JMI v Republic (Criminal Appeal 204 of 2018)
[2024] KECA 1114 (KLR) (30 August 2024) (Judgment)

Neutral citation: [2024] KECA 1114 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 204 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

AUGUST 30, 2024

BETWEEN

JMI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega (G. Dulu, J) delivered on 31st July, 2018 in HCCRA No. 198 of 2011)

JUDGMENT

1. This is a second appeal by the appellant, JMI, against his conviction and the sentence of life imprisonment, that was imposed upon him by the Magistrate's Court at Kakamega, for the offence of incest by a male person contrary to Section 20(1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the 13th day of August, 2010 within Kakamega South District, he unlawfully and intentionally inserted his genital organ namely penis, into the genital organ namely vagina of JK (name withheld), a girl aged 9 years, who to his knowledge is his daughter. The appellant also faced an alternative count of an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No. 3 of 2006, but no finding was made on this count the appellant having been found guilty on the main charge of incest.

3. During the trial, seven witnesses testified for the prosecution, and the appellant gave a sworn statement. The child victim, JK, has some element of mental disability. She is 9 years old and was, at the material time in class one, since she suffers from developmental disabilities. She was declared a vulnerable witness by the court, and her evidence was taken through the assistance of an intermediary, her teacher LM, who is a trained ECD teacher.

4. JK is a beneficiary of a project known as [Particulars Withheld] Child Development Centre, run by ACK St Andrews Church. David Muchama Andeka, who was also referred to by the witnesses as

Joseph Andeka (Joseph), is a Director of the project. Henry Musamba (Henry) is the Treasurer of the project whilst Joyce Anyango (Anyango) is a spiritual teacher at the school.

5. On the material night, JK was asleep with her two younger sisters, when the appellant, who is her father called her. She woke up and went to the bedroom where her father was. He then asked her to remove her underpants after which he inserted his penis into her vagina. JK screamed and the appellant beat her up, so she ran away and went to her uncle, S's, house where she spent the night. The next morning Joyce, who is her spiritual teacher, noticed that her eyes were swollen and she was crying. Joyce sought to know from JK what was wrong. The child did not immediately tell her, but later, when Joyce was alone with the child, she opened up and informed Joyce that her father had on the previous night defiled her, and beat her up when she cried. The child explained that, that was not the first time her father had defiled her, and that her mother was not staying with them.

6. Joyce reported the matter to Joseph and then took JK to Bukura Health Centre where she was examined and referred to Kakamega Provincial Hospital. Joseph and Joyce took JK to Kakamega Hospital where she was examined by Francis Wasike (Wasike), a clinical officer, who found that JK had lacerations on her labia minora. Wasike concluded that there was attempted defilement, but that

   penile penetration was not complete. Later, Joseph took JK to Elvina Namalwa Siniat (Elvina) an assessment teacher with the District Education Office in Kakamega, who assessed JK and noted that she was traumatized. Elvina, who estimated JK's age as 9 years, concluded that her mental status was due to lack of parental care and the incidence of defilement. Following a report made by Henry at Isulu Police Patrol Base, the appellant was arrested and charged.

7. In his sworn statement, the appellant vehemently denied having committed the offence. He stated that on 14th August, 2010, he came home at around 4:00 pm and learnt from JK, who is his daughter, that a teacher called Joseph had taken her to hospital. He was not alarmed because the child was a beneficiary of the Child development project, and she had been coughing and her eyes would also sometimes be swollen. He thought the medication JK was given was for the cough. Later the appellant heard of the allegations that he was mistreating his children. He denied the allegations, and stated that there was a grudge between him and his brother Simon; and that there was a plan to take his land because he only had daughters. He added that if JK was defiled, it might have happened at the school, and that the teacher had bought JK new shoes so that she could testify against him.

8. The trial magistrate, in convicting the appellant, believed the evidence of JK as he found her an honest witness with no reason to lie against her own father. The trial magistrate found the evidence of JK consistent with that of Joyce to whom she reported the matter, and also the evidence of the clinical officer who examined her and prepared the P3 form and the post rape form.

9. In his appeal to the High Court against his conviction and sentence, the appellant faulted the trial court for failing to find: that he was not represented; that he was not sufficiently supplied with the prosecution statements; that the case was unconstitutional; that he was not subjected to medical examination; that he was not treated as a first offender; and that the trial magistrate failed in rejecting his defence of alibi. However, this first appeal was not successful, hence the second appeal now before us.

10. In his appeal to this Court, the appellant has raised five grounds which he referred to as supplementary grounds. He faults the learned judge for: failing to find that the evidence of a mentally retarded person is inadmissible; failing to note that the interpretation in the trial court was done by a person who does not understand Idakho language; failing to find that the appellant was not informed of his rights to representation nor accorded an advocate to represent him; failing to find that the appellant was tried on a defective charge sheet; and failing to note that there was bad blood between the appellant and the witnesses.

11. During the hearing of the appeal before us, the appellant appeared in person, while the State was represented by Mr. Chacha from the Office of Director of Public Prosecution. Bothe the appellant and the respondent, fully relied on their written submissions.

12. The appellant in his written submissions that was filed in person, contended that he was subjected to an unfair trial as he was never supplied with the documents that the prosecution intended to rely on, and that the case took unduly long without any good reason. In addition, he was not informed of his right to representation nor was he availed an advocate at the government's cost.

13. The appellant submitted that the prosecution case was not proved to the required standard. This is because, he argued, the child's assessment was not done by an expert as required under Sections 48, 49, and 50 of the *Evidence Act*, nor was her age ascertained by a medical doctor. He faulted the clinical records and books kept by the teachers, that were relied upon by the trial court, maintaining that the same are unreliable as they can be easily manipulated. He took issue with the intermediary that was appointed by the trial court, maintaining that she could not interpret Idakho language as she had stated that she only knew the language partly.

14. The appellant argued that neither the age of the complainant nor penetration was proved because crucial witnesses were not called, and the evidence of the prosecution witnesses was marred with contradictions. He noted that Section 36 of the *Sexual Offences Act* was not complied with as there was no DNA testing that was done. He identified the Chief as a crucial witness who was not called. He faulted the evidence of Elvina as she did not produce an original letter confirming her assessment of the age of JK. He argued that the evidence regarding the age of JK was contradictory as Elvina gave her age as 9 years whilst PC Gichuru gave her age as 8 years. Further, that although JK claimed that she was defiled 4 times, there was no discharge of fluids or spermatozoa that was noted, and the hymen was intact. He opined that the lacerations on the labia minora may have been due to physical exercise.

15. The appellant complained that his defence regarding bad blood that existed between him and the prosecution witnesses, as well as his mitigation were not considered; and that he was tried and convicted on a defective charge sheet as the evidence adduced was inconsistent with the charge sheet. He pointed out discrepancies in the charge sheet, such as the age of the complainant, which was indicated as 8 years old, while in the testimony it was indicated as 9 years old; and the names of the witnesses on the charge sheet which were different from the names of the witnesses who actually testified.

16. Regarding the sentence, the appellant submitted that the mandatory life sentence imposed upon him was unconstitutional and contravened Articles 25, 26 and 50(2) of *the Constitution*. He relied on the Supreme Court decision in Francis Kariokor Muruatetu and Another vs Republic; Petition *No 15 of 2015* and *Gerald Macharia Githuku vs Republic, Criminal Appeal No 119 of 2004*.

17. For the respondent, Mr. Chacha submitted that contrary to the appellant's assertion that he was not supplied with the evidence that the prosecution intended to rely on, the record of the trial court proceedings indicated that the appellant applied for witness statements, and an order was made for the statements to be supplied to him. Thereafter, the appellant was always ready to proceed with the hearing, and thoroughly cross examined the witnesses, an indication that he had been supplied with the statements.

18. On legal representation, Mr. Chacha relied on Halgryn vs S (2002) All SA 159 at page11, a decision from South Africa, in which Articles 35(3)(f) and 35(3)(g) of the South Africa Constitution that is identical to Article 50(2)(g) and 50(2)(h) of *the Constitution* of Kenya, was interpreted as follows:

> " *The constitution* has two provisions which are relevant to the argument: the right to chose a legal representative and to be represented by that person (Section 35(3)(f), and the right to have a legal representative assigned by the State and at a state expense if substantial injustice would otherwise result (Section 35(3)(g). Although the right to chose a legal representative is a fundamental right and one to be zealously protected by the courts, it is not an absolute right and is subject to reasonable limitations (R. vs Speid (1983) 7CRR 39 at 41). It presupposes that the accused can make the necessary financial or other arrangements for engaging the services of the chosen lawyer and furthermore, that the lawyer is readily available to perform the mandate having due regards to the courts organization and the prompt dispatch of the business of the court..."

19. Mr. Chacha argued that the right to representation under Article 50(2)(g) of the Kenya Constitution, involves a choice to be represented and not a guarantee of representation; and that the record of appeal does not show any denial of the appellant's right to legal representation, but shows that the appellant elected to represent himself. Mr. Chacha submitted that the charge of incest that the appellant faced was properly particularized in the charge sheet, in accordance with Section 20 of the *Sexual Offences Act*; and that the record does not reveal any misunderstanding of the charge by the appellant. Counsel added that the issue of a defective charge sheet, was not available for consideration by this Court as it was not raised on first appeal.

20. Mr. Chacha further submitted that the ingredients of the charge against the appellant were proved beyond reasonable doubt. This included penetration, which was proved through the evidence of JK who testified that the appellant defiled her, which evidence was relied upon by the trial court under Section 124 of the *Evidence Act*. The evidence of JK was corroborated by the evidence of Joseph, Elvina, Henry and Joyce who responded to JK's report and helped escort her to Hospital and the police, and Wasike who examined JK and confirmed that there was partial penetration after noting vaginal lacerations.

21. On failure to call crucial witnesses, Mr. Chacha argued that the prosecution had the prerogative to determine the witnesses to call. That as per the concurrent findings of the trial court and the first appellate court, the evidence of the witnesses who testified was sufficient to prove the charge against the appellant. Counsel cited JAO -vs- Republic [2011] eKLR for the proposition that this Court should not interfere with concurrent findings of the two lower courts as they were based on sound evidence. In regard to JK's mental status, Mr. Chacha argued that her evidence was given through an intermediary, and that the intermediary who was professionally qualified properly communicated JK's evidence.

22. In regard to sentence, Mr. Chacha relied on Rule 4 of the Sexual Offences Rules of Court 2014, for proof of the age of JK which was assessed as 9 years and confirmed through a child's health card. He submitted that under Section 20(1) of the *Sexual Offences Act*, the appellant was liable to life imprisonment; and that the offence was a barbaric act that deserved such a deterrent sentence. Mr. Chacha added that severity of sentence was a matter of fact that was not open to this Court's intervention.

23. We have carefully considered this appeal, the contending submissions and the law. The appeal before us being a second appeal, we are mindful of the limitation in our jurisdiction to considering matters of law only. We also take cognizance of our responsibility to pay homage to the concurrent findings

of the two lower courts, and only interfere if the findings were not based on evidence, or were based on a perverted appreciation of the facts or if on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings, in which event, the decision is bad in law, thus entitling this court to interfere. See Nyale v Republic (Criminal Appeal 54 of 2021) [2023] KECA 1081 (KLR) (22 September 2023) (Judgment); and Rashid v Republic (Criminal Appeal 90 of 2021) [2023] KECA 596 (KLR) (26 May 2023) (Judgment).

24. The issues that we discern for our determination are whether the issues raised by the appellant regarding infringement of his right to a fair trial, and the charge sheet being defective, are open to us for consideration; if so, whether there was infringement of the right to a fair trial and whether the charge sheet was defective. In addition, there is an issue as to whether the learned Judge of the High Court considered and re-evaluated the evidence, and whether based on that evidence the charge against the appellant was proved to the required standard.

25. We have perused the record of appeal, and do note that the appellant raised some grounds that concerned his right to representation, and failure to serve him with prosecution witness statements. The High Court in its judgment addressed both these two issues and dismissed the two grounds, finding that the complaint regarding representation was misplaced, and the complaint regarding failure to supply prosecution witness statement during the trial had no basis as the record did not show that he requested for and was denied the statements. We are satisfied that these are issues that requires our determination and are properly before us.

26. We have carefully perused the record of the trial court, and, like the High Court, do find that the appellant never requested to be supplied with witness statements. He cannot, therefore, complain of the alleged failure to supply the statements to him when there was no request. As regards representation, we are in agreement with the submissions made by Mr. Chacha, that Article 50(2)(g) gives the appellant the right to be represented by an advocate of his own choice, but that he must be ready to meet the financial cost. Article 50(2)(h) of *the Constitution* provides for a right for an accused to be assigned an advocate at the State's expense, where substantial injustice would otherwise result. In this case, the appellant was not supplied with an advocate at the State's expense during the trial or at the hearing of the appeal. He has not satisfied this Court that he suffered any substantial injustice or prejudice due to this failure. During the trial he robustly defended himself by cross examining the witnesses at length. During the hearing of the appeal in the High Court, he was represented by an advocate of his choice. We therefore find that his rights under Article 50(2)(g) & (h) of *the Constitution* were not violated.

27. As concerns the alleged defective charge sheet, there is no ground in the appellant's petition filed in the High Court, that raises this issue. The issue was not raised before the trial court, nor did it form a ground for appeal before the High Court. Nor did the High Court render itself in on the issue. This means that the matter is improperly before us as it is being raised for the first time on this second appeal. The appellant is, accordingly, precluded from raising it in this appeal, and the issue is not, therefore, open for our determination. See John Kariuki Gikonyo v Republic [2019] eKLR and Alfayo Gombe Okello v. Republic [2010] eKLR Criminal Appeal No. 203 of 2009;

28. The appellant, having been charged with incest under Section 20(1) of the *Sexual Offences Act*, it was incumbent for the prosecution to prove that JK was the daughter of the appellant. Secondly, that the appellant committed the act of penetration by inserting his genital organs into the genital organ of JK and thirdly, that JK was nine years old as alleged in the charge sheet.

29. The relationship between the appellant and JK was not in dispute as the appellant admitted that JK was his daughter. As regards penetration, this is defined under Section 2 of the *Sexual Offences*

Act as "the partial or complete insertion of the genital organ of a person into the genital organ of another person." JK testified that the appellant inserted his genital organs into her genital organs. The appellant took issue with the court's use of an intermediary in accepting JK's evidence. However, he did not dispute the fact that JK had a mental challenge. Contrary to the appellant's assertion that JK's evidence was inadmissible, there is no law that renders the evidence of a person with a mental challenge inadmissible, more so, where the evidence is taken with the aid of an intermediary. Although the appellant complained that the intermediary did not understand Idakho language very well, the Court record is very clear that JK spoke in Idakho, which was translated by a court clerk Ramadhan Mate and which language the appellant said he understood very well. Therefore, neither the intermediary nor JK or the appellant was disadvantaged in any way.

30. Section 124 of the *Evidence Act*, allows a trial court, where an accused person is charged with an offence under the *Sexual Offences Act*, to base a conviction on the evidence of the victim only, provided the court is satisfied that the witness is speaking the truth. Both the trial court and the first appellate court found JK's evidence credible and sufficient to be relied upon under that section. The trial magistrate who saw and observed JK testify, was in a position to, and did assess her demeanor, which advantage we do not have as an appellate court, and have no reason to question. Moreover, JK's evidence was consistent with the evidence of Joyce, Joseph and Henry to whom she narrated her ordeal. Her contention that she was defiled was corroborated by the medical examination which was done by Wasike, and which confirmed that there was partial penetration.

    In the circumstances we are satisfied that the ingredient of penetration was proved.

31. As regards the age of JK, the charge sheet dated 19th August, 2010, gave the particulars of JK as a girl aged nine years. In her evidence, JK who gave her evidence on 12th January 2011, stated that her age was ten years old. Elvina who saw her on 29th November, 2010, estimated her age as nine years old. Wasike who examined JK immediately after the defilement estimated her age as nine years old. The appellant who gave sworn evidence in his evidence on 5th July, 2011, stated JK's age as ten years old. We have not seen any material contradiction regarding JK's age. She was around nine years old at the time she was defiled and was around ten years old at the time some witnesses testified. Therefore, the charge sheet stated the correct position. Moreover, under Section 20(1) of the *Sexual Offences Act*, it was sufficient that JK was under eighteen years old as this brought the proviso to Section 20(1) of the *Sexual Offences Act* into play, the appellant being liable to imprisonment for life. Consequently, we are satisfied that the evidence adduced regarding JK's age was sufficient to establish her age as charged, and sufficient for purposes of the penalty proviso under section 20(1) of the *Sexual Offences Act*.

32. In his judgment, the learned Judge concluded as follows:

> ''Having re-evaluated all the evidence on record, I find the prosecution proved its case against the appellant beyond any reasonable doubt. The complainant being a child of the appellant had no reason to fabricate lies against the father about the incest. The medical evidence showed that indeed there was partial penetration. The appellant took advantage of the absence of his wife to commit the offence. Though the appellant complains that the person to whom the complainant sought refuge [Simon] was not called to testify, he himself could also have called that person to testify. He did not. There is no evidence that the person witnessed the incident anyway. There is also no evidence that that person connected the appellant with this offence. I find that the failure of the prosecution to call the witness did not dent the prosecution case.''

33. We are satisfied that the learned Judge properly considered and re- evaluated the evidence, and that all the ingredients of the charge of incest were proved against the appellant. The learned Judge was, therefore, right in dismissing the appeal against conviction.

34. As regards the sentence, under Section 361(1) of the Criminal Procedure Code, severity of sentence is a matter of fact that is not open for our consideration. The record reveals that the trial magistrate exercised his discretion. Although the appellant was treated as a first offender, he opted not to give any mitigation. The learned Judge of the High Court considered the appellant's appeal against sentence and concluded that the sentence was both legal and appropriate given that the child victim was traumatized and would have to deal with the incident for the rest of her life.

35. Moreover, although the appellant was sentenced to an indeterminate life sentence, he did not raise any issue before the High Court, regarding the constitutionality of the indeterminate life sentence. Before us the appellant has raised the issue in his written submissions. However, the constitutionality of the indeterminate sentence of life imprisonment under Articles 28 and 29(f) of *the Constitution*, is different from challenging the constitutionality of minimum sentences under the *Sexual Offences Act*, for fettering the discretion of the sentencing court. In accordance with the Supreme Court decision in Gichuki Mwangi: Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (amicus curio) [2024] 34KLR, the issue of the constitutionality of the indeterminate sentence is not open to us for consideration at this stage as it was neither raised in the High Court nor preserved as an issue that could be argued before us.

36. In the circumstances, we have no jurisdiction nor do we have any justification to interfere with the sentence. Consequently, we dismiss the appeal, and uphold both the appellant's conviction and sentence.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF AUGUST, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR