ESM v Republic (Criminal Appeal 99 of 2015)
[2023] KECA 736 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KECA 736 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 99 OF 2015

F SICHALE, FA OCHIENG & LA ACHODE, JJA

JUNE 16, 2023

BETWEEN

ESM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (A. Mshila, J.) delivered and dated 30th March, 2015) in HC. CR. A. No. 313 of 2010)

JUDGMENT

1. ESM was first arraigned before the Nakuru Chief Magistrate's Court on charges of incest contrary to section 20(1) of the *Sexual Offences Act*. He also faced an alternative count of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that between January 1, 2002 and May 16, 2010 within Njoro in Nakuru County, the appellant committed incest with LWN, a child aged 14 years knowing her to be his granddaughter. The appellant was convicted and sentenced serve life imprisonment. Dissatisfied with the trial court's judgment, he lodged an appeal to the High Court which appeal was dismissed and the findings of the trial court affirmed.

2. The appellant was dissatisfied, and is before this court on a second appeal raising 7 grounds of appeal which we condense and summarize as follows; that his conviction was based on the evidence of a single witness which was doubtful; that his defence was rejected without reasons therefore; that the two courts below erred by shifting the burden of proof to the defence; that the identity of the appellant was not proved; that key witnesses were not called to testify; that the appellant's age was not established and that the sentence passed was harsh and mandatory in nature.

3. This is a second appeal and by virtue of section 361(1)(a) of the *Criminal Procedure Code*, our mandate is limited to re-evaluation and consideration of matters of law. We are required to pay homage to the findings of fact by the two courts below. The exception to this is only where any such findings of fact

as reached by the two courts below, is not supported by the evidence on record or where the findings are made as a result of a wrong application of the law.

4. In a nutshell, the case against the appellant was constructed by the evidence of 5 witnesses. LWN testified that she was born in 1996 and her mother, the appellant's daughter, had passed away. Upon her mother's demise, she lived with the appellant, her grandfather. From the year 2002 when she was in class one, the appellant started defiling her and gave her money to keep her mouth shut. She stated that the incidences would take place when her grandmother was away. She had disclosed the issues to her aunt, Rahab, who disbelieved her. She later disclosed the same to their neighbor (PW3) who escorted her to the nearest AP post. Upon informing the administration police officers of her plight, the police assaulted her and accused of her peddling lies. She ran away from home and was later traced by the children officers who took her to the hospital and thereafter they took her to a children protective centre. LWN was taken to the hospital and upon examination, PW1 confirmed that the complainant had been defiled. For the defence, the appellant denied the charges and instead claimed that LWN ran away from home in 2010 because she did not want to go to school. He also alluded to a possible disagreement between him and PW3 which gave rise to the accusations leveled against him.

5. The learned Judge arrived at the conclusion that the prosecution had established a strong case that the appellant had defiled the complainant, and that his defence, that the allegations were concocted by the complainant to avoid going to school were unlikely and unbelievable.

6. The learned Judge further held that it is trite that the age of the complainant under the *Sexual Offences Act* must be proved as it is one of the determinants of the sentence to be handed down. The appellant contended that the complainant was 16 years old while the complainant and PW5 told the court she was 14 years old. The court proceeded to hold that notwithstanding the contradictions, it was proved that the complainant was below 18 years and was also the appellant's granddaughter. The learned Judge accordingly made a finding that the particulars under section 20 of the *Sexual Offences Act* were established. Subsequently, the conviction and sentence by the trial court was upheld and the appeal dismissed for lack of merit.

7. When this matter came up for hearing on March 15, 2023, the appellant appeared in person while Ms Maina appeared for the respondent. Both parties had filed their written submissions which they sought to rely on, with a short oral highlight in plenary.

8. In his submissions, the appellant contended that the complainant's age at the time of commission of the offence was not proved. The appellant submitted that it was unclear whether the complainant was 14, 16 or 17 years and that it was therefore impossible to determine the appropriate sentence. The appellant relied on the case of *Kaingi Elias Kasomo v Republic,* CA CR Appeal No 504 of 2010 to point out the importance of proving the age of a complainant in offences under the *Sexual Offences Act*. The appellant also submitted that the medical report and the P3 form relied upon by the respondent to secure his conviction was not clear whether it was prepared by the witness who produced it in court. He also challenged the authenticity of the P3 form on grounds that it did not have the stamp from the police station that issued it. Further, the appellant contends that the P3 form did not establish the element of penetration. He also submits that no medical analysis was conducted hence the author of the form was unable to fill section b no. 2, 3, and 4 of the form. He buttressed this notion by arguing that due to inability to observe and analyse the patient, the author of the form could not estimate the age of the injuries caused. He also submitted that there was evidence that he had a urinal infection while the complainant did not have the same infection therefore it was impossible for the appellant to have carnally known her without passing on the infection to her.

9. It was also the appellant's submissions that the medical evidence as produced offends section 48(1) of the *Evidence Act* and section 33 of the *Sexual Offences Act*. To this end, the appellant relied on the case of *Unoka Mutonyi & Jackson Kamende v Republic,* CR Appeal No 92 of 1981. For the preposition that;

> "... an expert witness who hopes to carry weight in a court of law must, before giving his expert opinion;
>
> i. Establish the evidence that he is especially skilled in his science or art.
>
> ii. Instruct the court on the criteria of his science or art so that the court may itself test the accuracy of his opinion, ..."

It was the appellant's contention that the medical evidence adduced in this case did not meet the criteria set out in that authority.

10. The appellant also submitted that prosecution failed to call two critical witnesses.

He argues that PW2 mentioned one Rahab and her grandmother who she allegedly shared with the allegations of sexual assault by the appellant. He submitted that no explanation was tendered as to the difficulty encountered in a bid to secure these two witnesses. In his view, had the two witnesses been summoned, their evidence would have been adverse to the prosecution's case. He relied on the case of *Bukenya & others v Uganda*, CR Appeal No. 68 of 1972 to urge that the prosecution ought to have complied with section 150 of the *Criminal Procedure Code* by making available all necessary witnesses. He also relied on the case of *Peter Gitau Muchene v Republic* ,HC CR Appeal No 364 of 2006 to urge the court to find that the failure to call Rahab and the complainant's grandmother was detrimental to the prosecution's case.

11. It is also the appellant's submission that the trial court erred when it failed to inform the appellant of his rights to address the court at the close of both the prosecution's and defence case. He was of the view that this error on the record was prejudicial to his case. He relied on the case of *Musando vs. Republic,* CR Appeal No. 326 of 2004 to argue that having not been represented, it was upon the court to inform him of his rights under the *Criminal Procedure Code* and under the *Constitution* of Kenya. Finally, on the issue of sentence, the appellant contends that the sentence passed by the trial court was illegal as it was passed in its mandatory nature. He contends that the trial court took into consideration wrong principles of the law thereby awarding a wrong and illegal sentence. He relied on the case of *PMM v Republic* (2018) eKLR to reinforce his submissions on this issue. He also relied on the case of *Thomas Mwambu Wenyi v Republic* (2017) eKLR among others to urge us to set aside his sentence of life imprisonment and substitute thereof with a favourable sentence. The appellant urged us to allow his appeal.

12. For the respondent, Ms Maina submitted that the offence of incest was adequately proved against the appellant. Counsel pointed out that the appellant in his defense confirmed that the victim was his granddaughter and had stayed with him since 2002 after the demise of her mother, who was his daughter. On the question whether there was failure to summon key witnesses, counsel submitted that the evidence of the victim confirmed that she notified the alleged witnesses who were a relative and a grandmother about the grandfather's act of defiling her, but they trashed the information as lies. Counsel also drew our attention to the fact that the trial court had observed the demeanor of the victim even at cross examination and concluded that the victim was saying the truth. The trial court was satisfied that the victim's credibility was not in doubt. In the said circumstances, the failure to summon additional witnesses would have no bearing on the prosecution's case. On the aspect of penetration, counsel submitted that (PW1) was a clinical officer authorized to fill the P3 as confirmed

in her testimony and did confirm to have examined the victim and noted that the victim had been defiled. She also stated that the evidence of PW1 corroborated that of the victim and there could not be any doubt as to the fact that the victim had been defiled.

13. Counsel also submitted that the appellant's right to a fair trial, as provided for under article 50 of the *Constitution*, was never infringed since the appellant was granted his right to address court. It was the respondent's position that article 50(c) of the *Constitution* of Kenya 2010 was compiled with, as the appellant was granted adequate time and facilitated to prepare his defense. Counsel maintained that the appellant's defense was properly considered by the two courts below prior to being dismissed as the same could not impeach the credible and corroborated evidence of the prosecution witnesses. With regards to the sentence, counsel submitted that the sentence issued by the trial court was commensurate to the circumstances of this offence. Counsel pointed out that the sentence was legal and that the court had the discretion to pass the sentence. She urged us to uphold both the conviction and sentence.

14. We have carefully considered the record, submissions by the appellant and the law. The issue for determination is whether the offence of incest against the appellant was proved beyond any reasonable doubt.

15. This is a second appeal. The jurisdiction of this court is limited to consideration of matters of law only. Accordingly, we are generally bound by the concurrent findings of fact by the two courts below. However, we are fully alive to the fact that this Court may depart from findings on matters of fact when the Court finds that they are not based on any evidence, or that the said findings were derived from a misapprehension of the evidence, or are plainly untenable. (See: *Karingo v Republic* [1982] KLR 219 and section 361 of the *Criminal Procedure Code*).

16. The appellant was charged with the offence of incest under section 20(1) the *Sexual Offences Act*. It provides:

> "(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."

17. For the prosecution to sustain a conviction for the offence of incest under section 20(1); it must be proved that a male person committed an indecent act with a female who to his knowledge is a related to him as listed in the Act and the age of the complainant plays a determinant role in sentencing.

18. It is common ground that the complainant in this case is the appellant's granddaughter, who was left in his care upon the demise of her mother. The appellant expressly acknowledged that the complainant was his granddaughter. He alleged that the complainant had brought the allegations against him because she did not want to go to school, which evidence the two courts below did not believe.

19. In the case of *GMB v Republic* [2018] eKLR, the court held that in an offence of incest, penetration is not a necessary ingredient but an indecent act as defined under the Act must be proved. In the instant case, medical evidence concluded that the complainant's hymen was broken and that in itself was proof of defilement. The person who caused the hymen to be broken was the appellant. He was the only person who had had a sexual liaison with the complainant.

20. PW1 was a Clinical Officer. She testified that she examined the complainant at Njoro Health Centre, and filled the P3 Form. She produced the said P3 Form in evidence.

21. During cross-examination, the appellant did not ask any questions that could give rise to doubts about the qualification or professional knowledge of the witness.

Therefore, the learned trial Magistrate was right to have admitted the evidence, and to have founded her judgment upon it.

22. As regards the age of the complainant, in the case of *Joseph Kieti Seet v Republic* [2014] eKLR the court held thus:

> " It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of *Francis Omuroni versus Uganda*, Court of Appeal Criminal Appeal No. 2 of 2000. It was held thus:
>
> > " In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense..."

23. It follows therefore that conclusive proof of age in cases under *Sexual Offences Act* does not necessarily mean a Birth Certificate. Such formal documents might be useful but other modes of proof are available and can be used in evidence.

24. The complainant stated that she was 14 years old and the documents which could have proved her age were with her grandmother who did not believe her and who did not testify. A letter was produced from the complainant's teacher which showed that she was 14 years. The appellant contended that the complainant was 17 years. The only evidence adduced in this regard was the letter. We find that whether it is to be believed that the complainant was 14 years or 17 years is immaterial as it was a proven fact that she was under 18 years and even younger at class one when she alleged the defilement started.

25. Perhaps the only issue that would require our intervention is the fact that the trial court entered a sentence of life imprisonment in its mandatory nature. However, we appreciate that this is what the law was back then. In the recent past, there has a been a pragmatic shift, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR where it was held that the mandatory nature of the death sentence was unconstitutional. This court has taken cue, and has taken the position that mandatory sentences when so prescribed by statute, are unconstitutional. In Similarly, in *Christopher Ochieng v Republic* [2018] eKLR (also cited by the appellant) this court held as follows:

> " In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

26. Nonetheless, the court isnot precluded from handing down the prescribed mandatory sentence if the same is appropriate in the circumstances prevailing in a particular case. In order to determine whether or not it was appropriate, the court has to give consideration to the mitigation, if any, as well as the

laid down sentencing guidelines. This view is fortified by the decision of this court in *Joshua Gichuki Mwangi v Republic*, Nyeri Criminal Appeal No 84 of 2015 where the court held that:

> "We emphasise that thiscourt is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished...
>
> On the other hand, there are definitely others deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts..."

27. However, considering the peculiar circumstances of this case, the appellant was a grandfather to the complainant; the man who was entrusted to jealously guard the interests of the only living reminder of his own daughter. Yet, in an unnatural manner, he turned his back and "be-wifed" the minor, from a very tender age. And he continued to molest her for years on end. To make matters worse, the appellant persuaded people that the child was lying. In the end, we find that the sentence of life imprisonment was warranted in this case. The same is for the appellant to serve.

28. For the foregoing reasons, we find that the appeal lacks merit and is consequently dismissed. The conviction and sentence are affirmed.

29. Orders accordingly.

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

F. SICHALE

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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