IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NAMBUYE, KARANJA & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 2 OF 2017

BETWEEN

JKM.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Machakos

(B. T. Jaden, J.) delivered on 3*rd June, 2014 in H.C.CR.A NO. 111 OF 2012)*

****

JUDGMENT OF THE COURT

1. This is a second appeal by **JKM,** (the appellant) against conviction and sentence by the Senior Resident Magistrate at Mutomo, for the offence of incest by male person contrary to **Section 20(1)** of the Sexual Offences Act No. 3 of 2006.

2. According to the charge which was read over and explained to the appellant by the Court on 31st May, 2012 the appellant *"committed an act of indecency or an act namely incest which caused his penis to penetrate the vagina of a girl namely EK aged 11 years who to his knowledge was his daughter"*. In the alternative, he was charged with committing an act of indecency by touching her private parts contrary to **Section 11(1)** of the same Act. He denied both charges.

3. Following a full hearing in which the prosecution called four witnesses, with the appellant tendering an unsworn statement of defence, the learned Magistrate in a jumbled up judgment convicted the appellant on both the main and alternative counts but sentenced him only in one count which she did not specify, and sentenced him to ten years imprisonment. We shall advert to this issue later.

4. Aggrieved by the conviction and sentence, the appellant filed an appeal to the High Court relying on grounds *inter alia* that the prosecution had not availed any exhibits or eye witnesses in support of its case and that the whole case was fabricated by his wife *"in order to have enjoyable love affair in my absence"*. In his supplementary grounds of appeal and brief submission filed in court on 17th October, 2013, the appellant raised some additional grounds, raising the issue of the complainant's age which he said had not been proved; violation of his constitutional right to fair trial, saying that the evidence of the Police Officer and the Medical Officer was taken in a language he was not very conversant with. He also assailed the trial court for violating **Section 169(1)** of the Criminal Procedure Code, which deals with contents of judgment.

5. The appeal fell for hearing before Thuranira J. On 17th October, 2013.

When the matter came up for hearing, Mr. Maingi, learned counsel for the State informed the Court that they were applying for enhancement of the sentence from 10 years imprisonment to life imprisonment because the complainant was below 18 years old and the law provided for imprisonment for life in cases of incest where the victim was below 18 years of age. The record shows that the appellant was duly warned of the impending enhancement of sentence in the event his appeal was unsuccessful but he was adamant that he wanted to proceed with the appeal. The learned Judge then made an order as follows:-

> **"The Court will give the appellant more time to confirm his position in view of the short notice given by the State. Hearing of the appeal on 4th November, 2013."**

6. The appeal did not take off on 4th November, 2013 as scheduled but proceeded on 28th November, 2013 when the appellant expressing his decision to proceed with the appeal addressed the Court as follows:-

> **"I have thought about the notice by state to have the sentence enhanced. However, I still wish to proceed with the appeal."**

From the above analysis, it is evident that the appellant was given the notice of enhancement, though orally and also given sufficient time to think about the matter and make an informed decision before deciding to proceed with his appeal. Having done so, he made a deliberate decision to proceed with the appeal.

7. Unfortunately for the appellant, the learned Judge having re-evaluated the evidence dismissed the appeal and having satisfied herself that the proviso to **Section 20(1)** of the Sexual Offences Act had not been taken into account, and having warned the appellant on the possibility of enhancement of the sentence substituted the sentence of 10 years to life imprisonment.

8. As would be expected, the appellant was aggrieved by the dismissal of the appeal and enhancement of the sentence and he moved to this Court on this second appeal, which is anchored on some five grounds. The grounds include the contention that the appellant was not given formal notice of enhancement; that **Section 20(1)** Sexual Offences Act does not impose a mandatory life sentence, and that the complainant's age was not proved. We have narrowed down the grounds of appeal to the above in view of the fact that this being a second appeal, the law enjoins us by dint of **Section 361 (1)** Criminal Procedure Code to deal with matters of law only. The other two grounds raised by the appellant belong in the factual realm.

9. The appellant prosecuted his appeal by way of written submissions which we acknowledge are thorough and to the point. He also entreated the court to reduce the sentence and allow him to serve his earlier sentence of 10 years imprisonment.

10. The appeal was opposed by the State through learned counsel Mr. Obiri (Assistant Director of Public Prosecutions). According to Mr. Obiri, the charge of incest was proved against the appellant beyond reasonable doubt. He reiterated that the language used at the trial was Kikamba which the appellant was well conversant with and that ground of appeal was untenable. He also urged that from the evidence on record, there was no doubt that the complainant was aged 11 years as attested by the mother who testified in court and also as indicated in the P3 Form. He therefore urged for dismissal of the appeal on that ground.

11. On the ground on failure to serve written notice of enhancement, learned counsel strangely termed the said notice unlawful. He did not however cite any law to us in support of that contention.

12. We have considered the said grounds and rival submissions by the appellant and the learned state counsel. We start with the ground on enhancement of the sentence. Earlier on in this judgment, we revisited the record of the proceedings before the High Court and cited verbatim what transpired in court before the appeal was heard. It is evident that the learned Judge and also counsel then appearing for the state were well aware of the need to warn the appellant on the possibility of enhancement of the sentence. The state counsel gave verbal notice of intention to apply for enhancement. The court explained the same clearly to the appellant who without equivocation expressed his desire to proceed with the appeal. The learned Judge gave the appellant time to ponder his decision and recorded this in that day's proceedings.

13. The appellant went back to court over a month later and was again asked if he had considered the notice and whether he still wanted to proceed with his appeal. He affirmatively confirmed that he would proceed. He therefore proceeded with the appeal being possessed of full knowledge of the consequences of his decision in the event the appeal was unsuccessful. He cannot therefore be heard to say that he was not warned, or that he was not given sufficient time to ponder over the issue. We have considered the record and the submissions made in support of the said ground. As stated earlier, the state counsel did not cite any law or decisions to convince us that this position is the correct one in law.

14. On the other hand, our view of the matter is that notice of enhancement does not need to be a formal document filed in court. What is important is that the appellant is warned by the Court and made to understand that should his appeal fail, then there is possibility of his sentence being enhanced. The crucial principle here is that the appellant should not be ambushed, and he should take that attendant risk with his eyes open. There is nothing unlawful about a notice of enhancement being given orally as long as it is clearly explained to the appellant. This issue has been addressed by this Court on several occasions. For instance, in **JJW v. Republic, Cr. App. No 11 of 2011,** this Court held that notwithstanding the fact that **Section 354(3)** of the Criminal Procedure Code empowers the High Court to enhance or alter the nature of the sentence imposed by the trial court, in the absence of an appeal against sentence, the court must warn the appellant before it enhances the sentence. The Court stated:

> **"It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the Criminal Procedure Code. However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross appeal in which it seeks enhancement of the sentence and that cross appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."** (Emphasis supplied)

And in **Samwel Mbugua Kihwanga v. Republic, Cr. App. No. 239 of 2011,** the Court explained that although the practice of warning the appellant before enhancing the sentence was not a requirement of law, it was a matter of practice that had gained notoriety and served to put the appellant on notice.

15. It is clear from the foregoing that there is no requirement for a notice of enhancement to be in writing. In this case, we find that the notice of enhancement was proper and the appellant was not prejudiced in any way by failure to reduce the notice into writing. That ground therefore fails.

16. On the question of the complainant's age, the complainant herself said she was 11 years of age. This was corroborated by PW2, her mother as well as by the doctor who examined her and completed the medical report and the P3 Form. As rightly submitted by the state counsel, **Section 2** of the Sexual Offences Act defines 'Age' as apparent age. No evidence was availed to cast any doubt as to the complainant's age. In any event, there was no dispute whatsoever that she was below 18yrs of age. We cannot fault the two courts below in their concurrent findings of fact that the child was 11 years old. That ground also fails.

17. There is however, an issue that has bothered us which the High Court appears to have overlooked. The appellant had in his first appeal raised (as ground 3) the issue of contravention of **Section 169(1)** of the Criminal Procedure Code by the trial court. The issue reappears in the appellant's submission before us at paragraph 10 thereof. **Section 169(2)** of the Criminal Procedure Rules provides that:-

> **"(2) In the case of a conviction, the judgment shall specify the offence of which, and the Section of the Penal Code or other law under which, the accused person is convicted, and the punishment to which he is sentenced."**

18. At the beginning of this judgment, we pointed out that the learned Magistrate did not indicate the offence for which the sentence was imposed. As stated earlier, the trial Magistrate convicted the appellant on both the main and alternative counts. The Magistrate stated:-

> **"I find that the prosecution has proved its cases of incest by male person and indecent act with a child contrary to Sections 20(1) and 11(1) respectively of the Sexual Offence Act No. 3 of 2006, beyond reasonable doubt against the accused. I therefore convict the accused on both charges accordingly."**

When it came to sentencing the Magistrate just sated "**I hereby sentence the accused to serve 10 years imprisonment**". The question is, for which offence was the appellant sentenced? Under **Section 11(1)** of the Sexual Offences Act, the sentence for indecent assault is imprisonment for a term not less than 10 years. Is it therefore possible that the Magistrate sentenced the appellant for indecent assault and not incest? If so, and if that was a possibility, was the learned Judge in order to enhance that sentence? Without belabouring the point, it goes without saying that the compounded sentence, as it were, was expressly in contravention of **Section 169(1)** and **(2)** of the Criminal Procedure Code, and the same also prejudiced the appellant.

19. The learned Judge just assumed that the sentence appealed against was on the charge of incest, hence the enhancement. As we have demonstrated however, there was no express, distinct sentence on the count of incest which the learned Judge could have enhanced.

20. In view of also this confusion, we are persuaded that the life imprisonment sentence is not anchored in any law and the same must be set aside. This appeal therefore partially succeeds. The appeal against conviction is dismissed. The appeal against sentence partially succeeds. The life imprisonment which was substituted for the 10 years imprisonment is hereby set aside. The appellant will nonetheless serve the original 10 years imprisonment from the date of conviction if he has not yet served the entire sentence.

Dated and delivered at Nairobi this 6th day of March, 2020.

R. N. NAMBUYE

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR