



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE –MAKHANDIA, MUSINGA & GATEMBU, J.J.A.)

CRIMINAL APPEAL NO. 43 OF 2018

BETWEEN

SS APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Malindi, (C.W.Meoli J.) delivered on 2nd June, 2012

in

H. C. CR. APPEAL NO. 113 OF 2010)

JUDGMENT OF THE COURT

SS was charged with the offence of incest by a male contrary to Section 20(1) of the Sexual Offences Act. The particulars were that on diverse dates between September and October, 2009 at Malindi District, within the former Coast Province, the appellant had Carnal Knowledge of the complainant, DS, a girl aged 15 ½ years whom he knew to be his daughter and who was under his care as a parent.

The trial Court after a full trial convicted and sentenced the appellant to life imprisonment upon finding that the offence was proved to the required standard.

The appellant being dissatisfied with the decision, appealed to the High Court of Kenya at Malindi and after hearing the appeal in the plenary Moeli, J. upheld the conviction and sentence of the trial court and dismissed the appeal.

Undeterred, the appellant is now before us on second and perhaps last appeal on the grounds that the Judge erred in law by upholding the trial Court’s decision without considering that the case was not proved beyond reasonable doubt; that the evidence adduced lacked corroboration and that the sentence meted out on him was harsh, excessive, unjust, unfair, unconstitutional and against the objectives of the sentencing policy guidelines.

A précis’ of the facts are that, DS had been staying with her father, the appellant as her mother was said to have abandoned them long ago when she was still young. DS, who was 15 years at the time of the incident and a pupil at [Particulars Withheld] Primary School, had been sexually abused by the appellant on several occasions. The epitome was on 2nd October, 2009 when the appellant wanted to continue with his nervous acts of sexual assault on DS at around 6:00 a.m. However, DS screamed, which attracted family members and neighbours who came to her rescue among them, PW3 KS, a brother of the appellant and PW4, Jumwa Kombe, a neighbour. DS informed them and those who came to her rescue that her father, the appellant, had been sexually abusing her severally and was on the mission again. However, the appellant came out of the house armed and chased everybody present from his compound. It would appear that the deputy teacher at [Particulars Withheld] primary school where DS used to school was suspicious of the relationship between DS and the appellant. He therefore requested PW2, LH, a teacher at the same school to talk to DS. Upon questioning her in the company of two local community policing members, DS informed her that the appellant had been sexually abusing her and the trend had continued up to the time she was talking to them. PW2 reported the incident to the area chief one, David Mwagandi, (PW6) who gave her a letter to report the matter to Malindi police station and accommodated DS at her house for safety reasons. The following morning, she reported the incident to the police station and was referred to the hospital where DS was treated by PW8 and discharged. She thereafter took DS to a juvenile remand home for her own safety. Thereafter PW6 assisted in the arrest of the appellant who was then at large, upon discovering that he was being sought for by the police with a view of being arrested.

The appellant was thereafter charged with the offence leading to this appeal which he denied. In his unsworn defence, he testified that the charge against him was trumped-up as he had a land dispute with the Pastor over a church which had been built on his land without his consent and or permission, and that there was bad blood between him and PW3 and PW 4 who testified against him and in support of the prosecution case.

At the hearing of the instant appeal, the appellant who appeared in person, submitted that a case was not made out against him beyond reasonable doubt as required in criminal cases and as envisaged by Section 109 of the Evidence Act; that the evidence by DS did not point to him as having committed the offence; that it was possible that DS might have been defiled by someone else; that the medical evidence did not conclusively link him to commission of the offence as the evidence only talked of a broken hymen; and that there was no evidence on the aspect of the age of the injuries and the type of weapon used. The appellant further submitted that there was no corroboration with regard with the evidence of incest. The appellant relied on section 124 of the evidence Act and the case of ***Mutonyi v Republic [1982] 203*** in support of the above propositions.

On sentence, the appellant submitted that though convicted and sentenced to life imprisonment under section 20(1) of the Sexual Offences Act which was the mandatory minimum sentence, the mandatory nature of such sentences have since the case of ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** been ruled as being unconstitutional.

The appellant further relied on the case of ***Samuel Achieng' Alego v Republic [2018] eKLR*** in which **Odunga J.** relying on the **Muruatetu case** (supra) observed that the holding by the Supreme court with respect to Mandatory sentence applied with equal force to mandatory minimum sentences or non-optional sentences. The appellant thus submitted that the life sentence meted out on him was unconstitutional and that this Court, in the event that it dismisses the appeal on conviction should at least review the sentence and impose one that is in line with the current jurisprudence and the law.

The appeal was opposed. The respondent submitted that the offence of incest was proved beyond reasonable doubt. The appellant did not deny the fact that he was the father to DS. That the evidence of DS was corroborated in material particulars by the evidence of PW3. On sentence, it was submitted that the sentence imposed was legal and should not be interfered with, more so considering the relationship between DS and the appellant.

We have considered the appellant's grounds of appeal, the submissions and the authorities cited. This is a second appeal. By dint of **section 361 of the Criminal Procedure Code**, a second appeal is confined to matters of law only. This court restated the principle in ***Karingo v Republic [1982] KLR 213*** thus;

“A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence in which the trial Court could and as it did.”

Further, in the case of ***Adan Muraguni v Republic Criminal No. 347 of 2007 (Nyeri)*** this court set out the circumstances under which it will disturb concurrent findings of fact by the trial court and the first appellate court as follows:-

“As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings that would mean that the decision is bad in law, thus entitling this court to interfere.”

From the record before us, both the trial Court and the High court concurrently concluded that the relationship between the appellant and DS had been established, that penetration had been proved to the required standard as DS upon medical examination by PW8, her hymen was found broken but with no clear age of the injuries which ideally meant that the evidence that she had been severally assaulted in the past was true. Further, both courts believed the evidence of DS as one which was truthful and was even unshaken in cross-examination by the appellant. On the issue of corroboration both courts below were in agreement that there was enough corroboration as there was the evidence of the medical practitioner PW8 who produced the P3 form and other witnesses including PW2, and PW3. The defence by the appellant that there existed a land dispute between him and local pastor was neither here nor there and in any event, DS had nothing, if at all, to do with the dispute. Lastly, both courts were in agreement that the sentence imposed on the appellant was lawful and in line with section 20(1) of the sexual offences Act.

As already stated, three grounds of appeal have been put forth by the appellant being that, the case was not proved beyond reasonable doubt, there was no corroboration and finally, that the sentence imposed was unlawful which we consider all to be matters of law.

Incest is an offence under Section 20 (1) of the Sexual Offences Act. This section 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, 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.”

The charge has three components namely, sex between the perpetrator and the victim, the relationship between the two, and the age of the victim for purposes of sentencing. This in essence means that the respondent was under a duty to prove both penetration and the relationship

between the appellant and DS in order to prove the offence of incest.

In the instant case it was proved beyond reasonable doubt that the appellant was the father to DS. The appellant himself did not deny this fact. Indeed, in his evidence he admitted to this fact. PW 8 was a registered medical officer who tendered in evidence the P3 form regarding DS which attested to the fact that DS had been sexually assaulted severally as her hymen was broken. This evidence thus corroborated the evidence of DS as regards penetration. Section 124 of the Evidence Act provides that:

Corroboration required in criminal cases

“Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:

Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”

From the proviso to Section 124 of the Evidence Act it follows that the evidence of DS does not require corroboration for it to form the basis of a conviction. The trial court which heard and saw DS testify observed that she was a truthful, candid and credible witness and believed her. Her evidence alone was thus sufficient to find a conviction. Therefore, corroboration with regard to the evidence of DS was not necessary. And even if there was such need, there was sufficient corroboration of the DS’s testimony by several other witnesses who testified among them, PW8.

We are thus satisfied that the trial court properly convicted the appellant for the offence of incest as charged and the High Court was right in upholding the conviction. Consequently, the appeal on conviction fails and hereby dismissed.

On sentence, the appellant contends that the mandatory life sentence meted out on him is harsh and unconstitutional. This Court in ***Christopher Ochieng v Republic [2018] eKLR*** considered the legality of minimum mandatory sentences under the Sexual Offences Act and relying on the Supreme Court decision in ***Francis Karioko Muruatetu & another v Republic [2017] eKLR*** stated:

“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. Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years’ imprisonment from the date of sentence by the trial court.”

In the instant appeal, and guided by the Supreme Court decision in ***Francis Karioko Muruatetu & another v Republic*** (supra) and persuaded by the decision of this Court in ***Christopher Ochieng v Republic*** (supra) in relation to sentencing, we are convinced and satisfied that the life imprisonment meted upon the appellant by the trial Court and upheld by High Court cannot stand. We are therefore inclined to interfere with the sentence as we hereby do. We accordingly set aside the life imprisonment meted upon the appellant. As regards an appropriate sentence we should impose, we have considered the mitigation proffered by the appellant on record. The sentence that commends itself to us is 30 years’ imprisonment effective from 10th September, 2010 when the trial court imposed the life sentence. To that extent only, the appeal succeeds. The appeal on conviction is hereby dismissed.

Orders accordingly.

Dated and delivered at Nairobi this 9th day of July, 2021.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR