PK v Republic (Criminal Appeal 74 of 2018) [2022] KECA 416 (KLR) (4 March 2022) (Judgment)

Neutral citation: [2022] KECA 416 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 74 OF 2018

PO KIAGE, J MOHAMMED & M NGUGI, JJA

MARCH 4, 2022

BETWEEN

PK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against conviction and sentence of the High Court of Kenya at Eldoret (Kimondo, J.) dated 19th February, 2015 in HCCR. A. NO. 32 of 2012)

JUDGMENT

Background

1. PK (the appellant), has preferred this second appeal against the judgment of the High Court at Eldoret (Kimondo, J.) dated 19th February, 2015, in which his appeal against conviction and sentence by the Principal Magistrate's Court at Kabarnet for the offence of incest contrary to Section 20 (1) of the *Sexual Offences Act* was dismissed.

2. The particulars of the offence with which the appellant was charged were that on 26th June, 2011 in Marigat District Baringo County, he caused his penis to penetrate the vagina of JC (name withheld), a girl aged 11 years whom he knew to be his daughter.

3. The appellant denied the charge after which a trial ensued. In a judgment delivered on 19th October, 2011, the Principal Magistrate at Kabarnet convicted the appellant of the charge and sentenced him to life imprisonment.

4. Aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and the learned Judge found the appeal lacking in merit and dismissed the same in its entirety.

5. Undeterred, the appellant filed the instant appeal vide a memorandum of appeal and subsequently vide supplementary grounds of appeal and submissions. He raised grounds that the High Court erred: in upholding the conviction of the appellant yet failed to note that the age of the complainant was

not established by the trial court before conviction hence violating the appellant's rights to a fair trial; in upholding the conviction while the P3 Form did not support the charges against the appellant; in failing to note that the appellant's defence was not considered; and in upholding the sentence yet failed to note that the trial court relied on wrong principles and gave a wrongful sentence against the provision of Section 20(1) of the Sexual Offences Act.

6. Briefly, the facts of the case before the trial court are that on 26th June, 2011, PW5, JC (the complainant) aged 11 years was sent by her mother, LC (name withheld) (PW3) to her father (the appellant) to collect money for school fees. In the company of her brother, they went to look for their father. On meeting the appellant, he asked the complainant's brother to proceed to school while the complainant awaits money for school fees. The appellant asked the complainant to go to his house to prepare dinner. Later on, the appellant arrived and prepared for her a place to sleep beside his bed. At night, she felt the appellant on top of her. The appellant was naked and he did "tabia mbaya". She screamed and that is when neighbours came and kicked the door open.

7. Samuel Chebon (PW2) and Wilson Chesange, (PW4) were the appellant's neighbours. PW2 testified that on the material night, while at home, he heard cries coming from the appellant's house. He woke up the other neighbours including PW4, with whom he went to the appellant's house. They knocked the door but the appellant refused to open forcing them to open it by force. The complainant (PW5) came out of the house while the appellant was lying on the bed. The complainant informed them that her father (the appellant) had defiled her; and that they took her to the hospital and also informed the police.

8. LC, PW3 the complainant's mother testified that she had sent the complainant to her father to collect school fees and she was to return home the same day. The complainant did not return home as they had agreed but instead, PW3 received a telephone call informing her that her daughter (the complainant) was in hospital. It was PW3's testimony that the complainant informed her that it was the appellant who had defiled her.

9. Leonard Chirchir, (PW1) a Clinical Officer at Marigat District Hospital examined the complainant on 27th June, 2011. He found lacerations on the labia walls, blood stains on the vagina fault, the hymen was perforated and blood discharging from the vagina. Laboratory tests were negative and she was given drugs to prevent H.I.V. PW1 formed the opinion that there was traumatic penetration into the complainant's vagina. Upon examination of the appellant, no abnormality was detected. Laboratory tests revealed that he was H.I.V positive.

10. In his defence, the appellant denied the charges and stated that he had given his son money to go to school and that the complainant remained behind as he had not raised enough money for her. He stated that he had quarreled with his girlfriend, one Esther, for not cooking dinner and she left; that he also left the complainant sleeping and went to look for money; and that he came back and slept only to be woken up by his neighbours.

Submissions

11. The appeal came up for plenary hearing wherein the appellant appeared in person. He stated that he had filed written submissions and the memorandum of appeal which he sought to rely on in their entirety. He stated in his written submissions that the trial court erred by convicting him under Section 8(2) of the Sexual Offences Act without observing that Section 20(1) provides a different sentence; the documents produced by PW1, the Clinical Officer could not be supported medically; the medical report produced by PW1 was inconclusive, contradictory and therefore unreliable; and that the prosecution evidence was not sufficient to sustain the conviction and sentence meted out on the appellant.

12. Learned counsel, Ms. Lydia Kipyego appeared for the State. She confirmed having filed written submissions which she would rely on. On highlighting, Ms. Kipyego submitted that the absence of a birth certificate to establish the age of the complainant was not fatal to the proceedings; and the complainant's mother's testimony as to the age of the complainant was sufficient proof of age. Counsel further submitted that the sentence meted out on the appellant was legal and in line with the provisions of the Sexual Offences Act.

13. On the issue raised by the appellant that his defence was not considered by the trial court, counsel submitted that the defence was considered but failed to dislodge the prosecution evidence. Counsel urged this Court to find that the appeal lacked merit and should therefore be dismissed.

Determination

14. We have considered the record, the rival oral and written submissions of the parties, the authorities cited and the law. 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 vs. Republic Nyeri Cr. Appeal No. 149 of 2006 (UR)* this Court rendereditself 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 …"

15. In *David Njoroge Macharia vs. 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)."

16. With regard to the first issue, the appellant decries that the trial court convicted him of the offence of incest basing its decision on Section 8(2) of the Sexual Offences Act as opposed to section 20(1) of the Act. The relevant part of Section 20 (1) of the Sexual Offences Act provides as follows:

> " 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…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…

17. In *M. K. vs Republic [2015] eKLR*, this Court made the following observations: -

> " On our part, we contrast the wordings in Section 8 (2) of the Sexual Offences Act with the proviso in Section 20
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> (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
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> (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 thesentence 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."

18. In the instant appeal, the victim was eleven (11) years. By reason of the proviso to section 20(1) the appellant was liable to a sentence of life imprisonment.

19. On the ground that the P3 form produced as an exhibit before the trial court contradicted the findings of PW1 in his medical reports; the appellant argues that the injuries detected in the P3 form were insufficient to sustain the charge that gave rise to the conviction. From the record, the medical report and the testimony adduced by PW1, who examined the complainant immediately after the incident, that there were lacerations on the labia walls and blood stains on the vagina vault, the hymen was perforated and blood was discharging from her vagina.

    The P3 form on the other hand indicated that the complainant had lacerations on the labia walls and blood stains were noted on the vagina vault. We find that the injuries in both the evidence/testimony adduced by the Clinical Officer and the P3 form provide sufficient proof of penetration within the meaning of section 2 of the Sexual Offences Act.

20. We are satisfied, just like the trial court and the High Court, that penetration was indeed sufficiently proved and that it was the appellant who defiled the complainant. Consequently, this ground of appeal fails.

21. 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 that there was penetration of the complainant's vagina and that the penetration was caused by the appellant. The offence of incest was therefore proved against the appellant beyond any reasonable doubt and there was overwhelming evidence to sustain the appellant's conviction for the offence charged.

22. This Court in *JMM vs. Republic [2020] eKLR* stated as follows:

    "Incest sparks strong emotions in many cultures and communities around the world and is largely regarded as a taboo; frowned upon, completely reprehensible, unacceptable, disgusting and above all, criminal. Though viewed this way, familial sexual relationships continues to be a relatively frequent phenomenon as demonstrated by the number of such cases registered in various courts in the country, like the present one."

23. In the circumstances, we find that the High Court did not err in upholding the appellant's conviction and sentence for the offence of defilement nor do we have any basis upon which we would interfere with the sentence. The upshot of the foregoing is that the appellant's appeal on both conviction and sentence is without merit and the same is hereby dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MARCH, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR