**SKG v Republic (Criminal Appeal 6 "A" of 2020)**
**[2023] KECA 1547 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1547 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CRIMINAL APPEAL 6 "A" OF 2020**

**F SICHALE, LA ACHODE & WK KORIR, JJA**

**DECEMBER 15, 2023**

**BETWEEN**

**SKG ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An Appeal from the Judgment of the High Court of Kenya at Nakuru (Hon. J.A. Emukule, J) delivered and dated 8th March 2013 in HCCRA No. 25 of 2013)***

## JUDGMENT

1. SKG, the appellant herein, was at the magistrate's court charged with the offence of incest by a male person contrary to section 20(1) of the *Sexual Offences Act*. He also faced an alternative charge of indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. He was found guilty of the main charge and sentenced to life imprisonment. Dissatisfied with the judgment of the trial court, the appellant preferred an appeal to the High Court. The High Court in its judgment concurred with the trial court hence dismissing the appeal entirely.

2. The appellant is now before us on a second appeal dissatisfied with the judgment of the first appellate court on the grounds: that his rights under Article 50(c), (g) and (h) of the *Constitution* were violated; that the complainant's age was not proved; that vital exhibits were not produced; that crucial witnesses were not called; that the first appellate court erred in dismissing his defence of intoxication; that the trial court erred in relying on the evidence of a single witness; that the first appellate court abdicated its duty to independently re-evaluate and re-analyse the evidence; and, that life sentence prescribed under section 20(1) of the *Sexual Offences Act* is unconstitutional.

3. The case for the prosecution was premised on the evidence of five witnesses. In a nutshell, the prosecution's case was that on 19th August 2012 at around midday, the appellant went home and found his three children, amongst them the complainant. He ordered the other two children out of the house

while he remained with the complainant. He then took the complainant to the bed where he defiled her. The complainant's brother J.K. (PW4) heard the complainant scream from inside the house and alerted a neighbour. It was the neighbour who accessed the house and brought out the complainant who had been defiled. The complainant was taken to the hospital where, upon medical examination, PW1, a clinical officer, established that she was defiled. He filled and produced a P3 form at the trial.

4. When the matter came up for hearing before us, the appellant appeared in person while Ms. Kisoo appeared for the respondent. Both parties sought to rely on their written submissions.

5. For the appellant, he contends that he was not informed of his rights under Article 50 of the *Constitution* among the right to be informed of the charges against him; the right to counsel of his choice; and, the right to prepare for his defence. He submits that as a result of the violations of his constitutional rights, the entire trial was rendered a nullity.

6. The appellant also submits that the complainant's age was not proved as no documentary evidence was adduced before the trial court. He urges that his conviction and sentence are therefore unconscionable as a conviction for the offence which he was charged with required proof of the age of the complainant.

7. The appellant further contends that vital exhibits were not tendered in evidence hence the conviction cannot be upheld. In support of this contention, he submits that the complainant's clothes were not subjected to forensic analysis and that there were no primary treatment chits to back up the information contained in the complainant's PRC form. He submits that this set of evidence was key, and, in its absence, the conviction is not safe.

8. The appellant also faults the manner in which investigations were conducted in this matter arguing that it was necessary for him to be subjected to medical examination but this was not done. He argues that such examination was mandatory to either exonerate or link him to the offence.

9. The appellant also submits that his defence of intoxication was corroborated by the prosecution witnesses but was not considered by the two courts below.

10. Through secondary submissions, the appellant urges that life sentence provided under section 20(1) of the *Sexual Offences Act* is unconstitutional as it denied him the opportunity to a less severe sentence while also offending the doctrine of separation of powers due to its pre-determined nature. He submits that the said sentence violates Article 14 of the *International Convention on Civil and Political Rights* and denies the trial court the sentencing discretion under sections 216 and 329 of the *Criminal Procedure Code* while also subjecting him to cruel, inhuman and degrading treatment. In the end, he urges us to allow his appeal.

11. Ms Kisoo, opposes the appeal and submits that this being a second appeal, we should limit ourselves to matters of law being the jurisdiction set out for us by section 361 of the *Criminal Procedure Code*.

12. Counsel submits that the appellant's right to a fair trial was not infringed as during the trial he clearly indicated that he was ready to proceed.

13. Regarding the appellant's assertion that his right to legal representation was violated, counsel submits that legal representation at the State's expense is only granted in instances where substantial injustice is likely to occur and this was not the case in the appellant's trial. Counsel referred to *Karisa Chengo & 2 others vs. Republic* [2017] eKLR and section 36(1) of the *Legal Aid Act* to buttress this argument.

14. Although Ms. Kisoo appreciated the necessity to prove the age of the complainant in sexual offences, she submits that in this case the evidence of the complainant's age was consistent and the credibility of the witnesses who gave this evidence was never questioned even at the first appeal. Counsel urges us to find that the raising of this issue on this second appeal is an afterthought. She maintains that the

prosecution discharged the burden of proof to the required standards and any misstep as alleged by the appellant was not fatal to the case against him.

15. As for the appellant's claim that his defence was not considered, counsel submits that both the trial court and the first appellate court considered the appellant's defence and gave reasons for dismissing it. Counsel therefore urges us to dismiss this appeal in its entirety.

16. This being a second appeal, our mandate under section 361(1) of the *Criminal Procedure Code* is limited to considering matters of law only. Matters of fact which includes severity of sentence are not within our purview. However, questions surrounding the legality of a sentence are deemed to be matters of law.

17. Upon reviewing the record of appeal and the submissions of the parties, we are of the view that this appeal will be determined upon resolution of the following issues: whether the appellant got a fair hearing; whether the prosecution discharged the burden of proof on all elements of the offence of incest; and, the constitutionality of the sentence of life imprisonment provided in section 20(1) of the *Sexual Offences Act*.

18. The appellant contends that his rights under Articles 50(c), (g) and (h) of the *Constitution* were violated. He asserts that he was not informed of his right to counsel and neither was he informed of the charges facing him nor was he accorded an opportunity to secure counsel and that he was not given time to prepare for his defence. As correctly submitted by Ms Kisoo, this is the first time that the appellant is raising these and ideally, they should therefore not be for determination in this appeal. Be that as it may, the appellant's complaints herein go to the core of the right to fair trial. Therefore, although raised for the first time, we find it fair and reasonable to consider the allegations. In doing so, we are alive to the centrality of the rights to fair trial in any trial. Indeed, that the rights to a fair trial must be jealously protected has been appreciated in several decisions. In *Natasha Singh vs. Cbi (State)* [2013] 5 SCC 741, the Supreme Court of India underscored the importance of the right to fair trial thus:

> " Fair trial is the main object of criminal procedure, and it is the duty of the court to ensure that such fairness is not hampered or threatened in any manner. Fair trial entails the interests of the accused, the victim and of the society, and therefore, fair trial includes the grant of fair and proper opportunities to the person concerned, and the same must be ensured as this is a constitutional, as well as a human right. Thus, under no circumstances can a person's right to fair trial be jeopardized.... Thus, it is essential that the rules of procedure that have been designed to ensure justice are scrupulously followed, and the court must be zealous in ensuring that there is no breach of the same."

19. A look at the record shows that the appellant took plea on 21st August 2012 while the hearing of the case commenced on 4th of January 2013. Even though the record is silent as to whether the appellant was supplied with witness statements, on 4th January 2013 when the trial commenced, the appellant indicated to the court that he was ready to proceed with the hearing. At no point during the trial did the appellant raise the issue of being in the dark with regard to the offence he was facing. On the contrary, the appellant actively took part in the trial by cross- examining witnesses and eventually tendering evidence in his defence. We would be descending into the dark realms of speculation were we to hold that the appellant was never supplied with witness statements when everything on record points to a fair trial. We are therefore convinced that the appellant had adequate knowledge of the charges against him and the manner in which the trial was conducted accorded him adequate time to prepare his defence. The appellant has not persuaded us that in such circumstances one can say that a miscarriage of justice was occasioned to him warranting the setting aside of the decisions of the two courts below.

20. The other complaint premised on Article 50 of the *Constitution* was that the appellant was not informed of his right to legal representation. This Court (differently constituted) in *Thomas Alugha Ndegwa vs. Republic* [2016] eKLR undertook an extensive analysis of regional and international jurisprudence on this subject and concluded that:

> "From the foregoing it is clear that the right to legal representation at state's expense is a fundamental human right and essential to the realization of a fair trial. However, this right is not absolute and there are instances where the same can be limited."

21. We concur that the right to legal representation is not absolute as it is conditional on the accused person meeting certain parameters as enacted in the *Legal Aid Act*. Under section 43 of the *Legal Aid Act* the duties of the trial court include informing the appellant of his right to legal representation and assessing whether substantial injustice is likely to occur if legal representation is not offered to the accused. In undertaking the assessment as to whether substantial injustice is likely to occur, some of the factors which the court consider are the severity of the charge and sentence, the complexity of the case, and the capacity of the appellant to defend himself. In our view, the duty to assess the possibility as to whether substantial injustice is likely to occur is an exercise of discretion by the trial court but which is guided by the *Legal Aid Act*. Further, section 40 of the *Legal Aid Act* requires that a person who wishes to receive legal aid should make an application to the National Legal Aid Service for such assistance. In the present case, the only shortcoming is that the record does not show that the appellant was informed of his right to be represented by counsel. However, the appellant did not demonstrate that he could not afford counsel or that the trial court declined to admit his counsel. We therefore do not find this ground of appeal convincing. There is nothing from the record to show that a miscarriage of justice was occasioned as to warrant the setting aside of the judgments of the trial court and the first appellate court.

22. The next issue for determination is whether the prosecution discharged its burden of proof. The appellant's complaint is two- fold; that the age of the complainant was not proved and that vital evidence was not adduced by the prosecution. The importance of proving a complainant's age in sexual offences is appreciated by both sides. We agree with counsel for the parties that the majority of the offences under the *Sexual Offences Act* makes a complainant's age a crucial element since it determines the sentence to be handed down to a person convicted of that offence. Therefore, in *Alfayo Gombe Okello v Republic* [2010] eKLR it was stated that:

> "In its wisdom, Parliament chose to categorise the gravity of that offence on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1)"

23. Just like for every other fact in a criminal trial, the prosecution is therefore expected to prove the age of the complainant beyond reasonable doubt, where the age of the complainant is an ingredient of the offence. It is the appellant's contention that the evidence regarding the complainant's age did not meet the standard of proof in criminal trials. From the record, we note that PW1 in Part C of the P3 form estimated the complainant's age as 14 years. The complainant herself testified as PW2 and stated that she was 14 years old. PW3, the complainant's mother, also testified that the complainant was aged 14 years at the time of the commission of the offence. This evidence sufficiently established the age of the complainant.

24. Furthermore, we note that the trial court was satisfied that the complainant was a minor and proceeded to subject her to voir dire examination. As has been held previously by this Court in several decisions,

among them *Richard Wahome Chege v Republic [*2014] eKLR, proof of a complainant's age should not primarily be pegged on production of a birth certificate. Oral evidence that is consistent and well corroborated is also sufficient to establish a complainant's age. Such evidence is even more assuring when it is the mother of the complainant who states the age. We therefore find that the evidence pertaining to the complainant's age sufficiently established that she was indeed 14 years old at the time she was violated.

25. Furthermore, we are of the view that unlike for the offence of defilement under section 8 of the *Sexual Offences Act* where the age of the complainant determines the conviction and the appropriate sentence, the core ingredient in the offence of incest under section 20(1) of the *Sexual Offences Act* is the degree of the consanguinity between the persons involved. In a case of incest, the need to prove that the person involved in the coitus with the accused person is under 18 years is so as to allow the trial magistrate to exercise discretion and enhance the minimum sentence of 10 years to any period between the minimum sentence and the maximum sentence of life imprisonment. It must be appreciated that in charge of incest whether under section 20(1) or section 21 of the *Sexual Offences Act*, the existence of consent between adults is not a defence.

26. Another ground upon which the appellant impeached his conviction is that vital exhibits were not produced at the trial. He also submitted that failure to subject him to forensic examination to link him to the offence contravened the provisions of the *Sexual Offences Act*. The appellant is not breaking new ground with this submission as this Court has stated time without number that the provisions of section 36(1) of the *Sexual Offences Act* does not make medical or scientific examination of an accused person mandatory in order for a conviction to ensue. In that regard, this Court (differently constituted) in *Martin Nyongesa Wanyonyi vs. Republic* [2015] eKLR cited, with approval, the holding in *Geoffrey Kionji vs. Republic* Cr. Appeal No 270 of 2010 that:

> " Where available, medical evidence arising from examination of the accused and linking him to the defilement would be welcome. We however hasten to add that such medical evidence is not mandatory or even the only evidence upon which an accused person can properly be convicted for defilement. The court can convict if it is satisfied that there is evidence beyond reasonable doubt that the defilement was perpetrated by the accused person. Indeed, under the proviso to section 124 of the *Evidence Act*, Cap 80, Laws of Kenya, a court can convict an accused person in a prosecution involving a sexual offence, on the evidence of the victim alone, if the court believes the victim and records the reasons for such belief."

27. Similarly, we find that subjecting the appellant herein to forensic or other scientific testing for purposing of gathering evidence was not a mandatory requirement in law and neither was that the only evidence upon which a conviction could be based. In this case, the evidence of PW2 and PW4 was clear that no other person apart from the appellant committed the offence. Consequently, this particular ground of appeal also fails.

28. On the appellant's assertion that his defence was not considered, we find that the record shows otherwise. It is apparent from the record that the two courts below duly took into consideration the appellant's defence. This is evident at paragraph 3 of page 22 of the typed proceedings of the lower court as well as paragraph 11 of the judgment of the High Court. The trial court dealt with the appellant's defence as follows:

> " In this instance, both prosecution witnesses and the accused person have confirmed that indeed the accused person was taking alcohol. Though one can think of a defence of intoxication, the accused's conduct shows that he knew what he was doing. He is in bed

with the minor yet when the brother comes in and asks for her, he says that she is not there and the brother hears her cry. The same directs a guilty mind.

I have no reason not to believe the evidence of the minor and the brother. Nothing has been shown [to] indicate that the accused person might have been framed or any reason for doing so. The evidence of the complainant has been corroborated by the P3 form and the PRC forms."

The High Court on its part stated as follows:

> "When put on his defence, the Appellant denied the offence in an unworn statement that made no reference to the charges against him. His statement comes out from a person who does not seem to care about the seriousness of the offence he had committed against his daughter."

29. The excerpts from the decisions of the trial court and the High Court as reproduced above clearly demonstrate that the appellant's defence was taken into consideration. We are satisfied that both courts took the appellant's side of the story into account and rightly discounted it in view of the overwhelming evidence adduced by the prosecution. Accordingly, we find that the appellant's appeal against conviction on the ground that is defence was not considered has no basis. From our analysis above, it follows that the appeal against conviction is without merit and is for dismissal.

30. As for the appeal against sentence, we are cognizant that severity of a sentence is a matter of fact and matters of fact fall outside the mandate of this Court when exercising its jurisdiction as a second appellate court. In this appeal, however, the appellant has questioned the sentence handed down on two fronts, namely, that the same is in its mandatory nature and is predetermined hence denying the court its discretion, and second, that the sentence is unconstitutional due to its mandatory nature.

31. On the submission by the appellant that section 20(1) of the *Sexual Offences Act* is couched in mandatory terms, we are of the view that it is not and we agree with the holding of this Court in *Joseph Maina Mwangi vs Republic*, Nakuru CR Appeal No. 28 of 2014 that:

> "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."

32. The question of constitutionality of the life sentence was not canvassed before the first appellate court and we do not deem it appropriate to address the issue in this judgment. In our view, the appellant's salvation lies elsewhere in this appeal. As already stated the enhancement of the sentence under section 20(1) from the minimum of ten years to the maximum of life imprisonment is left to the trial court's discretion. In our view, both the trial court and the 1st appellate court erroneously proceeded, as if the sentence of life imprisonment is mandatory for any male person convicted of incest where the female person is under the age of eighteen years of age. This misapprehension of the law makes the appellant's appeal against sentence a matter of law.

33. The record shows that in his mitigation the appellant stated that he had five children who relied on him. The prosecution also informed the Court that the appellant was a first offender. On the other

hand, we note that the complainant is one of the appellant's five children and the eldest of them. There was testimony that the appellant had committed such an act with the complainant before. Incest is morally and legally wrong. A child must always feel safe near a parent and a parent who violates this trust deserves no mercy. In the circumstances we hold the view that a prison sentence of 35 years is appropriate punishment for the appellant. The sentence of life imprisonment is therefore set aside and substituted with a sentence of 35 years imprisonment. The sentence will run from the date of conviction being 13th February 2013.

**DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023**

**F. SICHALE**

**.....**

**JUDGE OF APPEAL**

**L. ACHODE**

**.....**

**JUDGE OF APPEAL**

**.....**

**W. KORIR**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**