JMM v Republic (Criminal Appeal 28 of 2014)
[2023] KECA 479 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 479 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 28 OF 2014

FA OCHIENG, LA ACHODE & WK KORIR, JJA

MAY 12, 2023

BETWEEN

JMM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (H. Omondi, J.) delivered and dated 10th June, 2014 In Criminal Appeal No. 101 of 2013)

JUDGMENT

1. JMM, the appellant herein, was charged with the offence of incest contrary to section 20(1) of the *Sexual Offences Act*. He also faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. He was convicted of the main charge and sentenced to life imprisonment. Dissatisfied with the judgment of the trial court, he lodged an appeal in the High Court which appeal was dismissed prompting him to file the present appeal.

2. In a nutshell, the case against the appellant was that on the morning of April 19, 2013, the appellant was at home alone with his daughter, HWM (PW1). When HWM went into her bedroom, the appellant followed her and demanded to have sex with her. HWM conceded to the command of her father and the appellant proceeded to defile her. After the act, the appellant instructed her not to tell anyone of the ordeal lest he ends her life. After sometime, DMN (PW2), a brother to HWM came home and his sister informed him of what the appellant had done to her. PW2 then called a children's officer whose contacts he had acquired from a local radio station. The children's officer sent a motorbike to collect the complainant. Corporal John Rono (PW5) narrated how he received the complainant at the police station accompanied by a children's officer. He then took the complainant to the hospital where it was confirmed that she had been defiled. PW5 also organized for HWM to spend the night within the police station. The following day, he assigned his colleagues to arrest the appellant. In his

defence, the appellant denied committing the offence stating that he was framed as a result of a domestic disagreement between him and his wife, EWM (PW3).

3. In the appeal before us, the appellant raises four grounds of appeal, namely, that the element of penetration was not proved; that he was convicted on contradictory and uncorroborated evidence; that his defence was not considered; and, that the life imprisonment imposed on him was harsh and excessive.

4. When the matter came up for hearing on February 1, 2023, both parties had filed their submissions which they sought to rely on. In support of his appeal, the appellant submitted that the evidence of PW1 was contradictory and incapable of proving the element of penetration. He pointed out that the evidence of Dr Wacera (PW4) was inconclusive as to whether the complainant was actually defiled on that material day. He also stated that the trial court believed the prosecution evidence without considering the fact that PW1, PW2 and PW3 were his family members who had planned to fix him; and that his evidence was disregarded. He relied on the case of *Michael Odhiambo v Republic* criminal appeal No 280 of 2004 to submit that the fact that the hymen was intact meant that the complainant was not defiled. He also submitted that contrary to the findings of the trial court, the evidence of PW1 was not corroborated. With regard to the sentence, the appellant relied on the case of *M.K v Republic* [2015] eKLR to submit that section 20(1) of the *Sexual Offences Act* provided for a sentence within the range of 10 years to life imprisonment. He was of the view that the trial court erred in sentencing him to a mandatory sentence of life imprisonment.

5. Ms Mburu set off submissions on behalf of the respondent by appreciating the statutory provisions in relation to the charge of incest and the statutory definition of "penetration" and "indecent act". Counsel submitted that the elements of the offence of incest were proved against the appellant and that the evidence proved that it was the appellant who defiled PW1; and that PW1 was aged 13 years at the time and was a daughter to the appellant. Counsel also urged this court to dismiss the appellant's allegation that the charges were trumped up against him stating that the offence was proved and no evidence was tendered to prove that the charges were brought in bad faith.

6. On whether the evidence was contradictory and uncorroborated, Ms Mburu urged that the record reveals that the evidence was consistent and the evidence of PW1, PW2, PW3 and PW4 corroborated each other.

7. As regards the sentence, counsel for the respondent submitted that there was evidence that the complainant was aged 13 years and the sentence of life imprisonment was therefore within the statutory limits. Counsel therefore urged us to dismiss the appeal in its entirety.

8. During the hearing of this appeal on February 1, 2023, the appellant informed the court that he was abandoning his appeal on conviction and he would only concentrate and pursue his appeal on sentence.

9. This is a second appeal, and our jurisdiction is confined to matters of law only. Under section 361 of the *Criminal Procedure Code*, severity of sentence is regarded as a factual matter which does not fall within our remit. However, this court is allowed to delve into matters of sentence where it is demonstrated that either the sentence was enhanced by the first appellate court, or that the subordinate court had no power to pass the sentence in question. The decision of this court in *Simon Karanja Kiarie v Republic* [2014] eKLR speaks to this point thus:

> " The appellant herein is not challenging legality of the sentence that was meted out. He is merely arguing that the same was severe and urges this court to reduce it to the period already served. This court has severally held that in such an instance it lacks jurisdiction to interfere

with a lawful sentence. See *Raphael Kavoi Kiilu v Republic* [2010] Eklr, *Zacharia Waithaka Mwaura v Republic* [2010] eKLR

Jurisdiction is the bedrock of any court decision and without it a court has no power to do anything, other than to dismiss the matter before it, as we hereby do in respect of this appeal."

10. Our inquiry into this appeal will therefore be confined within the borders of our mandate under section 361(1)(b) of the *Criminal Procedure Code*. It is not in dispute that the High Court did not enhance the sentence meted by the trial court. It is also not in dispute that the trial court was legally mandated under section 7 of the *Criminal Procedure Code* to pass the sentence. The appellant, however, challenges the sentence on the grounds that the learned trial magistrate and the first appellate court failed to appreciate that life sentence is not mandatory under section 20(1) of the *Sexual Offences Act*. In our view, this ground raises a matter of law that calls for our determination and our jurisdiction is therefore properly invoked by the appellant.

11. Section 20(1) of the *Sexual Offences Act* is couched in the following terms:

> " 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)

12. The appellant's contention is that the words "shall be liable to imprisonment for life" does not connote that the only sentence in such an instance is imprisonment for life and no other. To address this issue, we wish to associate ourselves with the interpretation of this court in *Caroline Auma Majabu v Republic* [2014] eKLR. In that case, the court rendered itself on the meaning of the word "liable" as used in section 4(a) of the *Narcotic Drugs and Psychotropic Substance (Control) Act* and stated as follows:

> "(13) In our view, the word "shall" is used in relation to the guilt of the offender and the word used in relation to the sentence is "liable". The *Concise Oxford English Dictionary* 12th Edition defines the word "liable" as
>
> "(i) Responsible by law, legally answerable, (liable to subject by law to;
>
> ii. (Liable to do something) likely to do something;
>
> iii. (Liable to) likely to experience (something undesirable).

> *Black's Law Dictionary* defines "liable" as responsible or answerable in law; legally obligated, subject to or likely to incur (a fine, penalty etc)"

The court continued to state:

> "(14) Applying the above definition, the use of the word "liable" in section 4(a) of *Narcotic Drugs and Psychotropic Substance Control Act* merely gives a likely maximum sentence thereby allowing a measure of discretion to the trial court in imposing sentence with the maximum limit being indicated. It should be noted that sentencing is an exercise of judicial discretion, and therefore provisions which provide for mandatory sentence compromise that discretion, and are the exception rather than the rule. Thus, where applicable the mandatory sentence must be expressed in clear and unambiguous terms. The following examples from the *Penal Code* provides such mandatory sentences expressly and concisely as follows:
>
> 204. Any person convicted of murder shall be sentenced to death.
>
> 296
>
> (2) which provides capital punishment for the offence of robbery provides as follows:
>
> "if the offender is armed with any dangerous or offensive weapon or instrument or is in company of one or more other person (s) or of at or immediately before or immediately after the time of the robbery, he wounds, beats strikes or uses any other personal violence to any person he shall be sentenced to death"
>
> (15) The *Sexual Offences Act*, is another legislation which provides for a mandatory sentence. Section 3 of that Act which provides the penalty for the offence of rape provides as follows:
>
> (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.
>
> Although the word used in section 3 of the *Sexual Offences Act* is "liable", the provision is clear that the sentence provided is minimum by use of the words "shall not be less than", thus giving allowance for discretion on the upper limit and not the lower limit."

The court then concluded that:

> "In our view, this leaves room for judicial discretion and we would be reluctant to adopt an interpretation that would defeat or muzzle the exercise of such judicial discretion. With respect, we must depart from the finding in *Kingsley Chukwu v R* (supra) as the same was made per in curium. Both the trial magistrate and the learned judge misdirected themselves in holding that the sentence was mandatory, and failing to exercise their discretion by addressing the appellant's mitigating circumstances. An error of law was thereby committed which justifies the intervention of this court."

13. In our view, the provisions of section 20(1) of the *Sexual Offences Act* provides a lower limit sentence for the offence of incest with an adult as ten years. The same section, when dealing with incest concerning a minor, leaves an element of discretion to the trial court to go as far as life imprisonment. The provision therefore does not tie the hands of the court; it is couched in a manner which preserves the discretion of the trial court to impose any sentence between ten years and life imprisonment. A reading of the *Sexual Offences Act* discloses that where the legislature intended to have a minimum sentence, it did not mince its words. For instance, the sentence provided in section 8(2) of the Act for a person who commits an offence of defilement with a child aged eleven years or less is couched in mandatory terms 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."

[emphasis ours]

It is therefore our opinion that the use of the word "liable" in the proviso to section 20(1) of the *Sexual Offences Act* was therefore deliberate. In providing the sentence under section 20(1) the lawmaker must have been alive to the fact that the sentences in section 8 of the Act are also applicable to those who sexually violate children in circumstances that can be deemed to be incestuous.

14. The next action for us would be to determine whether the trial court judiciously exercised its discretion in the circumstances of this case and in line with the legal provisions for sentencing. The trial court's ruling on sentence is as follows:

> " Sentence
>
> Court: I have read the children officer's report which points out the feelings of the relatives of the accused person.
>
> Incest is a very shameful act which affects mainly very close members of a family unit. The complainant, HW is a girl of 13 years who have undergone a lot of physical sexual abuse and a lot of emotional stress occasioned by this heinous act by the person whom she has untrusted with her own life; her father. These physical and emotional scars may affect her for the rest of her life. She is obviously going to need a lot of support from her mother and other siblings to overcome this horrendous experiences; and to think that, the father have on other occasions done the same thing to her. The children officer's report reveals that the accused person had sexually abused his first born daughter, RW in 2007. This act made her leave her home to go and live with her grandmother.
>
> The accused is a man who is not able to contain his carnal instincts. He has abused his own daughter sexually even though his wife is still alive and very much healthy. This is a man who should not be allowed to live among his daughter again. Therefore, this court has taken his mitigation into consideration. The complainant is his daughter. She is 13 years

old. In consideration of the aforegoing, I hereby sentence the accused person to serve life imprisonment as provided for in section 20(1) of the *sexual offences Act* No 3 of 2006. Right of appeal 14 days." (emphasis ours)

15. Before addressing the specific grievance raised by the appellant, a reminder of the rules of sentencing is necessary. Section 137I(2)(a) of the *Criminal Procedure Code* and the proviso to section 333(2) of the same Code require courts to take into account the period during which the accused person has been in pre-sentence custody when passing sentence. Paragraph 23.9 of the Sentencing Policy Guidelines issued by the Kenyan Judiciary in 2016 provide for how to conduct a balancing act between the aggravating and mitigating factors when passing sentence. Paragraph 23.10 of the Guidelines provides that even in instances calling for imprisonment for life, courts should still endeavor to impose a sentence in keeping with the spirit of the Guidelines, which includes the promotion of consistency and certainty in the sentencing process as well as enhancing delivery of justice and promoting confidence in the judicial process. A life sentence ultimately takes away the freedom of the offender forever since unlike in other jurisdictions, imprisonment for life in Kenya means that the convict remains in jail until the last breath. It is therefore a sentence that should be reserved for repeat or depraved offenders. It should be imposed with utmost caution considering its harsh nature.

16. From the foregoing discussions and considering the record, we find that even though the sentence as passed was within the law, certain procedural tenets of sentencing were overlooked by the trial magistrate. The sentence neither conformed to the provisions of sections 137I(2)(a) and 333(2) of the *Criminal Procedure Code* or the Sentencing Policy Guidelines, 2016. It is on this basis that our jurisdiction is invoked.

17. What then was the proper sentence in the circumstances? In this case, the appellant's trial took less than two months during which period he was in custody. The trial court duly considered in detail the aggravating circumstances of this case as earlier reproduced in this judgment. In our view, the only mitigating circumstance in this case was that the appellant was a first offender. What we are then required to do is to endeavor to impose a sentence that meets the objectives and principles of sentencing under part 1 of the Sentencing Policy Guidelines, 2016.

18. We are persuaded that the offence committed by the appellant is one which called for a deterrent sentence and one which should protect not only the community but also the basic societal structure, being the family. It must also be one that portrays the society's denunciation of the offence of incest, especially in the circumstances such as in this case where a father, who, by all means, is expected to be a best friend, a custodian, a jealous protector of a daughter's well- being, interest and virginity, abdicated this solemn duty. On the other hand, even as we heed the calls for a punitive sentence geared at achieving the pre-mentioned objectives, we must also accord the offender an opportunity to reform with the hope of one day rejoining his kinsmen in the society as a changed man. In the circumstances, the appropriate sentence for the appellant herein, which we do pass is a prison term of 30 years.

19. The upshot of the foregoing is that the appeal against conviction is without merit and is dismissed. However, the appeal against sentence is allowed. The sentence of imprisonment for life is set aside. The appellant is hereby sentenced to 30 years' imprisonment. The sentence shall run from the date of his first appearance in court being April 22, 2013.

DATED AND DELIVERED AT NAKURU THIS 12TH DAY OF MAY, 2023

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR