TMM v Republic (Criminal Appeal 74 of 2018)
[2024] KECA 1853 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1853 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 74 OF 2018

MA WARSAME, JM MATIVO & WK KORIR, JJA

DECEMBER 20, 2024

BETWEEN

TMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court at Naivasha (Mwongo, J.) dated 6th, November, 2018 in H.C.CR.A No. 15 0F 2017)

JUDGMENT

1. The appellant, TMM was charged and convicted with the offence of incest contrary to section 20 (1) of the *Sexual Offences Act*. The particulars were that on 2nd August, 2016 in xxxxx town within Nakuru County, he intentionally and unlawfully touched the vagina of the complainant, PW1 (JSS) with his penis who was to his knowledge his daughter aged about 6 years.

2. The appellant denied the charges and the trial proceeded before the Chief Magistrate's Court in Kitale. After the conduct of a voir dire examination, JSS gave unsworn evidence where she stated that on the said day, her mother (PW2) and elder sister S, had gone to the Shamba and left her to play with her younger brother R. When she went into the house to drink a cup of water, her father (the appellant herein) told her to climb on to the bed. He then removed both their clothes and defiled her. He proceeded to threaten her life if she disclosed the incident to anyone.

3. On her return home, PW2 noticed blood on her daughter's leg and on her shorts as she was putting her to bed. Her daughter informed her that the appellant, who was her step father had defiled her. On the following day she reported the matter to their employer, RN (PW4) who examined the child and noticed that her vagina was bruised and bleeding. She informed the police, and (PW5), PC Elizabeth Muema came to the farm where the appellant and his wife worked and found them packed and ready to leave to an unknown destination. She drove them to Narok police station, took their statement and

upon examining the minor by lifting up her dress, she found she had a blood stained short, dried blood on her private parts and her vagina was swollen. She arrested the appellant and charged him with the stated offence. PW1 was later treated at Naivasha District Hospital and Nairobi Women's hospital.

4. PW3, Sylvester Mesa, a clinical officer at Naivasha District Hospital produced a medical report on behalf of his colleague, Tabith Ndung'u who examined PW1. He testified that her vagina was swollen and bruised, her hymen broken. There were blood clots, foul smelling discharge and pus which were all indicative that PW1 had been defiled.

5. Put on his defence, the appellant denied the offence in an unsworn statement, stating that his wife and his employer had colluded and framed him. He stated that he had secured employment at the farm in XXXX and arrived with his family on 1st August 2016.However, given that the children were sickly due to the unfavourable climate, he decided to go back to Nairobi on 4th August 2016. As he was preparing to do so, PW4 arrived with the police who arrested him and charged him with the alleged offence. He maintained that he did not defile JSS and that he and his wife had disagreed severally in the house since she lost her 7 month old child.

6. The trial magistrate reviewed the whole matter and was persuaded that the appellant was guilty of the offence and sentenced him to life imprisonment. His appeal to the High Court having been dismissed, he has now come to this Court on a second appeal.

7. The appellant's appeal, as per his written submissions is premised on two grounds; first, that the learned Judge erred by finding that the ingredients of the offence had been proved beyond reasonable doubt and secondly, that the offence committed had only one mandatory sentence of life imprisonment.

8. When the appeal came up for hearing before us on 1st July 2024 the appellant appeared in person from Prison while Mr. Omutelema, learned counsel, appeared for the office of the Director of Public Prosecutions. Both parties relied on their written submissions.

9. While admitting that the complainant was his step- daughter, the appellant submitted that penetration and the age of the JSS were not proved. He contended that the complainant's testimony that he was the one who took off her clothes and "did bad manners" was misinterpreted by both courts to mean sexual intercourse whereas it could have meant any unfavourable thing done by any person. Citing the case of P.K.W. v Republic [2012] eKLR he submitted that hymens were not only raptured by sexual activity and that a broken hymen does not automatically indicate that a person was defiled.it was the appellant's position that the medical report did not clarify whether the hymen was freshly broken and when it was broken. As for the complainant's age he argued that it was not proved by a birth certificate, a school leaving certificate, a clinical card or an age assessment report by a clinical officer.

10. On the second ground, the appellant complained that the sentence meted by trial court and affirmed by the High Court was illegal and that the sentence of life imprisonment provided under Section 20 (1) of the *Sexual Offences Act* was not a mandatory sentence as stated by trial court. The case *M K v Republic (Criminal Appeal 248 of 2014*) [2015] KECA 468 (KLR) was relied on where the court stated as follows:

> " 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."

11. On its part, the respondent opposed the appeal and submitted that the prosecution proved all the ingredients of the charge in that the age of the minor and penetration were proved; that penetration was established by the minor's evidence and corroborated by PW2 who noticed blood on the child's leg after she was defiled and further the clinical officer who examined her noted that her vagina was bruised and her hymen was torn. It was contended that the trial court was satisfied that the evidence was sufficient to place the appellant on his defence and give rise to the conviction. Lastly, the respondent maintained that the sentence imposed was lawful and the circumstances of the case warranted severe punishment.

12. We have considered these submissions and carefully perused the record of appeal. It is not in dispute that the child, PW1, was the step-daughter of the appellant. With regard to penetration, JSS testified how she went to take a cup of water in their house and the appellant undressed her and proceeded to defile her. The record indicates her distress as she described in tears the ordeal she underwent, the pain she felt as she bled and how the appellant threatened her afterwards. She remained consistent in her narration of the events when she informed her mother, when she was interrogated by the police and when she was examined by the clinical officer who confirmed that she had been defiled as indicated by her swollen and bruised vagina, absence of the hymen, foul smelling discharge, pus in her urine and blood stained shorts.

13. Looking at the record, the narration of the JSS and the medical evidence, we are satisfied that the ingredient of penetration was proved to the required standard. Furthermore, the fact that JSS was left in her father's custody while her mother went to the farm, and that she was found with blood stained shorts and dried blood on her genitals while in his custody leads us to the inescapable conclusion that the appellant defiled his daughter.

14. As for the complainant's age, the medical examination report submitted by PW3 clearly indicates that the appellant was 6 years at the time of the incident. This evidence was corroborated by the JSS who testified that she was in pre-unit in xxxx school in Maai-Mahiu and the appellant's cross examination of PW2, which clearly shows that prior to moving to Maai-Mahiu, they co-parented to take the complainant and her siblings to Gracious school in Kangemi. Consequently, it is clear that JSS was a school going minor and in our view, her age was sufficiently established.

15. On the life sentence imposed by the trial court and upheld by the High Court, the appellant's contention is that it is unlawful and against the spirit of *the Constitution* under Article 50 (p) and (q) and that it does not serve the objectives of the sentencing guidelines.

16. Section 20 (1) of the *Sexual Offences Act* provides as follows:

> " 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."

17. The phrase 'shall be liable' has received extensive consideration by this Court. It is common ground that where a sentence is couched under the said phrase, it is an indication that the sentence prescribed is not a mandatory sentence rather it provides the maximum sentence or a ceiling of the sentence

that can be issued. Therefore, the sentencing court is clothed with discretion to determine the appropriate sentence taking into consideration the circumstances of each case. See Fred Michael Bwayo vs. Republic [2009] eKLR.

18. We note that the trial court in sentencing the appellant, directed itself as follows after listening to the appellant's mitigation:

> " Mitigation noted. The offence committed is a serious one. The accused was the complainant's father and it was his responsibility to take care of her instead, he became the predator.
>
> The action was inhuman and beastly. There is only one sentence provided by law which I hereby impose."

19. The High Court in upholding the sentence of the trial court held us follows:

> " The sentence provided for under section 8(2) of the *Sexual Offences Act* is as follows:
>
> "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" (sic)
>
> The sentence is mandatory if a child is aged 11 years or less, and in this case, the child was found to be a six year old kindergarten child. Accordingly the learned Magistrate was entitled and obliged to mete out the sentence given. I would not interfere with the same."

20. In view of the above sentiments, it is clear that upon correctly affirming the conviction of the appellant for incest under section 20(1) of the *Sexual Offences Act*, the learned Judge of the High Court erroneously considered the legality of the sentence imposed by the trial court based on section 8(2) of the *Sexual Offences Act* and misdirected itself in inferring that there was only one mandatory sentence imposed by law.

21. We have considered the appellant's mitigation that: he was suffering in custody and his parents and children depend on him, however, just like the two courts below, we are of the view that that he acted in a beastly and inhuman fashion. He took advantage of a helpless child who was under his care and who trusted him entirely. In fact, the complainant was adamant that it was not the first time the appellant had defiled her.

22. In the circumstance, we find that a sentence of thirty years is appropriate given the nature of the offence, the tender age of the victim, the trauma endured by victim and her family and the relationship of trust that the appellant took advantage of.

23. In the light of the foregoing, the appeal partially succeeds. We uphold the conviction and set aside the sentence of life imprisonment imposed by the trial court and affirmed by the High Court. The appellant is sentenced to 30 years' imprisonment to commence from August 5, 2016 which was the date that he was first brought to court, and remanded in custody for the remainder of his trial.

DATED AT NAKURU THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR