



REPUBLIC OF KENYA



KENYA LAW
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**NOR v Republic (Criminal Appeal 143 of 2017)
[2023] KECA 600 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 600 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 143 OF 2017
PO KIAGE, F TUIYOTT & JM NGUGI, JJA
MAY 26, 2023**

BETWEEN

NOR APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the Judgment of the High Court of Kenya at Homa Bay
(D.S. Majanja, J) dated 10th June, 2015. in HCCA No. 139 of 2014)*

JUDGMENT

1. This is a second appeal. Two things about a second appeal. The remit of the Court is to consider and determine matters of law only. In carrying out that remit the Court confines itself to issues that arose in the first appeal and the appellant cannot use the occasion to put forward a different appeal from that presented before the first appellate court by arguing new or additional grounds unless leave is granted by the second appellate court.
2. At his first appeal before the High court, the contention by the appellant against the decision of the trial court was that; the complainant did not testify; the children who were offended were not called as witnesses; a principal witness, SO did not testify; he was not subjected to medical examination; and on the whole the prosecution failed to prove its case. Before us, the appellant regurgitates some of those grounds but attempts to add others. We reject the invitation to consider any matter that was not taken up before the High court.
3. The appellant, father of FA and YA, was arraigned before the Chief Magistrate's Court at Homa Bay in Criminal Case No 1026 of 2013 on allegation of committing crimes against his daughters. The appellant faced charges of incest contrary to section 20(1) of the *Sexual Offences Act* No 3 of 2006 It being alleged that on the September 6, 2013 at about 6.00am within Homa Bay County, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of FA, who to his knowledge was



his daughter. In the second count, that on the same day, time and place, he unlawfully and intentionally caused his penis to penetrate the vagina of YA, who to his knowledge was his daughter. Based on the same facts he faced alternative counts of committing an indecent act with the said children contrary to section 11(1) of the *Sexual Offences Act, 2006*.

4. He was convicted of the first count, committing incest against FA, and on the second alternative count, committing an indecent act on YA, and sentenced to life imprisonment for the offence in the first count and 15 years' imprisonment in the second alternative count, the sentences to run concurrently.
5. The appellant preferred an appeal against both the conviction and sentence and in a decision dated June 10, 2015 the High Court (DS Majanja, J) affirmed the appellant's conviction and sentence on count 1 and set aside the conviction and sentence on the second alternative count and substituting it with a conviction for incest and imposed a life sentence for it. Both life sentences were to run concurrently. As is apparent, the appellant came off the worse after that appeal.
6. On the date she testified, September 17, 2013, FA was aged 8 years. She is the second born of the appellant, YA being the last. It would seem that their parents had a modest house in which the sleeping arrangement was that the parents would sleep in the only bedroom and the children in the sitting room. On September 6, 2013, the two children were alone with their father, as their mother was away. The appellant was later, in his defence, to explain that he had a disagreement with his wife, the mother of the children, who left ostensibly to see her parents.
7. At day break of the fateful day the appellant carried his two daughters from the sitting room onto his bed. He first held FA on her thigh, removed her underpants and defiled her. As for the younger girl, she usually slept naked. In respect to her there was no penetration but he touched her buttocks.
8. It was the evidence of FA that later she confided in SO about the sexual assault on her and her sister. AOD (PW6), the then Assistant Chief of [Particulars Withheld] sub-location, was told of this sad incident and he, with the help of police officers, made an inquiry into the report and visited the home of the appellant where they found the two children. FA told PW6 that she had been defiled by her father, the appellant.
9. APC Hamissi Nyarere (PW3) was one of the police officers who interrogated the children. After doing so, he and his colleague Corporal Ruto set out to look for the appellant whom they found and arrested at [Particulars Withheld] Trading Centre and escorted to [Particulars Withheld] AP post. A day later, on September 8, 2013, they escorted the girls to [Particulars Withheld] Health Centre for medical attention. Dr Oginda Mokoro (PW4) examined both girls on the same day. Both were terrified and traumatized. FA had an inflamed labia minora with a first degree vaginal tear with an absent hymen. YA's hymen was intact and an examination of a whitish creamy discharge from her labia minora and a vaginal swap revealed all to be normal.
10. When put on his defence the appellant denied the offence and stated that he had been framed up. It was his testimony that on 3rd August 2013, he had a misunderstanding with his wife because she was in an affair with a police officer who was attached to [Particulars Withheld] AP Camp. SO midwived the extra-marital affair. The misunderstanding led to a physical confrontation in which he beat his wife and SO who had also gotten involved. At that point the two threatened to have him locked up.
11. In upholding the conviction and sentence of the trial court, Majanja, J determined the four grounds of appeal as follows:
 - a. In criminal cases, the complainant is the republic.
 - b. The children who were subject of the sexual assault testified.



- c. Under section 143 of the *Evidence Act* it was not necessary to call all or any particular number of witnesses and as evidence incriminating the appellant was clear, the testimony of SO would not add or subtract anything from the prosecution.
- d. The life sentence was warranted as the evidence suggested that the appellant had been sexually assaulting the children previously.”
12. This appeal does not attempt to impeach the first two findings. Regarding the absence of SO as a witness, the appellant argues that both courts below failed to establish the whereabouts of SO, the informer in this case, and that failing to avail an important witness with vital information went to the root of the prosecution case and collapsed it entirely. Regarding the quality of the prosecution’s evidence, the appellant submits that it was insufficient, inconsistent and controverted.
13. On sentence the appellant concedes that sentencing is at the discretion of the trial court but argues that it ought to be fair and appropriate. The appellant cites the decision in *S v Scott- Crossley* [2008] (1) SACR 223 (SCA) for the argument that:
- “...one must not sacrifice an accused person on the altar of deterrence”
14. The appellant makes the familiar argument that the prosecution case was insufficient and inconsistent but without specifying how the evidence fell short of the standard of proof or how the evidence of the various prosecution witnesses was contradictory or unaligned. In a second appeal we are generally bound by the concurrent findings of fact by the courts below unless it is shown to have been based on no evidence or are perverse to the evidence adduced. It is against this long held principle that we must reject the appellant’s criticism of the sufficiency or consistency of the prosecution’s evidence which was made without any elaboration or specificity and is undoubtedly unavailing.
15. On this occasion we have no difficulty paying deference to the holding of the High Court, an affirmation of the findings of the trial court, that:
- “The appellant admitted that PW1 and PW2 were his children hence the offence of incest was properly laid. PW1 and PW2 gave unsworn testimony and no other witness saw them being defiled. Under section 124 of the *Evidence Act* (Chapter 80 of the Laws of Kenya), the court may convict a person on the basis of such testimony so long as it is satisfied that the children are telling the truth. Like the learned magistrate, I find that the children gave clear and consistent testimony that was not shaken by cross- examination. Although the appellant suggested that the children could have been coached and that he was being framed, the evidence points to a different conclusion. Both children specifically denied that they were coached to lie when the issue was put to them. Even if the appellant had a dispute with his wife, a certain police officer and his neighbor, why would the two children lie about what the appellant did to them. In addition, there was corroborative medical evidence provided by PW4, an independent witness, who examined both PW1 and PW2 and who observed that they were in a state of trauma and were indeed defiled. The injuries and trauma observed could not be explained in any other way other than what the children stated.”



16. On the argument that a crucial witness did not testify, the High Court took the following view:

“16. The appellant raised the issue why the(sic) SO, the informer, could not have been called as the report of defilement was made to her. Section 143 of the Evidence Act states,

“No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for proof of any fact.”

Hence it is not necessary to call all or any particular witness. However, in *Bukenya and Others v Uganda* [1972] EA 549, the Court held that that(sic) where essential witnesses were not called, the court was entitled to draw an inference that if their evidence had been called, it would have been adverse to the prosecution case. In this case, the evidence pointing to the appellant was clear and having found the children were truthful and their evidence was corroborated, the testimony of SO would not add or subtract anything from the prosecution case”

17. We agree with the learned Judge and add that the investigating officer offered an explanation as to why SO was not available to testify. She had run away from her home and she had been threatened against testifying in the matter. That she was no longer at her home and was not available was corroborated by PW6. There is no reason why a negative inference should be drawn on her failure to testify.

18. Regarding sentence, the position of Mr. Okango, appearing for the respondent, was that the life imprisonment is the proper and legal sentence where the victim is a child below the age of 12 years. At plenary hearing Okango submitted that the sentence imposed on the appellant does not benefit from the recent jurisprudence which applies the rationale in Francis Karioko Muruatetu & another v Republic (2017) eKLR regarding the unconstitutionality of the mandatory nature of the minimum sentences under the Sexual Offences Act.

19. But before we turn to reflect on the sentence, we must say that the High Court’s finding regarding the offence against the second victim is unsettling. After holding that:

“It was therefore unnecessary to charge the appellant with an alternative count of an indecent act with a child. In this respect the offence of incest was proved against PW2 as she clearly testified how she was touched in a manner that constitute an indecent act.”

the Court then made the following order on conviction and sentence:

“I set aside the conviction and sentence on the 2nd alternative count and substitute it with a conviction for incest and impose a life sentence for the same”

20. The result is that the appellant suffered a more severe sentence than that imposed by the trial court. While the first appellate court, undoubtedly, has power to alter a finding on conviction with the result that an appellant suffers a harsher sentence than that imposed by the trial court (Section 354 (3) (a) (ii) of the Criminal Procedure Code), that power should only be exercised where there is a cross-appeal expressly bespeaking it or where the appellant has been warned, before or at the hearing of the appeal, of that possible outcome so as to elect whether or not to proceed with the appeal. See. George Morara Achoki v Republic (2014) eKLR; JW v Republic (2013) eKLR.



21. We have no evidence of any cross-appeal or such warning and we feel constrained to quash that finding of the High Court and the sentence that was consequently imposed with the result that the conviction by the trial court on the alternative charge to count II remains and sentence of a prison term of 15 years reverts.
22. The life imprisonment imposed for count I is provided for under section 20 (1) of the [Sexual Offences Act](#) as follows:
- “20 (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”
23. The manner in which the word “liable” is used in this provision neither makes the sentence mandatory nor minimum. Axiomatic, the sentence is outside the realm of the jurisprudence in [Muruatetu \(supra\)](#). Second, we are aware of the extremely restricted remit imposed on us by section 361 (1) of the [Criminal Procedure Code](#) in regard to a second appeal on sentence:
- “(1) 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”
24. On another occasion that would be the end of the road on the issue of sentence. However, in imposing the sentence on count I the trial court stated:
- “The penalty for count I is mandatory. I sentence him to life imprisonment in that count one....”
25. Clearly the trial court proceeded under the wrong impression that the sentence was mandatory and it therefore did not have any discretion in the matter and proceeded to impose what it understood to be the only sentence available, a life imprisonment. A self –imposed fetter! There is no knowing what sentence the trial court would have imposed were it aware that the law did not prescribe a mandatory or minimum sentence. The net effect is to make the sentence imposed illegal because it was imposed without exercise of discretion that was expressly donated by statute.
26. This aspect of the sentence does not seem to have caught the attention of the learned Judge who, on sentence, held:
- “I do not find any fault in imposing the life sentence in respect of the first count as the appellant, had he been charged and convicted of defilement under section 8(1) and (2) of the [Sexual Offences Act](#), would have been liable to a sentence of life imprisonment. In this instance, the offence is aggravated by the fact that the appellant is the father of the children in whom they put their trust yet he violated it by sexually assaulting them. In fact the evidence



suggested that the appellant had been sexually assaulting the children before. A life sentence was indeed warranted.”

27. It is on this basis that we think we should review the sentence imposed by both courts below. There is merit in the observation by the High Court that because the appellant, a father of the victims, had violated the trust his children had put in him and may have sexually assaulted them previously, a harsh sentence was deserved. Yet the harshest of the sentences must be reserved for the most depraved circumstances, where for instance, the victim is of extreme young age, physical violence accompanies the sexual assault, the sexual assault is repeated, where the offender knowingly infects the victim with a Sexually Transmitted Disease , where the assault results in an extensive or complete damage of the genitalia of the victim or where the victim suffers extensive or irreversible psychological harm as a result of the assault. Without downplaying the gravity of the offence given the tender age of the victim, we are not certain that the crime by the appellant against FA falls in the category of “incest most foul” and a life imprisonment may be disproportionate punishment. After much reflection we think that a 30 year prison sentence is sufficient punishment for the appellant’s despicable transgression.
28. The final outcome is that:
1. The decision of the High Court in respect to the alternative to count 11 is hereby quashed and the consequent life imprisonment set aside.
 2. The decision and sentence of the trial court in respect to the alternative charge to count 11 hereby reverts.
 3. The sentence of life imprisonment in Count 1 is hereby set aside and in its place the appellant shall serve a prison term of 30 (thirty) years from the date of sentence at the trial court.
 4. The two sentences shall run concurrently.
 5. Only to that limited extent does the appeal succeed.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF MAY, 2023.

P.O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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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

