



REPUBLIC OF KENYA



**KENYA LAW**  
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**PKL v Republic (Criminal Appeal 6 of 2017) [2024] KECA 572 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 572 (KLR)

**REPUBLIC OF KENYA**  
**IN THE COURT OF APPEAL AT NAKURU**  
**CRIMINAL APPEAL 6 OF 2017**  
**PO KIAGE, FA OCHIENG & WK KORIR, JJA**  
**MAY 24, 2024**

**BETWEEN**

**PKL ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

*(Appeal from a Judgment of the High Court of Kenya at Bomet  
(M. Muya, J.) dated 20th July, 2016 in H.C.CR.A. No. 39 of 2015)*

**JUDGMENT**

1. The appellant, PKL was charged with the offence of incest contrary to Section 20(1) of the [Sexual Offences Act](#).
2. The particulars of the offence were that on 21<sup>st</sup> February 2010 at about 5:30 pm in Bomet District within the then Rift Valley province, the appellant caused his penis to penetrate the vagina of J.C, a girl under the age of 18 years knowing her to be his sister.
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](#).
4. On Counts II and III, the appellant was charged with assault causing actual bodily harm contrary to Section 251 of the [Penal Code](#). He pleaded not guilty and he was released on a cash bail of Kshs. 10,000.
5. The appellant pleaded guilty to the first charge. The facts as read to him by the prosecution were that; on 21<sup>st</sup> February 2010 at around 5:30 pm the complainant's mother left with her siblings to go collect milk from her brother-in-law's place. The complainant was 7 years old. The appellant, who was the complainant's brother, gave her a bunch of keys and told her to go open his house and wait for him. When the appellant came, he ordered the complainant to go to bed and remove her pants before he had carnal knowledge of her.



6. When the complainant's mother came, she found her missing and was informed that the appellant had taken her. She went to the appellant's house where she heard the complainant screaming for help. She pushed the door open and found the appellant having sex with the complainant.
7. When the appellant saw her, he ran away. He came back at around 7:30 pm armed with a knife and attacked the complainant's mother who was slightly stabbed on the left upper side of the eye. Her husband came to her rescue and a struggle ensued. He sustained an injury to his head.
8. The following morning, the complainant's father informed the neighbours who searched for the appellant and found him hiding near the river. He was arrested and taken to Bomet Police Station.
9. The appellant confirmed that the facts were correct.
10. In his mitigation, the appellant stated that he was sorry and that his actions were due to being drunk.
11. The learned trial Magistrate sentenced the appellant to life imprisonment.
12. On counts II and III, the appellant was found guilty but was discharged under Section 35(1) of the [Criminal Procedure Code](#) because he was serving a life sentence.
13. Aggrieved, the appellant appealed to the High Court where his conviction and sentence were upheld, leading to the present appeal.
14. The learned Judge noted that the issues raised by the appellant were that; the charge sheet was fatally defective for failing to include the words 'unlawfully' and 'intentionally'; that the trial court did not caution the appellant on the seriousness of the charges facing him and the applicable sentence if convicted; and that his defence of intoxication was not considered.
15. The learned Judge held that the appellant could not benefit from the defence of intoxication as he did not indicate the source of the alcohol he partook of, and whether or not he consented to its consumption. The learned Judge found that an evaluation of the facts was not consistent with the acts of a man who had not known that what he was doing wrong or did not know what he was doing, in the context of Section 13(1) of the [Penal Code](#).
16. The learned Judge held that the charge sheet indicated that the complainant was the appellant's sister, penetration was proved by the P3 form and the P3 form showed that the complainant was 7 years old.
17. The learned Judge further held that the appellant's plea was unequivocal. The charge was read over to the appellant in a language he understood and the facts were also read over to the appellant and he admitted to the correctness of the said facts.  
  
As the offence of incest does not carry a mandatory death sentence, the learned Judge found that the failure to caution the appellant was not fatal.
18. Dissatisfied with the impugned judgment, the appellant lodged the present appeal in which he raised two grounds of appeal to wit that:
  - a) The plea of guilty was not unequivocal and as such he was greatly prejudiced.
  - b) The sentence imposed was harsh and excessive since it was applied in mandatory terms as provided by statute."
19. When the appeal came up for hearing on 13<sup>th</sup> February 2024, the appellant appeared in person while Mr. Omutelema learned prosecution counsel appeared for the respondent. Parties relied on their respective written submissions.



20. However, the appellant abandoned his appeal on conviction, whilst Mr. Omutelema submitted that the life imprisonment be commuted to a determinate sentence.
21. We have carefully considered the record, the submissions by the parties, the authorities cited, and the law. The issue for determination is whether the sentence meted against the appellant was lawful in the circumstances.
22. This is a second appeal. The jurisdiction of this Court is limited to consideration of matters of law only. Accordingly, we are generally bound by the concurrent findings of fact by the two courts below departing therefrom only where they are not based on any evidence or proceed from a misapprehension of the evidence or are untenable. (See: *Karingo v Republic* [1982] KLR 219 and Section 361 of the *Criminal Procedure Code*).
23. The appellant was charged with the offence of incest under Section 20(1) of the *Sexual Offences Act*. It provides:
- “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 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.”
24. As the issue of conviction is not in dispute, we proceed to determine whether or not the sentence was justified.
25. We note that in his mitigation, the appellant submitted that he was only 19 years old at the time and therefore, still very young.
- However, we find that he committed a heinous act, and even physically assaulted his parents, in the process. It would be fair that he serves a sentence in prison for a considerable length of time. Considering that he also attacked his parents physically, justice demands that he be accorded sufficient time to be rehabilitated.
26. We have considered the appellant’s age; the nature of the offence committed; the age of the complainant; and the fact that the appellant and the complainant lived in the same compound and we cannot overlook the fact that the actions of the appellant occasioned trauma and suffering to a young girl who is his younger sister. The appellant’s actions demonstrate that the young and vulnerable that are around him could be in jeopardy, unless the appellant is properly and adequately rehabilitated.
27. The principles upon which this Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of *Ogolla s/o Owuor vs R*, (1954) EACA 270 wherein the court stated as follows:
- “The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R v Shershowsky* (1912) CCA 28TLR 263).”



- 28. In the case of *Wanjema v Republic* [1971] E.A. 493, 494, the court held that the appellate court is entitled to interfere with the sentencing discretion of the trial court where there is a plain error, such as one of omnibus sentence, or if there is illegality of the sentence. It is our considered view that the trial court considered the correct principles in imposing the sentence of life imprisonment, in accordance with the understanding of the law at the time.
- 29. For the offence of incest, the law dictates that; “the accused person shall be liable to imprisonment for life”. As already indicated herein, the trial court cannot be faulted for handing down the said sentence.
- 30. However, the emerging jurisprudence in Kenya persuades us that a sentence of life imprisonment is indeterminate in nature, as nobody knows how long the convict so sentenced, will serve.
- 31. It is our considered view that the duration of 30 years, as suggested by the court in the case of *Christopher Ochieng v Republic* [2018] eKLR, is only a guide, about the period which ought to be served by a person who has been sentenced to life imprisonment. In this case, we hold the view that the aggravating facts are such that the court cannot limit itself to the suggested duration.
- 32. In light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, we substitute the life imprisonment meted against the appellant with a sentence of 35 years imprisonment. The sentence shall run from 23<sup>rd</sup> February 2010 which is the date when the appellant was first arraigned in court and also sentenced.

Orders accordingly.

**DATED AND DELIVERED AT NAKURU THIS 24<sup>TH</sup> DAY OF MAY, 2024.**

**P. O. KIAGE**

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**JUDGE OF APPEAL**

**F. OCHIENG**

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**JUDGE OF APPEAL**

**W. KORIR**

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**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

