



REPUBLIC OF KENYA



KENYA LAW
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**RK v Republic (Criminal Appeal 87 of 2018)
[2022] KECA 490 (KLR) (25 March 2022) (Judgment)**

Neutral citation: [2022] KECA 490 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CRIMINAL APPEAL 87 OF 2018
PO KIAGE, J MOHAMMED & M NGUGI, JJA
MARCH 25, 2022**

BETWEEN

RK APPELLANT

AND

REPUBLIC RESPONDENT

*(Appeal from the judgment of the High Court of Kenya at Eldoret
(Kariuki, J) dated the 24th July, 2015 in HCCRA No. 234 of 2013)*

JUDGMENT

1. The question that arises in this appeal and the whole sad saga that preceded it is: how should the law treat the appellant who, in his early twenties at the time of the offence for which he was convicted, instead of embodying promise, was exceptionally vile?
2. So vile was he that the learned Kabarnet Principal Magistrate S. O. Temu, in sentencing him to 40 years' imprisonment for incest sounded aghast and indignant as he observed: -

" The accused herein committed the offence herein against a person he knew was his grandmother.

A grandmother of over 90 years. All that she required from her children and grandchildren was care and protection not abuse.

The accused is not a human being but a beast as human beings who are normal as he is are not required to commit such a heinous activity.

The accused in his normal senses and a man of his age was not required (Sic) to even think about such an act. He had gone to the house of the grandmother removed his clothes as if he had reached his house and raped the helpless grandmother."



3. The sickening facts leading to those observations as established through the cogent testimony of six prosecution witnesses were quite straightforward. On the night of 5th August, 2013, CK (PW1), a student at the [Particulars Withheld], was asleep in her house in [Particulars Withheld] which is in Saimo Location in Baringo North District. At about 11.00p.m., she heard the voice of her grandmother coming from the latter's house nearby. The grandmother, full of years and not able to communicate clearly, was enquiring as to "who was pushing". This was followed shortly afterwards by the grandmother's screaming saying to someone, "you are killing me." Alarmed, PW1 made a call to her brother VC (PW3) telling him that their grandmother was screaming under attack. She also called her father MK (PW5), a retired chief. The three rushed to the complainant's house.
4. As PW3 got there, he met the appellant running out of his grandmother's house. He was barefoot and clad in a tee-shirt and innerwear. PW3 flashed his torch on the appellant and called him by name. The appellant fled and PW3 gave chase falling in the process while the appellant vanished into the bushes.
5. Giving up the chase, PW3 went to his grandmother's house, joining PW1 and PW5. They had found the old woman under the bed, naked from the waist down as her skirt had been lifted up. She was without underwear, and never wore any, according to PW1. They lifted her up and helped her onto the bed.
6. These three witnesses all said that certain pieces of apparel, all said to belong to the appellant, were found in the complainant's house. These were a pair of jeans trousers, a jumper/sweater, a belt and a pair of shoes. PW1 stated that the appellant would go for many days without changing his clothes. She had seen him in those very clothes on many occasions and he had been in them earlier on the material day. This was confirmed by the other witnesses and they all said that all the people from the neighbourhood who came to the complainant's house instantly recognized the clothes, shoes and belt as belonging to the appellant.
7. That was not all. KC, (PW4) another cousin of the appellant testified that he was in his house asleep on the material night when at about midnight he heard a knock at his door. Enquiring as to who was there the nocturnal visitor introduced himself as Ronald. PW4 opened the door to find the appellant standing there clad in a tee-shirt and short only. The appellant said in answer to PW4's query that he was coming from town and requested to be accommodated for the night as it was late and dark.
8. In the morning, PW4 left the appellant sleeping and proceeded to the main house. Elders who were there asked him whether he had seen the appellant and he told them where he was. They asked him to go and confirm whether he was wearing clothes and shoes. He went back to his house and found the appellant basking outside the house. He had helped himself to PW4's pair of shorts. PW4 confirmed that the appellant did not have extra clothes and shoes, which he told the elders. They then reported to the Chief's office. PW4 knew the appellant, who was a relative and a neighbour who had come to his home many times. He, too, confirmed that the clothes found in their grandmother's house belonged to the appellant as the appellant "uses and wears them on a daily basis".
9. The appellant was arrested by the villagers led by the local chief and was later taken to the Police Station. PW5 and others took the complainant to Kabartonjo District Hospital where she was treated. He testified that since the date of the incident, she started urinating on herself. According to Benjamin Kendagor (PW2) a Clinical Officer who examined the complainant, she had bruises on the labia majora and the vaginal wall was swollen and painful. He concluded that she had been penetrated. She was put on antibiotics and analgesics. He signed a P3 form which he produced in court.
10. When placed on his defence to the charge of incest, the appellant in sworn testimony admitted that the complainant was his grandmother but denied the charges. He stated that on the material day he went



home and slept and that he was arrested for no reason by people who hated him and had framed him for the offence because he was self-dependent.

11. The trial magistrate believed the prosecution case and convicted him before meting out the sentence we mentioned at the beginning of this judgment. The appellant's first appeal against both conviction and sentence was heard by C. Kariuki, J. who dismissed it in a judgment dated 24th July, 2015, provoking the present appeal.
12. Even though in his self-crafted documents he calls 'Grounds of Appeal' and 'Supplementary Grounds of Appeal' the appellant raises a number of points on the basis of which he beseeches this Court to quash his conviction and set aside the sentence imposed on him, his address to us at the hearing of the appeal was a plea for leniency. He considers the sentence to have been harsh, laments that he is wasting his life in prison, having been in custody since 2013, and prays that we consider that he was 21 years old when he committed the offence.
13. As this is a second appeal, we are enjoined by law to consider only matters of law. This is an express constriction of our jurisdiction set out in section 361(1)(a) which provides that we shall not hear an appeal on a matter of fact. It goes on to provide that severity of sentence is a question of fact. Thus, we would ordinarily not have entertained this appeal but for the fact that the provision of the [Sexual Offences Act](#) that provide for mandatory minimum sentences do implicate fair trial rights post the Supreme Court decision in [Francis Karioko Muruatetu & Another -vs- Republic](#) [2017] eKLR, thus, bringing the issue under the legality of sentence rubric over which we have jurisdiction. Moreover, as we shall shortly show, a question of law does in fact arise on the legality of the 40 years' imprisonment that was meted out on the appellant.
14. Ms. Anguria, learned Prosecution Counsel in opposition to the appeal first submits that sentencing lies in the discretion of the trial court and cites [Shadrack Kipchoge -vs- Republic](#), Eldoret Criminal Appeal No. 253 of 2003 on the necessity for sentencing to be appropriate, just and proportionate. Applying those considerations to the case at bar, it is counsel's contention that the complainant having been over 90 years old and thus vulnerable, needing protection yet the appellant turned on her, the 40 years' sentence imposed was lawful. She reiterated, for good measure, that there was no doubt about the correctness of the appellant's conviction as he was positively identified by many witnesses. She urged us to dismiss the appeal.
15. Upon a consideration of this appeal in totality, we harbour no doubt whatsoever about the propriety of the appellant's conviction. He was recognized by PW3 as he fled the scene. PW3 gave chase but slipped and fell giving the appellant the opportunity to disappear into the bush. He was later to appear at the house of PW5 scantily dressed and barefoot. So much so that the next morning he helped himself to his host's pair of shorts. In his flight from the scene of the heinous crime, he left behind clothes that were easily and unanimously recognized as his because he was consistently in those very clothes which he rarely changed as well as his sports shoes. He doubtless was the man who had forced, non-consensual sexual intercourse with his frail and defenceless nonagenarian grandmother. The case against him was iron-clad, and the concurrent findings of the two courts below on his guilt were beyond reproach.
16. That brings us to the gravamen of this appeal, which is whether the sentence of 40 years' imprisonment should be interfered with. The offence of incest which the appellant was charged with and convicted of is created and punished in section 20(1) of the [Sexual Offences Act](#) No. 3 of 2006 which is titled

" incest by male persons", as follows;

20. Any male person who commits an indecent act or an act which causes
 - (1) 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.” (Our emphasis)

17. Thus, the minimum sentence provided is 10 years. The sentence may be enhanced up to life imprisonment but only if the female person with whom the penetrative or indecent act is committed is under the age of 18 years, and it would not matter whether the said act was with the consent of the said female person. It would seem then that the operative sentence for the offence of incest by a male where the female is over the age of 18 is the minimum of 10 years. The statute provides a leeway to the Court to impose a higher sentence with no guidance on how far it may go. The problem is what we might term a legislative blind spot that does not seem to anticipate incestuous rape. The offence of rape presupposes absence of consent while incest seems to proceed from an assumption that the parties thereto, if adults consented to the act.
18. This is traceable to common understanding reflected in the lexical meaning of incest as “sexual relations between people classed as being too closely related to marry each other” per the *Concise Oxford English Dictionary*. Indeed, according to *Black’s Law Dictionary, 10th Edn*, “Incest was not a crime under English Common Law but was punished as an ecclesiastical offence.” It was thus a question of morals.
19. This state of things may be the probable explanation for the markedly less severe sentence for the offence of incest, except in the case where the female person is a child. What this state of the law does is to create a legal absurdity in which conduct amounting to rape attracts a much more lenient sentence if committed against a female relation when, properly understood, it ought to attract a more severe sentence.
20. We think, with respect, that the offence of rape is not any less rape just because the victim is a female relation of the male perpetrator. To call it incest under those circumstances is to introduce a non-existent conceptual consent and to clothe the perpetrator with a cloak of statutory leniency. We should think that unless there is clear evidence that the case is of sexual relations between consenting adult relations of the opposite gender, it is inadvisable to charge the perpetrator with incest by a male person under section 20(1) of the *Sexual Offences Act*. If the sexual act was without consent of the female person, the proper charge should be rape contrary to section 3 of the Act which provides thus;

- " (1) A person commits the offence termed rape if -
- (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
 - (b) the other person does not consent to the penetration; or
 - (c) the consent is obtained by force or by means of threats or intimidation of any kind.
- (2) ...



(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.”

21. Rape is rape and a man who commits it against a relative should not be treated any more leniently through charging him with incest. It cannot be incest when a man forces himself sexually upon a non-consenting adult female relation. That is simply rape to be viewed from a standpoint of aggravation.
22. This has to be so considering what Black’s Law Dictionary has to state about modern, more progressive and realistic views of what incest entails;

” Modern statutes make it a felony.

‘Although incest under both English and American law is a distinct crime, its commission may involve any of eight different offences: illegal marriage, consensual cohabitation by unmarried persons, fornication (consensual intercourse), forcible rape, statutory rape, child abuse, and juvenile delinquency (sexual relations between minor siblings or cousins) ... The choice of crime charged is generally one of prosecutorial discretion. Unless one of the participants is a minor and the other an adult, both parties may be prosecuted for incest.’
Lois G. Forer, “Incest” in 3 Encyclopedia of Crime and Justice 1880, 880 (Sanford H. Kadish ed., 1983.”

23. In the instant case, it is ironical that the prosecution, in an attempt to charge the appellant with what appeared to be the correct offence given the uncontested fact that the complainant was his grandmother, substituted the original charge of rape with incest. In so doing, they unwillingly moved him from the punishment range of “10 years to life” to the lesser one of “a minimum 10 years.”
24. Even though the [Sexual Offences Act](#) does not give any guidance as to how far the court can go above the minimum sentence of 10 years, we are not sure that the 40 years imposed by the trial magistrate, which is four times the minimum sentence stated, bears any logical and reasonable relation to that minimum sentence. It looks on the face of it so excessive as to be a complete departure from the statutory guidance.
25. Upon the first appeal to the High Court, the learned Judge in upholding the 40-year sentence, reasoned as follows;

” Section 20(1) of the [Sexual Offences Act](#) provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for not less than 10 years and can be enhanced to life. The sentence pronounced by the learned magistrate is provided under the law.”

26. With great respect to the learned Judge, we think that he misapprehended the provision and ended up misdirecting himself on the sentence thereunder. It is plain to see from the said section that the beginning point for the offence is a sentence of at least 10 years. There is no general power of enhancement of sentence to life imprisonment. The enhancement, if can be so termed, applies only when the female relation in the act of incest is a child under the age of 18 years.
27. Given that patent misdirection, we think that much as the appellant’s act invites opprobrium and revulsion, the provision under which he was charged prescribes a sentence of at least 10 years and we would think that any sentence higher than the minimum should not entirely ignore it. Bearing that in mind, and taking consideration of the entire sentencing scheme evident in the [Sexual Offences Act](#)



which provides a graduated scheme, it would be unconscionable and probably unlawful to impose any sentence that bears no relation to the prescribed minimum.

28. Accordingly, and while cognizant that had the appellant remained under the charge of rape, the 40-year sentence would have been lawful and amply deserved, we are left with no option save to set aside the sentence. We must, however avoid any sentence that might even remotely suggest that we view the appellant's crime with anything less than the deepest outrage.
29. The upshot is that the appeal succeeds on sentence. The 40-year sentence is set aside and substituted with a term of 25 years' imprisonment to run from the date the appellant was convicted and first sentenced.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF MARCH, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

