PGK v Republic (Criminal Appeal 79 of 2018)
[2024] KECA 1081 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KECA 1081 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 79 OF 2018

W KARANJA, J MOHAMMED & LK KIMARU, JJA

AUGUST 21, 2024

BETWEEN

PGK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (R. K. Limo, J.) delivered on 17th October, 2015 `in HCCA No 13 of 2012)

JUDGMENT

Background

1. The appellant, PGK, was charged before the Senior Principal Magistrate's Court in Kerugoya for the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the offence were that on 3rd March,2011 at Kirinyaga County he defiled PWG, a child aged sixteen (16) years.

2. During the trial, the prosecution called four (4) witnesses in support of its case. At the conclusion of the trial, the appellant was found guilty of the offence of defilement, convicted and sentenced to twenty (20) years imprisonment.

3. Aggrieved, the appellant appealed against conviction and sentence before the High Court at Nyeri (R.K. Limo, J.). His first appeal to the High Court was unsuccessful, prompting this second appeal against conviction and sentence.

4. 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:-

> " 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."

5. It is against that jurisdictional remit that we shall briefly examine the evidence that was tendered before the trial court and re-examined by the High Court in reaching the impugned judgment.

6. PWG (PW1) was the complainant and gave sworn evidence. It was her testimony that she was 16 years old and that she had been attending school but had stopped as she was pregnant. It was her evidence that on 3rd March, 2011 she left school and went home where she found her father, the appellant herein in the house. It was her evidence that she served some food and that as she was eating, her father, the appellant herein, left the house and returned shortly thereafter, approached her slowly from behind and suddenly covered her mouth with a cloth. It was her further testimony that he made her lie down on the sofa and removed his trousers and underpants and pulled off her pants. It was her further evidence that the appellant lay on her and inserted his penis into her vagina. PW1 further testified that the appellant went away and threatened her with death if she disclosed what he had done to her.

7. PW1 further testified that she reported the matter to her paternal grandmother, one JWK who urged her not to tell her mother and she therefore kept silent. It was her further evidence that she also informed her uncle, one JMK what the appellant had done to her. It was PW1's further testimony that subsequently, on 25th March, 2011 she fell sick while at school and that she went home and slept. It was her testimony that her father defiled her for the second time and that she reported the matter to her grandfather, one BK but that he did not take any action but asked her to go home. It was her further testimony that on 26th March, 2011 she went to the dispensary and was treated and that she went home and that her mother, EW (PW2) enquired why she was crying whereupon she disclosed that the appellant had defiled her on two occasions and had threatened to kill her if she reported. It was PW1's further evidence that her mother, (PW2) reported the matter at Kerugoya Police Station who referred them to the hospital where PW1 was found to be pregnant.

8. EW (PW2) testified that she is PW1's mother while the appellant was her husband and had been married for 12 years. It was her evidence that PW1 was 16 years of age and that the appellant is PW1's biological father. It was her further evidence that on 1st April, 2011 she entered PW1's bedroom and noticed that she had not made use of her sanitarypads for that month. PW2 testified that she questioned PW1 regarding the unused sanitary pads whereupon PW1 hesitated but upon being threatened with a beating by PW2 she disclosed that her father, the appellant, had defiled her on two occasions. It was PW2's further evidence that she informed her grandmother of the defilement but her grandmother urged her to keep quiet. It was her testimony that she reported the matter to the Assistant Chief who referred her to Kerugoya Police Station and that they were subsequently referred to the hospital where PW1 was found to be one month and two weeks pregnant. In cross-examination, PW2 testified that the appellant's sisters attacked her after the incident and threw her out of the home.

9. Hezron Macharia (PW3) was the Clinical Officer at Kerugoya District Hospital who testified that on 16th April, 2011 at his place of work PW1 was taken to him for examination and treatment. It was his

evidence that she was 16 years and was complaining of having been sexually assaulted by a person well known to her namely her father on two occasions. It was PW3's further testimony that upon examining PW3 he found that she had a distended abdomen and her hymen was absent, she had vaginal infection and a laboratory examination confirmed that she was pregnant. PW3 produced PW1's P3 form.

10. Morris Kimotho No. 83353 (PW4) stationed at Kerugoya Police Station crime branch was the Investigating Officer who testified that he took over the police file from P.C. Kilau who had been transferred. It was his testimony that on 23rd May, 2011 the appellant was traced and arrested.

11. The appellant was put on his defence and gave unsworn evidence and did not call any witnesses. He denied committing the offence and testified that he was a carpenter and had been framed as there were differences between him and his wife (PW2). It was his evidence that every time they had a disagreement with his wife, her father informedthe appellant that he was able to raise his daughter (PW2). It was the appellant's further evidence that after his arrest all the household items were taken away from their home and sold.

12. The trial court dismissed the defence and found as follows:

> "On the evidence before me I am satisfied beyond any reasonable doubt the accused is guilty as charged on the principal charge of defilement namely that on the 3rd day of March 2011 at [Particulars Withheld] in Kirinyaga County, the accused intentionally caused his genital organ namely penis to penetrate the vagina of PWG a child aged 16 years of age."

13. Aggrieved by the conviction and sentence, the appellant appealed to the High Court. The High Court after re-evaluating and analyzing the evidence on record, found as follows:-

> "The learned Senior State Counsel for the respondent submitted that the appellant ought to have been charged with incest and urged me to correct the normally but invoking my inherent power under Section 354 of the Criminal Procedure Code by having the charge amended to reflect incest and impose the right sentence of the imprisonment but amending the charge at this stage is not tenable in law. I have however, looked at the provisions of Section 184 and 186 of the Criminal Procedure Code and note that the spirit of the law shows that where a person is charged with either rape or defilement but the trial court is of the opinion that the person is guilty of any other offence under the *Sexual Offences Act*, he can be convicted of that offence even if he was not charged with it in the first place. On the strength of evidence adduced, I do find that the trial court ought to have invoked those provisions of the law to correctly convict the appellant at the trial and I do find that the trial magistrate fell in into error when he convicted the appellant on defilement when the evidence adduced by the prosecution glaringly demonstrated that the appellant was guilty of incest. This is where the law under Section 354(3)(ii) and (iii) comes into play. I am satisfied that based on the evidence adduced by the prosecution at the trial, it is proper and right for this court to not only dismiss this appeal for lack of merit but to invoke the said provisions and set aside the conviction and sentence passed against the appellant. In its place, I substitute the conviction with that under Section 20(1) of the *Sexual Offences Act* for which the appellant should have been found guilty of though not charged with the offence. The conviction of the appellant is accordingly altered by this court. He was guilty of incest by defiling his own daughter and ruining her life and perhaps her career. He opined in his petition that the sentence of 20 years was harsh and excessive but I disagree. He is convicted of the offence of incest and given the age of the complainant; the only sentence prescribed

by law is life which the appellant actually deserves for what he did. He is therefore sentenced to life imprisonment. It is so ordered."

14. Undeterred, the appellant has now filed this second appeal. The appellant filed a memorandum of appeal raising seven (7) grounds that the 1st appellate court erred in law: in upholding his conviction in the absence of the complainant's first report; in upholding his conviction without considering that no evidence was adduced from his arresters; in upholding his conviction on uncorroborated evidence of PW1; in upholding his conviction by enhancing his 20 year jail term to life imprisonment without considering that the complainant was 16 years old; in upholding his conviction without considering that the prosecution did not prove that he was the biological father of the complainant; in upholding his conviction by shifting the burden of proof from the prosecution thereby contravening the provisions of Section 212 of the *Criminal Procedure Code*; and in upholding his conviction without fully evaluating and analysing the entire record in the interests of justice.

Submissions

15. During the hearing of the appeal, the appellant was acting in person and relied on the written submissions that he had filed with brief oral highlights. The respondent was represented by Mr. Naulikha the learned Prosecution Counsel who relied on the written submissions that had been filed with brief oral highlights.

16. The appellant submitted that the 1st appellate court erred in substituting the charge of defilement to incest and enhancing the sentence from 20 years' imprisonment to life imprisonment without following due process to his disadvantage. The appellant submitted that there was no warning or notice of enhancement of the sentence or a cross appeal filed by the prosecution. The appellant submitted that had he been given notice of enhancement of the sentence and the possible consequences, he would not have gone ahead with the appeal. The appellant relied on the decision of this Court in *Newton Mwaniki v Republic* Criminal Appeal No. 33 of 2016 which held that:

> "In the absence of a cross appeal by the State and without a proper or any warning given to the appellants it was wrong for the judge to enhance the sentence."

17. The appellant submitted that in the Newton Mwaniki case (supra) this Court allowed the appeal on sentence and reinstated the sentence from 20 years to 10 years which had been imposed by the lower court. The appellant urged us to allow his appeal and reinstate the sentence given by the trial court and take into consideration the provisions of Section 333 (2) of the *Criminal Procedure Code*.

18. The appellant further submitted that the trial court and the 1st appellate court failed to consider his defence. Further submitted that the sentence meted out on him by the 1st appellate court was harsh and excessive and that his mitigation was not considered.

19. At the plenary hearing the appellant submitted that PW1's birth certificate was not produced to prove her age and that DNA was not carried out to prove that he was the father of the child that PW1 bore as a result of the alleged defilement.

20. The respondent opposed the appeal. Learned Prosecution Counsel, Mr. Naulikha submitted that the 1st appellate court carried out its duty of re-evaluating, examining, reviewing and analysing the evidence on record and coming to its own conclusion independently in compliance with the requirements laid down in Okeno v Republic (1972) E.A. On the ground that the trial court convicted the appellant in the absence of a first report by the complainant, counsel submitted that during trial, the complainant narrated to the court what the appellant did to her which resulted in her conceiving and later giving

birth to a baby boy. Counsel further submitted that PW2 testified that the complainant is her daughter and that her husband, the appellant is the biological father of the complainant.

21. On the ground that the 1st appellate court erred by upholding the appellant's conviction on uncorroborated evidence, counsel submitted that the prosecution called witnesses who gave evidence that was direct, reliable, consistent, overwhelming and corroborated each other in all material ways especially the evidence of the complainant and PW2 who was the complainant's mother and the appellant's wife. Counsel asserted that during the trial there was evidence which demonstrated that the relationship between the complainant and the appellant was that of daughter and biological father.

22. Counsel further submitted that on the basis of the relationship between the complainant and the appellant and the complainant's age of 16 years, the offence of defilement was proved. Counsel submitted that in view of the relationship between the appellant and the complainant the 1st appellate court substituted both the conviction and the sentence meted on the appellant and imposed a new conviction and sentence of life imprisonment in accordance with Section 20(1) of the *Sexual Offences Act*. Counsel urged that the sentence of life imprisonment is lawful, legal and not excessive in the specific circumstances of the case.

23. The Court pointed out to counsel that the appellant was not given a notice of enhancement of the sentence and that the prosecution did not file a cross-appeal challenging the sentence meted out by the trial court. Counsel conceded that there was no notice of appeal or cross-appeal filed and that this was a procedural mishap as the appellant was not given an opportunity to respond to the substituted charge or to determine whether he wished to proceed with the appeal on the basis of a notice of enhancement of the sentence.

24. On the ground that the 1st appellate court erred in law when it upheld the appellant's conviction without medical evidence particularly the DNA results evidencing that he is the complainant's father and the father of the complainant's baby boy, counsel submitted that the appellant made an application for DNA testing in the High Court and thereafter withdrew the application. Counsel submitted that in the circumstances the High Court on the appellant's application set aside the DNA profiling orders and the 1st appeal was set down for hearing. Counsel asserted that the appellant is fully aware that both the complainant and the new born baby boy are his biological children and that he sired them to the exclusion of any other male person.

25. Counsel further submitted that the 1st appellate court did not shift the burden of proof to the appellant and it carried out its duty to re-evaluate, analyse and examine the evidence and the facts within the purview of *the Constitution* and the applicable laws. Counsel asserted that the 1st appellate court made its own independent decision without being influenced by the trial court. Counsel submitted that the evidence on record was sufficient and overwhelming and displaced the defence by the appellant and the 1st appellate court found that the prosecution had proved its case against the appellant beyond any reasonable doubt.

26. On the ground that the 1st appellate court erred in law when it upheld the conviction by the trial court without re-evaluating and analysing the entire record of the trial court, counsel submitted that the 1st appellate court evaluated, analysed and examined both the evidence and the facts in the trial court's records and came to its own independent decision. Counsel urged us to dismiss the appeal against both the conviction and sentence and uphold the findings of the 1st appellate court.

Determination

27. We have considered the record of appeal, the submissions, the authorities cited and the law. We discern three (3) main issues for consideration: whether the prosecution proved its case beyond all reasonable doubt; whether the 1st appellate court erred in failing to call for DNA testing of the appellant and the complainant's newly born baby boy to confirm paternity of the child; and whether the 1st appellate court erred in substituting the charge of defilement to incest and thereby enhancing the sentence meted out by the trial court of 20 years imprisonment to life imprisonment.

28. On the ground whether the prosecution proved its case beyond reasonable doubt, in a case of defilement, the prosecution must prove three key ingredients: the age of the victim, that there was penetration and the positive identification of the perpetrator. In the instant appeal, PW1 testified that she was 16 years old. The P3 form indicated that she was 16 years old. Further, PW2 who was the PW1's mother testified that PW1 was 16 years old at the time of the commission of the offence. We therefore find that the prosecution proved that PW1 was a minor aged 16 years old at the time of the commission of the offence.

29. On penetration, PW1 testified that the appellant defiled her on two occasions on 3rd and 25th March, 2011. Medical evidence produced by PW3 proved that upon examination of PW1 there was evidence of penetration, her hymen was absent and that she had contracted an infection. It was PW3's further testimony that PW1 was one month and 2 weeks pregnant at the time of the medical examination, which was consistent with the act of defilement in March 2011. On the identity of the perpetrator, PW1 testified that the appellant defiled her on two occasions. It is notable that the appellant is PW1's biological father and from her testimony, he defiled her on 2 occasions at about 5.00pm when they were alone in the house. Identification of the appellant as the perpetrator was therefore positive. We therefore find that the prosecution proved all the ingredients of the offence of defilement.

30. On the ground whether the 1st appellate court failed to consider that DNA testing was not done to prove the paternity of PW1's new born baby boy, from the record we note that the appellant's counsel applied for DNA testing in the High Court to enable them adduce the DNA test results as additional evidence in the High Court. A perusal of the record shows that on 27th April, 2015, counsel for the appellant, one Ngigi informed the Court as follows:

> " I am instructed that the appellant is no longer interested with additional evidence. He wishes to proceed with the appeal without additional evidence."

31. On the same day, the appellant stated as follows:

> " I confirm I do not wish to have fresh evidence of DNA taken. I wish to proceed with my appeal."
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> The 1st appellate court stated as follows:
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> > "In view of the sentiments expressed by counsel for the appellant and confirmed by the appellant himself, the appeal herein do proceed without additional evidence being taken as earlier ordered by this court. The said order is hereby reviewed and set aside. This appeal shall now be set down for hearing without additional evidence. Hearing of appeal on 23rd July, 2015."

32. In the circumstances, we find that the appellant's counsel opted to withdraw the application for DNA testing and the application to adduce additional evidence and the appeal was set down for hearing. Accordingly, this ground of appeal fails.

33. On the ground that the 1st appellate court erred in enhancing the sentence from 20 years imprisonment to life sentence, it is notable that at the hearing in the 1st appellate court, the learned Senior State Counsel submitted that the appellant ought to have been charged with incest. Counsel urged the 1st appellate court to correct the anomaly by invoking the court's inherent power under Section 354 of the Criminal Procedure Code. The 1st appellate court found that amending the charge at the stage of the 1st appeal was not tenable in law.

34. Section 354 (3) of the *Criminal Procedure Code* provides as follows:

a) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

a. in an appeal from a conviction—

i. reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

ii. alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

iii. with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

a. in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

(bb) in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High court thereon to the subordinate court for determination, whether by way of rehearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as High Court may think fit;

c. in an appeal from an acquittal, an appeal from an order refusing to admit a complaint or formal charge or an appeal from an order dismissing a charge, hear and determine the matter of law and thereupon reverse, affirm or vary the determination of the subordinate court, or remit the matter with the opinion of the High Court thereon to the subordinate court for determination, whether by way of re-hearing or otherwise, with such directions as the High Court may think necessary, and make such other order in relation to the matter, including an order as to costs, as the High Court may think fit;

d. in an appeal from any other order, alter or reverse the order, and in any case may make any amendment or any consequential or incidental order that may appear just and proper.

11. The 1st appellate court proceeded to enhance the sentence of 20 years' imprisonment to life imprisonment. It is notable that the respondent did not give a notice of enhancement or file a cross appeal. This Court in *Kesusa & another v Republic (Criminal Appeal 235 of 2018)* [2022] KECA 546 (KLR) (28 April 2022) (judgment) stated as follows:

> "We think, with respect, that an appellant is entitled, as a matter of procedural and substantive due process or natural justice, if you like, to be given notice of the possibility of so grave a possibility as enhancement of a sentence, especially when it is as dire as converting a 14- year term to a death sentence. It is a matter of fairness and a recognition of the inherent dignity of the prisoner. It implicates fair trial rights more so where, as here, the appellants did not have the benefit of legal representation before the High Court. It cannot be right or fair, whichever way one looks at it, that so grave a consequence should be sprung upon an appellant by the court at judgment stage. It does seem to us to be an unfair tackle and a terrible ambush that cannot be countenanced. An appellant should be warned of the possibility of enhancement so that he makes an informed choice whether or not to take the risk by prosecuting the appeal. It matters not that the sentence is an illegal one – fairness demands notice and/or warning and this Court has said so in a consistent line of authorities."

11. Further, in *EGK V Republic* [2018] eKLR this Court expressed itself as follows:

> "Be that as it may, we note that the first appellate court enhanced the appellant's sentence from 40 years' imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of section 354 (3) of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under S. 20 (i) of the *Sexual Offences Act* is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant. This court has had occasion to consider an enhancement of sentence without a cross-appeal and without warning an appellant in the decision of *JJW v Republic* [2013] eKLR wherein it states:
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> > "We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under section 354(3) (ii) and (iii) of the *Criminal Procedure Code*. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence

> and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal." [Emphasis supplied].

11. By parity of reasoning, we find that the 1st appellate court erred in enhancing the sentence meted out on the appellant by the trial court. In the absence of a cross-appeal and notice and or warning the 1st appellate court had no jurisdiction to enhance the sentence.

12. Accordingly, the appeal against conviction is dismissed for lack of merit.

    However, the appeal against sentence is allowed. The sentence of life imprisonment imposed by the 1st appellate court is set aside. The sentence of twenty years' imprisonment imposed by the trial court is reinstated to take effect from 24th April, 2011 when the appellant was first arraigned in court in accordance with Section 333(2) of the *Criminal Procedure Code*.

11. Orders accordingly.

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

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR