EAO v Republic (Criminal Appeal 34 'A' of 2016)
[2024] KECA 1088 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1088 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 34 'A' OF 2016

F SICHALE, FA OCHIENG & WK KORIR, JJA

AUGUST 21, 2024

BETWEEN

EAO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kericho (Muya J), dated 9th November 2016 in (HC. CRA NO. 23 of 2014)

JUDGMENT

1. The appellant, EAO was charged with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on the 5th day of January 2012 between 6:30AM and 5:PM at (particulars withheld), he intentionally and unlawfully caused his penis to penetrate the vagina of VK, a girl aged 5 years.

3. In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to Section 11 (1) of the same Act. The particulars of the offence were that at the same time and place, he intentionally and unlawfully with his penis touched the vagina of VK, a girl aged 5 years.

4. The appellant denied the charge pursuant to which a full trial ensued with the State calling a total of 4 prosecution witnesses while the appellant in his defence elected to give an unsworn statement and called no witness.

5. At the conclusion of the trial conducted by L. Kiniale, the then Ag. Senior Resident Magistrate Kericho, the learned trial magistrate found that the evidence on record showed that the appellant was the father to the victim and thus the appropriate charge in the circumstances would have been incest.

She nevertheless convicted the appellant of the main charge of defilement that he had been charged with and sentenced him to 20 years' imprisonment 9th May 2014.

6. Subsequent thereto and pursuant to the provisions of Section 363 of the Criminal Procedure Code, the learned trial magistrate placed the proceedings leading to the appellant's conviction and sentence before the high court (Sergon J), for perusal and satisfaction as to the correctness, legality, propriety or otherwise, of the decision.

7. Vide a Ruling delivered on 26th June 2014, Sergon J, found inter alia that the sentence of 20 years' imprisonment meted out on the appellant was illegal and substituted the same with a sentence of life imprisonment.

8. The appellant being aggrieved by the decision of the trial court, lodged his first appeal before the high court challenging his conviction and sentence, vide a Petition of Appeal dated 14th May 2014, which appeal was dismissed by Muya J on 9th November 2016, who upheld his conviction and sentence.

9. Undeterred, the appellant has now filed an appeal to this Court vide a Notice of Appeal dated 10th November 2016 and undated "homemade" Amended Grounds of Appeal raising 8 grounds of appeal.

10. When the matter came up for hearing on 28th November 2023, the appellant informed us that he was abandoning his appeal on conviction and requested to be allowed to serve the sentence of 20 years' imprisonment that had been initially imposed by the trial court. Miss Kisoo learned counsel for the respondent on the other hand relied entirely on her written submissions dated 23rd November 2023.

11. The brief facts in this appeal were as follows; PW1 was JKM and the mother to the victim. It was her evidence that the appellant was her husband and that on 5th January 2012, she woke up and left for work and woke up VK (the victim), but the appellant told her not to wake her up as she had a flu.

12. It was her further evidence that upon her return from work at 3:00PM, she noticed VK was not walking properly. She called her neighbor to ascertain as she was breastfeeding her other baby and the said neighbor told her that the reason why VK was not walking properly was probably due to the short dress she was wearing.

13. They then called the child to check on her but she cried out and told her not to beat her and further stated that it was her father (the appellant), who had done bad manners to her. She got shocked and when she asked her other neighbours to ask her what had happened, she maintained that it was her father who had done bad manners to her.

14. It was her further evidence that she checked the child and saw discharge coming from her vagina and noticed that the child was badly injured. She later took the child to hospital and when she returned, she found the appellant had already been arrested. She then asked the appellant if she had defiled the child and he admitted that he had done it twice and that the devil had come upon him and sought forgiveness.

15. We have considered the record, the brief highlights made before us and the law. The appeal herein is a second appeal. Our mandate in a second appeal is provided in Section 361 of the Criminal Procedure Code. It provides:

> "...
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> 361
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> (i) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its

appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:

a. on a matter of fact, and severity of sentence is a matter of fact; or

b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

16. The above provision has been enunciated in several decisions of this Court. In David Njoroge Macharia vs. Republic [2011] eKLR sums up the said mandate. In the said decision, it was stated:

> " Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also Chemagong vs. Republic [1984] KLR 213)."

17. The appellant having abandoned his ground of appeal on conviction we are only left with one issue for our determination namely; sentence, in which he has requested that he be allowed to serve the 20 years' imprisonment that had initially been imposed by the trial court.

18. It was submitted for the respondent that the appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*, which provides for a mandatory life imprisonment and that the sentence that was passed against the appellant was lawful.

19. As we had alluded to earlier and was correctly observed by the learned trial magistrate, the appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act*. The evidence on record however, disclosed a charge of incest as the victim was the appellant's daughter.

20. Section 8 (1) (2) of the *Sexual Offences Act* provides that a person charged with the offence of defilement shall be sentenced to life imprisonment upon conviction. Section 20 (1) of the same Act, which creates the offence of incest by males provides as follows:

> " 20. Incest by male persons
>
> (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." (Emphasis Ours).

21. It is evident that under the provisions of Section 8 (1) (2) of the *Sexual Offences Act*, the sentence provided thereunder is a sentence of mandatory life imprisonment, where the victim is 11 years or less, unlike the provisions in Section 20 (1) of the Act (supra), which give some leeway as the sentence of 10 years is the minimum sentence whereas life imprisonment provided thereof (where the victim is below 18 years) is the discretionary maximum sentence.

22. See the case of MK v Republic [2015] eKLR where this Court while addressing itself on this issue stated thus:

> " In the instant case, the appellant was charged with an offence under Section 20 (1) of the *Sexual Offences Act*. This Section provides for a minimum term of 10 years' imprisonment. However, the proviso to Section 20(1) stipulates that if the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life. The learned judge of the High Court interpreted this proviso to mean that a mandatory minimum sentence for life is provided for in the proviso if the female victim is under the age of eighteen years. The legal question for our consideration and determination is whether this interpretation is correct; does the proviso provide for a minimum term of life imprisonment"
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> The first observation to note is that the phrase "not less than" has not been used in the proviso to Section 20 (1) of the *Sexual Offences Act*. The inference is that the proviso does not create a minimum sentence. The phraseology and wording in the proviso is that the accused shall be liable to imprisonment for life.
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> What does "shall be liable" mean in law" The Court of Appeal for East Africa in the case of Opoya -v- Uganda (1967) EA 752 had an opportunity to clarify and explain the words"shall be liable on conviction to suffer death". The Court held that in 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 of imprisonment.The Court cited with approval the dicta in James -v- Young 27 Ch. D. at p.655 where North J. said:
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> > "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".
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> 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".
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> On our part, we contrast the wordings in Section 8 (2) of the *Sexual Offences Act* with the proviso in Section 20 (1) of the said Act. The contrast will shed light as to whether the sentence in the proviso to Section 20 (1) is minimum and mandatory or otherwise. Section 8 (2) provides that a person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life. The proviso in Section 20 (1) provides that the accused shall be liable to imprisonment for life.
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> Guided by the decision in Opoya -v- Uganda (1967) EA 752 and the persuasive dicta of North J. in James -v- Young 27 Ch. D. at p.655; we are satisfied that the sentence stipulated in the proviso to Section 20 (1) of the *Sexual Offences Act* is not a minimum mandatory sentence of life imprisonment. The proviso simply states that the trial court has discretion to mete out a maximum term of life imprisonment. Read in conjunction with the general provision in Section 20 (1) we hereby state that the correct interpretation of the proviso in Section 20 (1) is that a person convicted of incest when the female victim is under

the age of eighteen years is liable to a term of imprisonment between 10 years and life imprisonment." (Emphasis Ours).

23. We fully agree and adopt the reasoning by the Court in the above cited case. Having said that, it is clear to our mind that the holding by the learned judge that; "Either way, therefore, no prejudice was caused to the appellant as both offences carry the same punishment", was wholly erroneous. Suffice to state that the proviso to section 20(1) provides that a person can be sentenced to life imprisonment.

24. We have looked at the circumstances under which the offence was committed. PW1, the mother of the victim left her husband with their daughter. The victim was 5 years old. Instead of the appellant providing care and protection to his 5 year old daughter, he committed a heinous act against her. We think that the sentence imposed was appropriate. We find no merit in the appellant's appeal against the enhanced sentence.

25. Accordingly, the appellant's appeal is hereby dismissed.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF AUGUST 2024.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR