**SMW v Republic (Criminal Appeal 48 of 2014)**
**[2023] KECA 512 (KLR) (12 May 2023) (Judgment)**

Neutral citation: [2023] KECA 512 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 48 OF 2014**

**F SICHALE, FA OCHIENG & LA ACHODE, JJA**

**MAY 12, 2023**

**BETWEEN**

**SMW ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Nakuru, (Emukule J), dated 8th November 2013) IN HC. CRA NO. 211 OF 2012)***

## JUDGMENT

1. The appeal before us is a second appeal in which SMW (the appellant herein), had initially been charged at the Senior Principal Magistrate's Court at Nyahururu with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between January 2011 and 29th June 2012 at (particulars withheld), he intentionally and unlawfully caused his penis to penetrate the vagina of MW who was to his knowledge his daughter aged 13 years.

3. In the alternative, he faced a charge of committing an indecent act with a child contrary to the provisions of Section 11 (1) of the same *Act*. The particulars of the offence were that at the same time and place, he unlawfully and intentionally caused his penis to come into contact with the vagina of W a girl aged 13 years.

4. The appellant denied the charge after which a trial ensued. In a judgment delivered on 9th November 2012, Hon P.O Muholi (the then Resident Magistrate, Nyahururu), convicted him of the main charge and sentenced him to life imprisonment.

5. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 8th November 2013, Emukule J, found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

6. Unrelenting, the appellant has now filed this appeal vide a Notice of Appeal dated 20th November 2013, raising 7 grounds of appeal. Subsequently thereafter, the appellant filed supplementary grounds of appeal dated 26th January 2022, raising the following grounds of appeal:

> " 1. That the learned appellate court judge of the high court erred in law by acting on the wrong principles of the law and upheld a lawful sentence. (Sic) The proviso to the Section 20 (1) of the *Sexual Offences Act* uses the words that the accused shall be liable to imprisonment to life thus the word liable was an indication it does not make life imprisonment as mandatory.
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> 2. That the learned appellate judge of the high court erred in law by upholding the appellant's conviction and sentence but failed to note that the appellant was not provided with the relevant document that prosecution relied upon being witness statements, prior to the commencement of the hearing of the case.
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> 3. That the learned trial appellate judge of the high court erred in law by upholding the appellant's conviction and sentence but failed to note, that the elements of the offence of incest were not fulfilled.
>
> 4. That the appellant's defence was not considered."

7. Briefly, the background to this appeal is as follows; PW1 was MWM, a 13-year-old pupil at [Particular Withheld] primary school. It was her evidence that sometimes in the year 2011, she went to look after cattle when her father (the appellant herein) came and told her to take cattle to the river. She obliged and the appellant followed her, got hold of her hands made her lie down, removed her clothes, slept on top of her and started doing "bad manners" to her. She later ran away and went to Kipipiri police station where she spent the night.

8. It was her further evidence that on another occasion, she was in the "shamba" with the appellant when the appellant came and held her over the neck, forced her to bend removed her clothes and started having sex with her and PW2 found them in the act. She later told Mama Waithera (PW3) what had transpired.

9. PW2 was SN PW1's mother. It was her evidence that on 29th June 2012, she was at the shamba with PW1 and the appellant when she briefly left and upon coming back, she saw the appellant and PW1 holding each other and having sex. This caused her to collapse. Upon gaining consciousness, she met PW3 talking to her daughter and PW3 told her that her daughter had been having sex with the appellant.

10. PW3 was MWM, the village elder. It was her evidence that on 29th June 2012, she was called by the head teacher of [Particulars Withheld] Primary School (PW4) who told her that he had been called by PW1 and requested her to go to school to find out what had happened to PW1. On reaching the school, PW1 told her that when the appellant and PW1 were in the shamba, the appellant had told her to bend and started doing "mambo mbaya". She then called the area chief and told her what had transpired.

11. PW4 was JMK, the head teacher of [Particulars Withheld] Primary School. It was his evidence that on 29th June 2012, he got a call from one pupil (PW1), who told him that her father had sex with her while

they were in the shamba. He further testified that prior to this incident, he had spoken to PW1 when she had missed school because she had run away from home over sexual advances by the appellant and he had advised her to call him, should such a sexual abuse occur again. He called the village elder (PW3) and asked her to check on what had happened to PW1 as he was very far. He later reported the incident to PW3, a village elder.

12. PW5 was PC Isaiah Rotich attached to Olkalou police station. It was his evidence that on 11th July 2012, he was at the police station when PW1 accompanied by PW2, PW3 and PW4 made a report that PW1 had been defiled by her father (the appellant herein). He commenced investigations and PW1 told him that the appellant had defiled her in the shamba while they were ploughing maize. He later recorded witness statements and charged the appellant as indicated on the charge sheet.

13. PW6 was Dr. Peter Nginyo, a clinical officer attached to Olkalou district hospital. He produced a P3 form in respect of PW1 who had been sexually assaulted by someone known to her (her father). Upon examination, the external genitalia was normal and the hymen was perforated. He concluded that there was evidence of previous sexual activity owing to the fact that the hymen was perforated.

14. The appellant in his defence gave a sworn statement and denied committing the offence. He called no witness. He further stated that he was framed by PW1 and PW2 because he had disciplined PW1.

15. When the matter came up for plenary hearing on 23rd January 2023, the appellant who appeared in person intimated to Court that he had filed his written submissions. He submitted that he was not given witness statements prior to the commencement of the trial and that he had stayed in prison for 12 years and requested to be given another chance. Ms Mburu, learned counsel for the respondent while opposing the appeal relied on her written submissions dated 2nd February 2022.

16. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

17. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados v Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

18. In *David Njoroge Macharia v Republic* [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:

> "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)."

19. Turning to the first ground of appeal, we shall revert to the same shortly as it has a bearing on sentence. The learned judge of the High Court was faulted for upholding the appellant's conviction and sentence but failed to note that the appellant was not provided with witness statements prior to commencement of the hearing of the case.

20. We have carefully and anxiously perused the record. The record shows that when the appellant was first arraigned in court on 16th July 2012, the court directed that copies of witness statements be supplied to him at his own cost. When the matter came up again for hearing on 3rd August 2012, the court

again made an order that the appellant be supplied with witness statements. On 15th August 2012, the appellant again requested for witness statements and the prosecutor informed the court that the appellant had made no effort get the statements. The court subsequently reiterated the order of 3rd August 2012, that the appellant be supplied with witness statements and directed the matter to proceed for hearing. Again on 31st August 2012, after 4 witnesses had testified, the appellant sought the recall of witnesses who had then not made statements and the court acceded to his request and recalled PW2, PW3 and PW4.

21. It is not clear from the record whether the witness statements were eventually supplied to the appellant as requested and directed by the trial court as the appellant did not raise this issue again after 31st August 2012. Additionally, the appellant did not raise this issue before the High Court.

22. The record shows that when the charges were read to the appellant on 16th July 2012, he denied the same and ably cross examined the prosecution witnesses. He even at some point sought the recall of PW2, PW3 and PW4 for cross examination and gave a lengthy statement of defence whilst denying the charges.

23. The appellant therefore clearly understood the charges he was facing and from the circumstances of this case we are of the view that he was not prejudiced by the failure to supply him with witness statements, if indeed he was not supplied with the same as he contends since the record is silent on whether he eventually, got the witness statements or not. Our view in this regard is fortified by the case of *Simon Ndichu Kahoro v Republic* NRB CA Criminal Appeal No. 69 of 2015 [2016] eKLR, where this Court stated thus:

> "We should not be understood to be setting up a general principle or precedent that every breach of article 50 of the *Constitution*, 2010 should automatically result in an acquittal of an accused person. Each case must be considered in the light of its own special circumstances as consequences of breach of fair rights to fair trial depend on all the surrounding circumstances of a case." (Emphasis ours).

24. From the circumstances of this case and due to the above reasons, we are of the considered opinion that failure to supply the appellant with witness statements alone was not fatal to the prosecution's case as the appellant clearly understood the charges he was facing. Consequently, nothing turns on this ground of appeal and the same fails.

25. The learned judge was further faulted for upholding the appellant's conviction and sentence when the elements of the offence of incest were not proved. The appellant was charged with the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006. The offence of incest is defined by Section 20 (1) of the *Sexual Offences Act* No. 3 of 2006 in the following terms:

> "(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 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."

26. The ingredients of the offence therefore are as follows; penetration or indecent act, knowledge that the person is a relative, and age of the victim as where the victim is below eighteen years has a bearing on sentence.

27. Turning to the first element, PW1's evidence was that sometimes in the year 2011, she was home when the appellant (her father) came and told her to take cows to the river and she obliged. The appellant then followed her, made her lie down and removed her clothes and underpants and started doing bad manners to her. It was her further evidence that the appellant had defiled her on one more occasion while they were in the shamba, an act that was witnessed by PW2 who actually found them in the act. The evidence of PW1 remained unshaken even in cross examination and she reiterated that PW2 found him in the act which evidence was corroborated by PW2 that she indeed found the appellant defiling her daughter (PW1) in the shamba.

28. The evidence of these two particular witnesses was corroborated by the medical evidence of PW6 the clinical officer who produced the P3 Form in respect of PW1 which indeed confirmed that she had been sexually assaulted as her hymen was perforated and that as such there was evidence of previous sexual activity owing to the fact that the hymen was perforated. From the evidence on record, it is evident that penetration was proved to the required standard.

29. Turning to the other element and as to whether the appellant, had knowledge that he was related to PW1. PW1's evidence was that she used to live with her mother (PW2), and SM (the appellant), though she did not know her biological father. PW2 on the other hand testified that the appellant was her husband and that they got married in the year 2002 and that at the time of marriage she was living with PW1. The evidence of these two witnesses remained firm and unshaken throughout the trial. The appellant in his defence admitted as much that he was PW2's husband and that PW1 was not her biological daughter. The appellant therefore clearly knew that he was PW1's half father as contemplated by Section 22 of the *Sexual Offences Act* which provides for test of relationships as follows:

> " 22. Test of relationship
>
> 1. In cases of the offence of incest, brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree and a mother includes a half mother and an aunt of the first degree whether through lawful wedlock or not."

30. Additionally, the appellant's identity was not in question as they used to live together with PW1 and PW2 as a family and on both occasions, PW1 was sexually assaulted in broad daylight and there was no possibility of mistaken identity. Consequently, we are satisfied that this element was as well proved.

31. Lastly on age, PW1 testified that she was 13 years old and a standard seven pupil at [particulars Withheld] Primary School. PW2 on the other hand who was PW1's mother testified that PW1 was 14 years old having been born on 15th March 1998. She further produced a clinic card which confirmed the same. The evidence of these two particular witnesses as regards the age of PW1 was not even challenged in cross examination. Though there were minor discrepancies in the evidence of PW1 who stated that she was 13 years while PW2 stated that she was 14 years, the evidence of the clinic card produced by PW2 showed that PW1 was born on 15th March 1998 and was therefore 14 years at the time of the incident. In any event, this minor discrepancy was not fatal to the prosecution's case as PW1 was clearly below 18 years as at the time of the commission of the offence.

32. From the circumstances of this case and from the evidence on record, and contrary to the appellant's contention, all the elements of the offence of incest were proved to the required standard and this ground of appeal must fail.

33. Finally, the learned judge was faulted for failing to consider the appellant's defence. The appellant in his defence denied having committed the offence and stated that he was framed by PW1 and PW2. He also seemed to allude to the fact that his wife (PW2) was committing adultery with an unnamed teacher and that further, he was framed up because he had disciplined PW1. It is imperative to note that the appellant did not raise these issues during cross examination. PW2 further denied that there were any differences between her and the appellant.

34. The learned judge while considering the appellant's defence rendered himself as follows:

> "The appellant's defence that this was a frame up by the mother and daughter is clearly implausible as it clearly came out from the evidence of PW1 that the mother and grandmother had tried to silence her until she enroped (Sic) the aid of her teacher (PW3) whom the appellant, falsely the accused (sic) of having an affair with his wife (PW2). In fact, PW2, in an attempt to protect her husband, sought to hide the evidence, and had to be warned to tell the truth as per her statement to the police, that she had indeed caught the appellant in sexual intercourse with their daughter in the shamba!
>
> There is therefore no question of frame-up against the appellant by his daughter and his wife (PW1 & PW2, or PW4, the teacher, PW3 the village elder."

35. From the above passage from the judgment of the learned judge, and contrary to the appellant's contention, it is evident the appellant's defence was considered and in our view rightly so rejected. As a matter of fact, PW2 had even attempted to cover for the appellant by giving false and misleading evidence and it only took a warning from the trial court for her to tell the truth and as such there was no reason whatsoever why PW2 would frame the appellant when in actual sense she tried to cover up for him.

36. The appellant's defence in light of the evidence on record was clearly a sham and hollow and a mere denial and the same was rightly rejected. Consequently, there is no merit in this ground of appeal.

37. From the circumstances of this case, we are in agreement with the concurrent findings by both the trial court and the High Court that the prosecution established the offence of incest against the appellant beyond any reasonable doubt and that there was overwhelming evidence to sustain a conviction against the appellant for a charge of incest and that it was the appellant and no one else who committed acts of incest with PW1 knowing very well that he was related to PW1 by virtue of being his step father.

38. Accordingly, we find and hold that the appellants' conviction for the offence of incest was safe and sound, which conviction we hereby uphold and consequently, dismiss the appellant's appeal on conviction.

39. Finally, the learned judge was faulted for acting on wrong principles of the law by upholding an unlawful sentence of life imprisonment given under Section 20 (1) of the *Sexual Offences Act*. It was the appellant's contention that the use of the words "shall be liable to life imprisonment" did not make life imprisonment a mandatory sentence but was rather the maximum sentence.

40. Section 20 (1) of the *Sexual Offences Act* pursuant to which the appellant was charged with provides that any person found guilty of the offence of incest shall be liable to imprisonment for a term not

unless than 10 years. The section further provides that if "female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life...." (Emphasis added).

41. In the instant case, there was uncontroverted evidence that PW1 was below the age of 18 years as at the time of the commission of the offence. The trial court subsequently handed him the maximum penalty provided for under the Act while noting inter alia that the offence was rampant in the region and that the life of PW1 who was under the custody of the appellant had been destroyed and she may not be able to recover from the same.

42. This Court while considering the import of the wording "shall be liable to life imprisonment" under Section 20 (1) of the *Sexual Offences Act* in the case of *M K v Republic* [2015] eKLR 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. The Court cited with approval the dicta in *James v Young* 27 Ch. D. at p.655 where North J. said:
>
> > " 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".
> >
> > 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".
> >
> > 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.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."

43. We fully associate ourselves with the sentiments expressed by the Court in the above case that the sentence of life imprisonment provided for under Section 20 (1) of the *Sexual Offences Act* is not a mandatory sentence and the courts have discretion to impose a lesser sentence which discretion must of course be exercised judiciously depending on the particular circumstances of each case.

44. In the instant case, the appellant was handed the maximum life imprisonment. The trial court noted inter alia that the offence was rampant in the area and that the young life of a girl who was in the appellant's custody had been destroyed. Additionally, we note this incident happened on more than one occasion and there were attempts to cover up the same. We consider the circumstances under which the offence was committed to be aggravated and we are not inclined to disturb the maximum sentence of life imprisonment handed to the appellant.

45. The upshot of the foregoing is that the appellant's appeal is without merit and the same is hereby dismissed in its entirety.

46. It is so ordered.

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

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**F. OCHIENG**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**