



REPUBLIC OF KENYA



KENYA LAW
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**DKM v Republic (Criminal Appeal 120 of 2015)
[2023] KECA 698 (KLR) (16 June 2023) (Judgment)**

Neutral citation: [2023] KECA 698 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 120 OF 2015
F SICHALE, FA OCHIENG & LA ACHODE, JJA
JUNE 16, 2023**

BETWEEN

DKM APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. A. Emukule, J.) delivered and dated 2nd November, 2011) in HC.CR.A. No. 214 of 2011)

JUDGMENT

1. The appellant, DKM, is before us on a second appeal. He was first arraigned before the Principal Magistrate's Court at Naivasha to face charges of incest contrary to section 20(1) of the [Sexual Offences Act](#) and an alternative charge of indecent act with a minor contrary to section 11(1) of the [Sexual Offences Act](#). The particulars of the offence were that between August 1, 2010 and October 31, 2010, the appellant knowing RWB to be his daughter had carnal knowledge of her while she was 16 years old. The appellant was convicted and sentenced to life imprisonment. Dissatisfied with the judgment of the trial court, he lodged an appeal to the High Court which was subsequently dismissed.
2. The appellant was dissatisfied with the judgment of the High Court and raises the following grounds of appeal; that sections 65 and 128 of the [Evidence Act](#) were not adhered to; that there was omission to call certain critical witnesses; that the sentence passed was illegal and harsh and that section 29 of the [Sexual Offences Act](#) was not adhered to.
3. The case against the appellant was anchored on the evidence of 5 witnesses. In a nutshell, the case was that the appellant's wife died sometime in August 2010. Soon thereafter, the appellant started having carnal knowledge of his eldest daughter RWB which offence would take place late in the night when the appellant came back home. RWB would later drop out of school and leave the village for a house manager's work in [Particulars Withheld]. It took the intervention of PW2 who noticed that RWB had



stopped going to church to question her whereabouts. The matter was reported at Naivasha Police station. RWB was escorted to Naivasha hospital where she was found to be pregnant. Samples were extracted for DNA testing and the outcome revealed that the DNA of RWB's child was a 99.9% match with that of the appellant. The appellant was then arrested and arraigned on charges of incest. The appellant's defence only touched on what transpired on the day he was arrested.

4. This matter was before us in plenary on March 13, 2023 when the appellant appeared in person while Ms Mburu appeared for the respondent. Both parties had filed their submissions which they sought to rely on. At the hearing and in his submissions, the appellant informed the Court that his appeal was only on sentence. The appellant submitted that under section 8(1) of the *Sexual Offences Act*, the sentence of life imprisonment is not the minimum and that the Court was at liberty to refer to section 8 of the *Sexual Offences Act* to prescribe a punishment commensurate to the age of the complainant. The appellant in urging the Court to consider a shorter sentence for him, informed us that he was the only surviving parent to the victim alongside her other three siblings and that he needed a second chance to look after his children. He also submitted that the complainant frequently pays him a visit at the prison. The appellant referred to the case of *M K vs Republic* (2015) eKLR to submit that the prescribed sentence under section 20(1) of the *Sexual Offences Act* is between 10 years and life imprisonment and not a mandatory life sentence.
5. For the respondent, Ms Mburu maintained that the sentence passed was legal as the trial court exercised its discretion in passing a life imprisonment sentence. Counsel submitted that there was adequate proof that the complainant in this case was a minor and therefore the court in exercising its discretion had the latitude to impose the life sentence. Counsel also submitted that the trial court took into consideration the appellants mitigation as well as the existing aggravating circumstances prior to handing down the life sentence. Whilst pointing out the objectives of sentencing, counsel urged us to find that the life sentence passed by the trial court was merited in this case considering the nature of the offence and the fact that the minor conceived as a result of the offence.
6. This is a second appeal and our mandate is well cut out under section 361(1) of the *Criminal Procedure Code*. Under that provision, we are only to render ourselves on matters of law. The section also provides that matters of severity of sentence is a matter of fact and not of law, save for where the legality of the sentence has been challenged. As regards matters of fact, we are required to pay homage to the findings by the two courts below, except where such findings were not supported by the evidence on record or where the findings are made as a result of a wrong application of the law.
7. In line with our mandate as restated in the preceding paragraph, and considering that the appellant abandoned his appeal on conviction, the only issue for determination in this appeal is whether the sentence passed by the trial court and affirmed by the first appellate court was legal. For this Court to delve into matters of sentence, it must be proved that either the sentence was enhanced by the High Court, or that the subordinate court had no power to pass that sentence. Our view in this matter is fortified by an earlier decision of this Court in *Simon Karanja Kiarie v Republic* [2014] eKLR where the Court held that:

“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.”



8. Our review of the record of appeal reveals that the High Court did not enhance the sentence issued by the trial court. It is also not in dispute that the sentence passed is one which the trial court was legally mandated to pass under section 7 of the Criminal Procedure Code. The appellant however challenges his sentence on grounds that the learned trial court and the first appellate court failed to appreciate that life sentence was not a mandatory under section 20(1) of the Sexual Offences Act. It is our considered opinion that the appellant misapprehended the position. We say so because the trial court ultimately passed the sentence of life imprisonment after considering the appellant's mitigation and the aggravating circumstances. In other words, the sentence was handed down after due consideration of all the relevant factors. Therefore, the High Court upheld the sentence because it was satisfied that the trial court had handed down an appropriate sentence.
9. On our part, even though we agree with the appellant that section 20(1) of the Sexual Offences Act does not make life sentence mandatory, we decline his invite to interfere with the sentence of the trial court as affirmed by the first appellate court. The appellant has failed to meet the threshold to warrant this Court's interference with the sentence as his appeal is entirely on the severity of a sentence clothed as a challenge to the legality of thereof. We find that the life sentence passed by the trial court was not because it was of mandatory nature; but it was the consequence of a meticulous analysis of the appellant's mitigation and the aggravating circumstances of this case.
10. In the circumstances, we find that this appeal is without merit and is hereby dismissed.

DATED AND DELIVERED AT NAKURU THIS 16TH DAY OF JUNE, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

