching water near the appellant's home was approached by PW1, who wanted to talk to him but was unable to do so as some people joined them. Later, he received information that PW1 had been beaten by the appellant. When he went to inquire, he was told by PW1 that the appellant had wanted to have sex with her and when she refused, the appellant beat her up. That the appellant had previously, had several forced sexual intercourse with her. That she had reported the incidents to the D.O, who called the appellant and grilled him over the same. He later caused the appellant's arrest by PW3, APC Abdi Kiano in the company of PC Ndundi, then stationed at his offices.

7. In his defence, the appellant gave unsworn evidence and stated that he had quarreled with PW2 over land, who had threatened to have him jailed for life. That PW1 was very promiscuous and he had declined to take dowry for PW1 from her various suitors, hence the frame-up.

8. The trial court nonetheless found the appellant guilty and sentenced him to life imprisonment.

9. As already stated the appellant was aggrieved by both the conviction and sentence and therefore proffered an appeal in the High Court at

   Malindi. The appeal was heard by Meoli J, and in a judgment delivered on 19th December 2012, she upheld the trial court's conviction and sentence. The appellant has now lodged this second appeal contending that the charge sheet was fatally defective; the offence was not proved; crucial evidence was withheld leading to a miscarriage of justice; and that the sentence imposed was unconstitutional, harsh and excessive in the circumstances.

10. The appeal was canvassed by way of written submissions. In his submissions, the appellant stated that the charge sheet was defective as it was at variance with the evidence adduced, in particular, that PW1 had stated that the incidents happened in January 2009, whereas the particulars in the charge sheet indicate that the incidents happened on diverse dates between March and 13th September, 2009.

11. It was also submitted that PW1 never testified that she had been medically examined to ascertain the allegations of incest. The appellant further submitted that crucial witnesses like her mother, grandmother and grandfather were not invited to testify in support of her case. Reliance was placed on the case of *Bukenya v Uganda* (1972) EA 549 for the proposition that the prosecution is duty bound to avail all the witnesses to prove the charge, even if the evidence may be inconsistent with its case, otherwise an adverse inference may be drawn for that failure. The appellant submitted that life

imprisonment imposed on him was unconstitutional by dint of the Supreme Court decision in *Francis Muruatetu v Republic* [2017] eKLR.

12. The appellant made reference to the case of *Baraka Safari v Republic* HCCRA No. 75 of 2016 (UR) where the appellant's sentence of life imprisonment for defiling an 8-year-old girl was substituted with 15 years. According to the appellant, the proper construction of the words "shall be liable for" used in the sentence section of the offence is that a lesser penalty can still be imposed. Reliance was placed on the cases of *Opoya v Uganda* (1967) EA 752 and *DMM v Republic* [2016] eKLR for the proposition. The appellant submitted lastly, that if this Court is minded to uphold the High Court judgment, it should at least consider reducing the sentence imposed for being harsh and excessive.

13. On its part, the respondent submitted that the age of PW1 was proved by herself when she stated that she was 17 years old at the time of the incidents. Equally, by the use of common sense by the court as was held in the case of *Joseph Kiet Seet v Republic* [2014] eKLR and *Musyoki Mwakavi v Republic* [2012] eKLR.

14. On medical evidence, it was submitted that though medical evidence may be called for corroboration purposes, the lack of it does not fatally affect the prosecution case. There are other ways and means of proving the offence, for instance, if it is proved that the accused committed an indecent act with the victim. While relying on the case of *GMB v Republic* [2018] eKLR, the respondent submitted that in incest cases, penetration was not a necessary ingredient. Further,

    it was her submission that based on the proviso to section 124 of the *Evidence Act*, the trial court was permitted to use the singular evidence of the victim of the offence to convict an accused as long as the trial court gives reasons and that this was what happened here.

15. On the last ground, the respondent submitted that pursuant to section 20(1) of the *Sexual Offences Act*, the punishment for the offence is life imprisonment that the trial court imposed and which was confirmed by the first appellate court. This was informed by the age of the victim who was below 18 years. That this Court can only interfere with the sentence imposed, if it was shown that the sentence was not legal or was too harsh and excessive in the circumstances. This was not the case here. The respondent thus prayed that the appeal be dismissed.

16. 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; crucial witnesses were not summoned to testify, and lastly, whether the sentence imposed was harsh and excessive in the circumstances.

17. 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."

18. Further, the prosecution is bound to prove the commission of an indecent act or an act that causes penetration with the victim. In the instant case, there was no denial by the appellant that PW1 was his daughter and that she was 17 years old at the material time. From the evidence on record, PW1 was a straightforward and consistent witness. We agree with the concurrent findings of the two courts below on the issue of the age of PW1 as well as her relationship with the appellant, which was proved to the required standard. We do not find any error in the way both the trial and first appellate courts dealt with the issue.

19. As regards the second ingredient of the offence being either penetration or indecent act, PW1 testified in detail and graphically as to how the appellant, had sex with her severally on diverse dates. That evidence though not corroborated by medical evidence, the trial court and the first appellate court nonetheless arrived at concurrent findings of fact that PW1 was a truthful and believable witness. This in itself overrode the requirement for medical evidence being tendered regarding penetration, which was in line with the proviso

to section 124 of the *Evidence Act*. The provision is to the effect that an accused person can be convicted based on the sole evidence of the victim provided that the court does believe her and records the reasons for such belief. This is what exactly happened here.

20. This Court in *Arthur Mshila Manga v Republic* Criminal Appeal No. 24 of 2014 [2016] eKLR held that:

> " It is trite that under the proviso to section 124 of the *Evidence Act*, a trial court can convict on the evidence of the victim of a sexual offence alone. (See *Mohamed v Republic* [2008] KLR (G&F), 1175 and *Jacob Odhiambo Odhiambo v Republic* [supra]. However, before the court can do so, it first must believe or be satisfied that the victim is telling the truth and secondly it must record the reasons for such belief."

21. On the issue of the charge sheet being defective, it was submitted that, for instance, PW1 stated that the incidents happened in January 2009, when the particulars in the charge sheet indicated that the incidents happened on diverse dates between March and 13th September, 2009. Therefore, the evidence tendered was at variance with the particulars of the charge sheet.

22. Having considered the record of the trial court in its entirety, it is clear that the difference in dates in the particulars of the charge sheet did not in any way prejudice the appellant from understanding the charges levelled against him or making his defence. In our view, the appellant fully understood the case confronting him and participated in the trial, by cross-examining the witnesses and even giving his own defence. It cannot therefore be said that the appellant

suffered prejudice and or injustice because of the variance in the dates in the charge sheet and the evidence tendered in support thereof.

23. In any event, the confusion in dates the dates of the incidents if any, is curable under section 382 of the *Criminal Procedure Code*. This court in *Benard Ombuna v Republi*c [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!

24. As regards the failure to call key and crucial witnesses, we would state that section 143 of the *Evidence Act* specifically provides that: "...No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact" and therefore, the prosecution is not obliged to call a superfluity of witnesses. See *Keter v Republic* [2007] EA 135. So that, the prosecution having called the witnesses whose evidence pointed to the appellant as having been responsible for the offence, there was no need to call the witnesses alluded to by the appellant.

25. As regards sentence, the age of PW1 was proved to be under 17 years. By virtue of the age, the appellant was liable to imprisonment for life. However, taking a cue from the Sentencing Policy Guidelines, considering the age of the appellant, his record as a first offender, and the minimum sentence provided, the effect of the offence on her, the aggravating circumstances, and the life sentence was harsh in the circumstances of the offence.

26. As to what "shall be liable" means, the Court of Appeal for East Africa in the case of Opoya (supra) had an opportunity to clarify and explain the words "shall be liable on conviction to suffer death". The Court held that in the 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 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".

27. On the basis of the foregoing, we are satisfied that the trial court was not bound to impose the maximum sentence. It had the discretion to impose any other sentence.

28. 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 v Republic* [2015] eKLR. Given the foregoing, we are satisfied that the sentence imposed was harsh and excessive thus inviting our intervention.

29. All in all, we find this appeal bereft of merit on conviction. However, the appeal on sentence succeeds. In the result, the prison term of life sentence imposed on the appellant is hereby set aside and substituted with a sentence of 15 years effective from the date of sentence by the trial court.

30. This ruling is delivered pursuant to Rule 34(3) of the *Court of Appeal Rules, 2022* as Murgor, J.A has declined to sign.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF MARCH, 2024.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR