AKK v Republic (Criminal Appeal 41 of 2018) [2021] KECA 15 (KLR) (23 September 2021) (Judgment)

Neutral citation: [2021] KECA 15 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 41 OF 2018

SG KAIRU, J MOHAMMED & S OLE KANTAI, JJA

SEPTEMBER 23, 2021

BETWEEN

AKK .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Chitembwe, J.) dated 5th November, 2015 in H.C. CR.C. No. 36 of 2012)

JUDGMENT

1. This is a second appeal from the conviction and sentence of the appellant, AKK, by the Senior Resident Magistrates Court, Kilifi on an offence of incest contrary to Section 20 (1) of the Sexual Offences Act No. 3 of 2006. It was alleged in particulars of the charge sheet that on the 24th day of August,2013 at the place and time stated in the charge sheet he intentionally touched the genital organ namely vagina of TKK with his genital organ namely penis who was to his knowledge his daughter. Count 2 related to an offence of committing an Indecent Act with a child contrary to Section 11(1) of the said Act particulars being that on the same day at the said place he intentionally touched the genital organ namely vagina of TKK a child aged 12 years with his genital organ namely penis. He was tried, convicted and sentenced on the first count to life imprisonment and his first appeal to the High Court of Kenya at Malindi failed and was dismissed.

2. Being a second appeal our mandate is limited by Section 361(1) (a) *Criminal Procedure Code* to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated

on first appeal. In *Njoroge v Republic* [1982] KLR 388 it was held by this Court on the said mandate on a second appeal:

> "On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

3. We shall visit the facts of the case purely to satisfy ourselves whether the two Courts below carried out their mandate as required in law.

4. KKK (PW1) is the child's mother. She arrived home in the evening of 24th August, 2013 to be told by TKK that the appellant had not only defiled her that day but had done so on five previous occasions. He would, after the acts, threaten that he would kill her if she let out to anyone what was happening between them. TKK was conceived before KKK got married to the appellant with whom she had four children. TKK was then 12 years old; the appellant disappeared and was only arrested after he was tricked that he was to collect some money.

5. TKK (PW2) who underwent a voire dire and the trial court was satisfied that she understood the importance of telling the truth testified on oath how on the material day her father (the appellant) asked her to accompany him to the bush to cut "makuti" for constructing a house. When they got to the bush he ordered her to remove her clothes, lie down and he proceeded to defile her. He had a panga and he threatened that he would kill her should she report the incident. She informed her mother (PW1) that evening and the next day the two left home and went to stay with a relative. The incident was reported to police and TKK was taken to hospital.

6. Dr. Musra Ahhmed of Kilifi County Hospital (PW4) produced into evidence a post rape care form, a P3 form and a report by a Clinical Officer. The doctor testified that, upon examination, the child's vagina was red on the outer and inner part and hymen was broken. There was a yellowish discharge from the vagina. The conclusion was that the child had been defiled.

7. The other evidence led by the prosecution was by Judith Uchi Yohana of "Sauti ya Wanawake" Ganze branch, who assisted in having the appellant arrested and that of Corporal Paul Walumbwa of Bamba Police Station who received report and arrested the appellant.

8. The trial court found that a case had been made out by the prosecution which the appellant should answer and in an unsworn statement the appellant stated that he was arrested on 27th October, 2013 by three people who were in the company of his wife (PW1). Of the charges facing him he said:

> "I was remanded. Next day wife came and told me she had told me I will see. I had previously found my wife with a man having sex out of marriage. The charges are not true. I do not know anything about them."

As we have seen the appellant was convicted and sentenced.

9. There are four grounds of appeal set out in the homemade "Grounds of Appeal". It is said that the Judge on first appeal erred in law and fact by failing to consider "… a defective plea taking procedure rendering the resultant trial a mistrial a nullity of the entire case…". It is also said that the Judge erred in convicting and sentencing on evidence that was not water tight; that the Judge erred in not considering that the appellant was a juvenile during commission of the offence and, finally, that the Judge erred in law by failing to adequately consider the defence offered by the appellant.

10. The only issues of law we see from those grounds are whether a plea was properly taken and the issue of sentence.

11. The appeal came up for hearing before us on 10th May, 2021 through a virtual platform in view of the COVID-19 pandemic when the appellant was unrepresented while the Director of Public Prosecutions was represented by learned State Counsel Mr. Jimi Alex. At the time of writing this Judgment there were no written submissions by either side despite parties having been required to file submissions.

12. In opposing the appeal Mr. Jami submitted that evidence proffered by the prosecution had established penetration and defect, if any, in the charge sheet was curable in law and the appellant had fully cross-examined witnesses.

13. According to counsel there is no need to prove penetration under Section 20 of Sexual Offences Act as even touching of vagina with penis will complete the offence. Counsel dismissed the ground of appeal that the Judge disregarded that the appellant was a juvenile – how could this be when it was in evidence that he had fathered four children with PW1?

14. On sentence counsel cited the case of *Ali Mwanza v Republic* [2018] eKLR and asked us to interfere with sentence and give imprisonment for 67 years which, in his view, in the life expectancy of an average Kenyan male. In reply the appellant stated that he was not accorded an opportunity by the High Court to ask questions.

15. We have considered the whole record and will now consider the issues we have identified as falling within our mandate. On the manner in which the plea was taken the record shows that the appellant appeared before the Principal Magistrate on 28th October, 2013 when it is indicated that the charge was read over and explained to the appellant in Kiswahili language, a language which the appellant understood, and he pleaded not guilty by stating "… Si kweli" to the two counts read to him.

16. We note from Grounds of Appeal filed by the appellant at the High Court of Kenya, Malindi, that the issue of how plea was taken was not raised there and considering what we said the plea was properly taken and this ground of appeal has no merit and is dismissed.

17. Section 20 of the *Sexual Offences Act,2006* defines who can commit the offence of incest. This is a male person who commits an indecent act which causes penetration with his daughter, granddaughter, sister, mother, niece, aunt or grandmother.

18. Section 22 of the said Act on "Test of relationship" brother and sister includes half-brother, half-sister and adoptive brother and adoptive sister and a father includes a half father and an uncle of the first degree.

19. It was established on evidence that the appellant was PW2's step father who lived with PW1 as wife, PW2 and his other children. PW2 regarded him as her father and her testimony was that her father had defiled her on six different occasions.

20. In the recent case of *LOA v Republic* [2020] eKLR this Court sitting at Kisumu was faced with facts on the relationship between the appellant and the victim in a case of incest. The appellant was step father to the child. The Court held that sexual relationship between a step father and a step daughter was prohibited by Section 22 of the said Act and the two having sex was incestuous.

21. That is the position in this appeal. The appellant was prohibited in law from having sex with his step daughter.

22. On sentence we note that the appellant was sentenced to life imprisonment on 11th May, 2015 and his appeal was dismissed on 2nd March, 2016. Those were lawful findings when they were made. The Supreme Court of Kenya was asked to answer the question – *Francis Kariako Muruatetu & Others v*

Republic [2017] eKLR – whether it was constitutional for Parliament to provide minimum mandatory sentences. That case involved a charge of murder. The Court returned that it was unconstitutional for Parliament to do that as Courts should be let to give appropriate sentences within the confines of particular circumstances obtaining in the case before the court. That therefore has freed courts to consider circumstances of each case and we note here that learned State Counsel asked us to give an appropriate sentence. We shall proceed to do so.

23. There can be no doubt that it is a heinous act for a man to lure his daughter or step daughter and defile her all under threat that he would kill her if she revealed the act to others. The appellant here not only had sex with PW2 under threat not once but on six different occasions and there is evidence that on the last occasion he was armed with a panga.

24 Upon conviction the appellant a first offender, thanked God for being given the opportunity to mitigate and he then reminded the court that he had been in custody since 2013. He was the sole breadwinner of his family and he beseeched the Court:

> "I pray that the court looks at me."

25. We have considered all the matters we have spoken to and we think that this is an appropriate case where we should interfere with sentence. In the premises the appeal against conviction fails and is dismissed. We set aside the sentence and substitute thereof a sentence of thirty (30) years imprisonment from the date of conviction.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a true copy of

the original.

Signed

DEPUTY REGISTRAR