JMI v Republic (Criminal Appeal 50 of 2020) [2024] KECA 758 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 758 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 50 OF 2020

PO KIAGE, FA OCHIENG & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

JMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Naivasha (Hon. C. Meoli, J.) delivered and dated 17th November 2016 in HCCRA No. 13 of 2015)

JUDGMENT

1. This is a second appeal by the appellant, JMI.

   The appellant first appeared before the Chief Magistrate's Court at Naivasha where he faced the charge of incest by a male person contrary to section 20(1) of the *Sexual Offences Act*. The particulars of the charge were that on an unknown date and time in July 2023 in Maai Mahiu township within Nakuru County, the appellant willfully and unlawfully caused his penis to penetrate the vagina of BW aged 13 years, who he knew to be his daughter. Arising from the particulars of the main charge, the appellant also faced an alternative charge of indecent act contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant denied the charges but at the conclusion of the trial he was found guilty on the main count and sentenced to life imprisonment. His appeal to the High Court was unsuccessful as it was dismissed in its entirety by Meoli J. on 17th November 2016.

3. Undeterred, the appellant is now before this Court faulting his conviction on the grounds that: the investigating officer did not append his signature on the investigation diary; the evidence was not corroborated; the grudge element in his defence was not considered; and, the medical report was inconclusive.

4. In summary, the prosecution's case was that BW was at home alone with the appellant having been asked by the appellant not to go to church with her younger sister TN. (PW2). As was the routine, PW2

left for the church. Their mother was away. When the coast was clear, the appellant asked B.W. to dress in her mother's clothes and inner garments. Thereafter, the appellant commanded B.W. to undress, directed her to the bed and proceeded to defile her. On another day, in the night, the appellant asked BW to leave where she was sleeping with PW2 and join him in his bed. The appellant then defiled her. BW, fearing that the appellant may defile PW2 as well, plotted an escape to their grandmother's home at Nyahururu. A few days later the two girls started the trek to Nyahururu. Darkness found them in Maai Mahiu where they sought refuge in a nearby home. It is here that BW shared her ordeal with the host lady who later informed the area chief. PW1 and PW2 were later escorted to Maai Mahiu Police Station and then to hospital where it was confirmed that she had lost her innocence. The appellant was subsequently arrested and charged.

5. The appellant's defence was that BW who was his daughter was aged 15 years. He denied committing the offence terming the charges as fabricated and attributed his prosecution to a pre- existing grudge with her wife. He also attributed his predicament to PW6 Stanley Mwaura who he alleged to be his wife's lover and pretended to be a chief but denied being a chief when he came to court to testify. The appellant further testified that BW had been coerced to go and live with PW6 but she ran away. The next day she was found by police officers who threatened to beat her if she did not tell them what they wanted to hear.

6. When this matter came up for hearing on 12th February 2024 on the Court's virtual platform, the appellant was in person while learned counsel, Mr. Omutelema, appeared for the respondent. Both the appellant and the respondent had filed written submissions which they sought to wholly rely upon.

7. Relying on his submissions dated 10th January 2024, the appellant submitted that the case against him was not proved beyond reasonable doubt. The appellant contested that two of the ingredients of the offence of defilement, being the age of the complainant and penetration, were not proved by the prosecution. On the issue of penetration, the appellant submitted that the clinical officer (PW3) testified that the alleged offence happened six months earlier and that such a period was too long to sufficiently prove penetration. He also argued that the failure to call, as a witness, the medical officer who first attended to the complainant was fatal to the prosecution case as it meant that the evidence of PW3 was not corroborated.

8. Turning to the issue of the age of the complainant, the appellant submitted that the evidence on record was at variance with the particulars in the charge sheet as the witnesses testified that the complainant indicated that she was 14 years old whereas the charge sheet stated that she was 13 years old. According to the appellant, the contradiction should have been reconciled in his favour.

9. On an issue unrelated to the ingredients of the offence of defilement, the appellant faulted the trial Court for not conducting voir dire examination on PW1 and PW2 who were minors before receiving their evidence. He relied on Johnson Muiruri v. Republic [1983] KLR 447, among other authorities,to underscore the importance of conducting voir dire examination on a potential witness of a tender age. The appellant urged us to find that this omission offended the express provisions of section 19 of the *Oaths and Statutory Declarations Act* and section 233 of the Criminal Procedure Code and that we should therefore allow the appeal against conviction.

10. In his challenge against the life imprisonment imposed on him, the appellant argued that the life sentence provided in section 20(1) of the *Sexual Offences Act* is not mandatory but discretionary. The appellant referred to the decision of this Court in M.K. v. Republic [2015] eKLR in support of his argument. It was further the appellant's position that life imprisonment has, in any event, been declared unconstitutional by this Court in Julius Kitsao *Manyeso v. Republic, Malindi Criminal Appeal No. 12 of 2021*. The appellant consequently urged us to set aside the sentence for being imposed in its

mandatory nature and for being unconstitutional. In the end, the appellant urged us to allow the appeal.

11. For the respondent, Mr. Omutelema relied on the submissions dated 9th January 2024 and set off by pointing out the mandate of this Court on second appeals. In opposition to the appeal against conviction, counsel recounted the evidence on record and submitted that all the elements of the offence of incest found in section 20(1) of the *Sexual Offences Act* were proved beyond reasonable doubt. Concerning the complainant's age, counsel submitted that the prosecution was only required to establish that the complainant was below 18 years, which it did.

12. Rejecting the appellant's contention that his defence was not considered, counsel submitted that the defence was considered by the two courts below and found not to be credible as it did not in any way discount the evidence that had been put forth by the prosecution.

13. Turning to the appellant's challenge against sentence, counsel asserted that the life imprisonment meted upon the appellant was appropriate in the circumstances of the case. In persuading us not to interfere with the sentence, counsel argued that the sentence was not handed down in its mandatory nature. Further, that life imprisonment is a legal sentence. Counsel therefore urged us to dismiss the appeal.

14. This is a second appeal and by dint of section 361 (1) (a) of the Criminal Procedure Code, our mandate is limited to considering matters of law. Where the two courts below have made concurrent findings of fact, we must respect those findings unless we are satisfied that the conclusions are not supported by the evidence on record or are based on a perversion of the evidence. This legal position has been expressed in numerous decisions of this Court, including Adan Muraguri Mungara V. Republic [2010] eKLR, where it was held that:

> "Adan is now before us on his second and final appeal which may only be urged on issues of law (section 361 Criminal Procedure Code). As this Court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere."

15. Having reviewed the record of appeal and the submissions of the parties, we find that the issues for determination are: whether the offence of incest was proved against the appellant; the import of lack of voir dire examination in regard to the evidence of PW1 and PW2; and, whether the appellant has made out a case for our interference with his sentence.

16. On the first issue, the appellant's contention is that the offence of incest under section 20(1) of the *Sexual Offences Act* was not proved against him. In his submissions, he attacks the decision of the first appellate Court on the grounds that the element of penetration and the age of the complainant were not proved to the required standard. In his submissions, he indicated that he was not challenging the element of his identity as the complainant was his own daughter. Still on this issue, the appellant submitted that his evidence was not considered.

17. Concerning the question of the complainant's age, we agree with the respondent's counsel that in respect to the offence of incest by male persons under section 20(1) of the *Sexual Offences Act*, all that the prosecution is required to do is to establish that the complainant was a female person under the age of 18 years. The provision is not the same with that of defilement under section 8(1) of the *Sexual Offences Act*, which specifies in a graduated manner the age of the complainant for purposes of

sentencing. Faced with a similar argument in SKG v. Republic[2023] KECA 1547 (KLR), the Court held that:

> "Furthermore, we are of the view that unlike for the offence of defilement under section 8 of the *Sexual Offences Act* where the age of the complainant determines the conviction and the appropriate sentence, the core ingredient in the offence of incest under section 20(1) of the *Sexual Offences Act* is the degree of the consanguinity between the persons involved. In a case of incest, the need to prove that the person involved in the coitus with the accused person is under 18 years is so as to allow the trial magistrate to exercise discretion and enhance the minimum sentence of 10 years to any period between the minimum sentence and the maximum sentence of life imprisonment. It must be appreciated that in charge of incest whether under section 20(1) or section 21 of the *Sexual Offences Act*, the existence of consent between adults is not a defence."

18. It therefore, follows that all the prosecution ought to have established was that the complainant was below 18 years. In this case, all the evidence led to the conclusion that the complainant was below 18 years. Even though the charge sheet stated that the complainant was 13 years, the complainant in her own evidence stated that she was 15 years old. The age assessment report indicated that she was 15 years old while PW3 estimated the complainant's age to be 13 years old. PW6 stated that the older one of the girls appeared to have been 11 years old. The appellant in his defence testified that the complainant, who was his daughter, was aged 15 years old. Her age was likely to have been 15 years old considering the testimony of the complainant and the age assessment report. There is therefore no doubt that the complainant was below 18 years at the time of the commission of the offence because there was unanimity between the prosecution and the defence that the complainant was indeed a child at the material time.

19. This then leads us to the question as to whether the complainant and PW2, ought to have been subjected to voir dire examination prior to the reception of their evidence. The appellant contends that the trial Court ought to have subjected the complainant to voir dire examination before taking her evidence if she was indeed a minor. We hear the appellant to be saying that the failure to comply with the procedure rendered the evidence of the two girls inadmissible and reliance on their evidence to support his conviction was untenable. Counsel for the respondent did not address this issue.

20. The Court in Maripett Loonkomok v. Republic [2016] eKLR reiterated that whichever form the voir dire examination takes, the same must be reflected on the record. Upon perusal of the record, we agree with the appellant that indeed, PW1 and PW2 were not subjected to voir dire examination before their evidence was recorded. Section 19 of the *Oaths and Statutory Declarations Act* which the appellant relied on in arguing his case relates to the reception and admissibility of evidence of a child of tender years. The provision states that where a child of tender years does not, in the opinion of the court understand the nature of an oath, but is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth, the evidence of such a child may nonetheless be received though not given upon oath. As to what is considered to be tender years, the general consensus has been the age of 14 years and below. That is the age upon which courts are required to conduct a voir dire prior to receiving the evidence of a child of such age. Thus, in Maripett Loonkomok (supra) it was held that:

> "However way back in 1959 in the celebrated case of Kibageny Arap Kolil v R (1959) EA 82 the Court of Appeal for Eastern Africa held that the phrase "a child of tender years" meant a child under the age of 14 years. The only statutory definition of a "child of tender years" is section 2 of the *Children Act* where it is defined to mean a child under the age of 10 years.

> This Court has recently in Patrick Kathurima v R, Criminal Appeal No.137 of 2014 and in *Samuel Warui Karimi v R Criminal Appeal No.16 of 2014* stated categorically that the definition in the *Children Act* is not of general application; that it was only intended for the protection of children from criminal responsibility and not as a test of competency to testify. It follows therefore that the time-honoured 14 years remains the correct threshold for voir dire examination."
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> [Emphasis ours]

21. Having already found that the complainant was likely to have been 15 years at the time of the commission of the offence, we conclude that the trial magistrate did not err by not subjecting this witness to voir dire examination. As for PW2, she told the trial court at the time she testified that she was 13 years old.There is no other evidence on record to contradict her testimony. We will therefore proceed on the understanding that this witness having been below the age of 14 years ought to have been taken through a voir dire examination before her testimony could be recorded. The question that would follow is whether absent her evidence a conviction could not be sustained against the appellant. We think not. Corroboration of the incident is found in the testimony of the clinical officer who examined the complainant and confirmed that she had been defiled. Further corroboration of the testimony of the complainant is found in the evidence of PW6 who confirmed that the children strayed into their home and his mother requested him to report the incident to the area chief. Although PW6 did not witness the defilement of the complainant, his testimony affirms that of the complainant that they were on the run when darkness caused them to seek refuge with a Good Samaritan. The truthfulness of the complainant is very evident from the record and, by virtue of the proviso to section 124 of the *Evidence Act* which provides that a conviction can ensue based on the evidence of the victim of a sexual offence, we find no reason to fault the two courts for finding the appellant guilty.

22. Still on the issue of conviction, the appellant contends that the evidence on record was not sufficient to prove penetration. The appellant's submission is contrary to the clear evidence of the complainant and PW3 that there was penetration. The complainant described in detail what the appellant did to her and that testimony was confirmed by PW3 who testified that the complainant's hymen had been breached and she was infected with a sexually transmitted disease. In our view, even though PW3 examined the complainant about 6 months after the incident, her evidence still proved and corroborated the evidence of the complainant that her father, the appellant, defiled her on the two occasions. We therefore find that the trial court and the first appellate court properly addressed the issue of penetration and reached the correct decision.

23. There remains the complaint by the appellant that the grudge element in his defence was not considered. The appellant fingered four actors for his predicament; his wife, PW6, the police officers and the complainant. He, however, never explained how and why the entire world would gang up against him. First and foremost, his wife who testified as PW4 did not give any incriminating evidence against him. This cannot be said to be a person who plotted his downfall. As for the police officers, there is nothing to show that they deviated from their lawful duties so as to conspire against the appellant who was unknown to them. For the complainant, it is difficult to understand how she could leave the comfort of her home in order to fabricate a story of sexual assault against her father. She vividly narrated in detail how the appellant when defiling her told her that was the only way of cleansing the witchcraft of her mother.

24. In respect to PW6, we can only say he is a rare gem of the Kenyan species. When his 80-year old mother called him and requested him to go and take to the chief some girls who had taken sanctuary at her home overnight, he abandoned whatever he was doing and travelled from Kiambu to Maai Mahiu. He then took the girls to their area chief who referred him to the chief of Maai Mahiu from whence

the girls came. On finding the chief of Maai Mahiu he was advised to take the children to the police station. All PW6 asked of the chief was to accompany him to the police station. This candid testimony was never shaken by the appellant in his lengthy cross-examination. Interestingly, the appellant never raised the issue of an alleged love affair between the witness and the appellant's wife. This issue only popped up in the appellant's defence testimony. Further, at no point in his evidence did PW6 claim to have been a chief. This was a falsehood of the appellant's own making as he attempted to destroy the credibility of PW6. On our part we find no reason to depart from the concurrent findings of the two courts below on the truthfulness of PW6.

25. Arising out of the foregoing discussion, it follows that the appeal against conviction is without merit and is for dismissal.

26. As for the appeal against sentence, we start by appreciating that ordinarily the severity of a sentence does not fall within the jurisdiction of this Court. However, the legality of a sentence is within our jurisdiction. In this case, the appellant was sentenced to life imprisonment. Despite the appellant arguing that the sentence was issued in mandatory terms, the record shows otherwise. However, the jurisprudence emanating from this Court is to the effect that convicted persons should be given determinate sentences as life imprisonment, though still legal, owing to its indefinite nature is no longer recommended. It is on this basis that we find it necessary to consider the appeal against sentence.

27. The record shows that the appellant was a first offender and he also stated that he had a child who depended on him. However, we also note that the complainant was his child. The place known as home should ordinarily offer a safe haven for every child. This was not the case for the complainant. In the absence of the complainant's mother, the appellant took advantage of her. He did not only do it once but repeated the unlawful act before the complainant decided to flee from her own home. The circumstances of this case would not attract a lenient sentence for the appellant and we find 30 years' imprisonment to be appropriate.

28. In the end, the appeal against conviction is hereby dismissed. The appeal against sentence partially succeeds. The sentence of life imprisonment is consequently set aside and substituted with a sentence of 30 years in prison. As the record shows that the appellant was remanded throughout his trial, the sentence will, in accordance with the proviso to section 333(2) of the Criminal Procedure Code, run from 27th December 2013 when he was presented to the trial court for plea.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024

P. O. KIAGE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....

UDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR