IN THE COURT OF APPEAL

AT NAKURU

(CORAM: KOOME, OKWENGU & ASIKE-MAKHANDIA, JJ.A)

CRIMINAL APPEAL NO. 51 OF 2009

BETWEEN

MGK.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from a Judgment of the High Court of Kenya at Nakuru (Wendoh, J.) dated 28th March, 2008

in

H.C.CR A. No. 23 of 2008)

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JUDGMENT OF THE COURT

[**1**] This is a second appeal filed by **MGK** (the appellant), against his conviction and sentence. The appellant was originally convicted and sentenced to 20 years' imprisonment by the Chief Magistrate's Court at Nakuru, for the offence of incest by male person contrary to Section 20(1) of the Sexual Offences Act. His first appeal was dismissed by the High Court (**Wendoh, J**), who set aside the sentence of 20 years and substituted it with a sentence of 35 years' imprisonment.

[**2**] The appellant has now come before us faulting the judgment of the first appellate court on the grounds that the court made an error of law in dismissing his appeal, and upholding the conviction and sentence. He claims not to have been given a hearing by the first appellate court and maintains that the charge against him was not proved to the required standard. He also contends that his defence was dismissed without any cogent reasons.

[**3**] In a nutshell, the evidence that was adduced against the appellant in the trial court was that the appellant, who was father to EW (complainant), a 13-year-old minor, was at home with the minor on the material day. His wife, MWN was away having gone to their shamba at [Particulars Withheld]. The appellant called the complainant to his bedroom, pushed her on to the bed, removed her pants and had sexual intercourse with her, then forced her to sleep on the same bed with him until morning. The next day the complainant felt sick so she went to her uncle, W, who took her to hospital. She was treated and they went home but in the evening, she fell sick again and her grandmother (E), and this time also in the company of the appellant took her to hospital. Two days later the complainant was in her bedroom when the appellant entered the room through a window, and again had sexual intercourse with her. A few days later the complainant fell sick again and she went to her aunt (W) and informed her that the appellant had defiled her. The aunt communicated with her mother who came and took the complainant to the General hospital in Naivasha. She was admitted in the hospital for 1 month and 2 weeks. Dr. Philip Wainana Kamau who later examined the complainant found that she had a broken hymen with lacerated margins, and healing bruises but no discharge. He formed the opinion that there was penetration of the complainant's sexual organs. Subsequently, the matter was reported to the police and the appellant was arrested and charged.

[**4**] In his defence the appellant gave a sworn statement in which he denied having committed the offence. He claimed that the complainant had complained severally of being sick, and that she was taken away by her sister who collected her from school. Later, he learnt that his wife had been seen in [Particulars Withheld] and he went to ask her why she had not come home. There was an argument and he beat her (wife). The wife then went to the police station and he was later arrested. It was at the police station that he learnt of the allegations of defilement. He maintained that the allegations were false. The appellant called his mother E as his witness. She testified that the complainant had complained of being sick and was taken to hospital by her uncle W. During the night, she again complained of severe headache and was taken to the hospital and treated. She claimed that the complainant never complained to her about the alleged sexual assault.

[**5**] The trial magistrate found the evidence of the complainant consistent and believable, and that she had no reason to lie against the appellant who was her father. In addition, the evidence of the doctor corroborated the complainant's evidence that she was defiled, and the appellant having been alone with the complainant had the opportunity to commit the offence. He therefore rejected the appellant's defence. The first appellate court also believed the evidence of the complainant and rejected the appellant's contention that the charge against him was a frame up.

[**6**] During the hearing of the appeal, the appellant appeared in person, while the State was represented by Ms. Mercy Chelagat and Ms. Murima Wambui, from the Office of Director of Public Prosecution. The appellant indicated that he was in the process of filing written submissions which he was fully relying upon. The submissions were subsequently availed to the Court together with supplementary grounds of appeal in regard to the appeal against sentence.

[**7**] In his written submissions, the appellant submitted that the charge against him was not proved as the evidence adduced was full of contradictions, and that there was no evidence that could link him with the offence. In addition, the age of the complainant was not proved and that proof of age in defilement cases was crucial. The appellant urged the Court to reject the evidence of the prosecution witnesses as they were not truthful, and their evidence was contradictory. He lamented that his defence although sworn, was not considered. In regard to the appeal against sentence, the appellant faulted the learned Judge for enhancing the sentence of 20 years to 35 years without any cross-appeal or a notice of enhancement, and failing to comply with section 354 (2) of the Criminal Procedure Code.

[**8**] For the prosecution, it was submitted that the appellant was given ample opportunity to be heard during the hearing of his first appeal; that the court convicted him on sufficient evidence as all the ingredients of the offence were established; that there was clear evidence of the relationship between the appellant and the complainant; that there was evidence of penetration and therefore the appellant's appeal against conviction was properly dismissed. As regards the appeal against sentence, it was submitted that the prosecution had sought to have the appellant's sentence enhanced from 20 years to life imprisonment, although no notice appears to have been served on the appellant in support of the enhancement. It was submitted that the High Court properly exercised its discretion in enhancing the sentence.

[**9**] This being a second appeal, the Court is restricted under section 362(1)(a) of the Penal Code to considering matters of law only. The confines of the Court's jurisdiction was aptly set out by this Court in **Karingo vs. R [1982] KLR 213** that:

> ***"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 on which the trial court could find as it did (Reuben Karari C/O Karanja - vs- R (1956) 17 EACA 146)"***

[**10**] The appellant was charged with incest and it was therefore imperative that the prosecution proves the particulars of that charge. Section 20(1) of the Sexual Offences Act of which the appellant was convicted states:

> **"Any male person who commits an indecent act or an act which causes penetration with a female person who to his knowledge is 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 10 years provided that, if it is alleged in the information or charge and proved that the female person is under the age of 18 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 a consent of the female person."**

[**11**] Therefore the ingredients that must be established for the offence of incest by a male person is, first, that the victim and the offender are related within the categories stated under section 20(1) of the Sexual Offences Act. Secondly, that the offender committed an act which caused penetration with the victim, and thirdly, the age of the victim must also be established for the proviso to apply.

[**12**] It was not disputed that the complainant was the daughter to the appellant. Her age was stated in the charge sheet as 13 years. Dr. Phillip Wainana Kamau who examined the complainant estimated her age as 13 years. However, when the complainant was examined by the court, she stated her age as 14 years. In our view, the inconsistency regarding the age is not a material contradiction. Both the trial court and the first appellate court accepted the complainant's age as 13 years, and this was consistent with the evidence of the doctor who was in a better position to assess the complainant's age. It was also consistent with the age as given in the charge sheet. In any case, for the purpose of the charge, the proviso to the charge would only be applicable if the victim is under the age of 18 years, and whether the complainant was 13 or 14 years, her age was clearly under 18 years old and the proviso to section 20 of the Sexual Offences Act would be applicable.

[**15**] The complainant explained how the appellant, her father, removed her pants, laid on her and did what she describes as "tabia mbaya". This evidence was consistent with the evidence of Dr. Phillip Wainaina Kamau who found that the complainant had a broken hymen, lacerated margins and healing bruises on her genitalia, which in his view was evidence of penetration, confirmed the complainant's evidence that she had been violated. The complainant identified her father as the person who violated her. She explained clearly how it happened. Although the appellant denied the offence, it was clear there was overwhelming evidence against him. We therefore uphold the concurrent findings of the two lower courts, and find that the appellant was properly convicted of the charge and his first appeal was properly dismissed.

[**16**] As regards the sentence, under section 362(1) of the Criminal Procedure Code severity of sentence is a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal. However, the appellant is not just complaining about the severity of sentence but he is complaining about the legality of the enhancement of the sentence by the first appellate court, and this is a matter open for our consideration.

[**17**] In sentencing the appellant, the trial court stated as follows:

> ***"I have heard the mitigation by the accused person. I have considered the circumstances of the offence. The maximum sentence***

is life imprisonment. Accused person is sentenced to 20 years imprisonment."

[**18**] During the hearing of the first appeal, the State which was represented by Ms. Edagwa urged the Court to apply the proviso to section 20 of the Sexual Offences Act and sentence the appellant to life imprisonment. In her judgment the learned Judge addressing the issue of sentence stated:

> ***"The appellant was convicted of the offence of incest contrary to section 20(1) of the Sexual Offences Act, 2006. The section provides that if the victim is less than 18 years, then the accused person shall be liable to imprisonment for life. If the victim is over 18, the accused will be sentenced to not less than 10 years. The appellant was sentenced to serve 20 years. The victim was his 13-year-old daughter. She was seriously injured, was admitted for injuries suffered, and was even found to be depressed at the time of examination. He did not defile her once but twice. I find that the court was too lenient and will sentence him to a term of 35 years imprisonment."***

[**19**] This Court in **J.J.W. v Republic [2013] eKLR** held as follows on enhancement of a sentence by the High Court;

> ***"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."***

[**20**] Further, the case of **Sammy Omboke & Another v Republic [2019] eKLR** discussed the jurisdiction of the first appellate court on enhancement of sentences by holding thus;

> ***"In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then (sic) could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence."***

[**21**] It was admitted before us by the respondent that the State had not filed any cross-appeal against sentence nor had they served any notice of enhancement on the appellant. In the circumstances, the trial court having properly exercised its discretion in sentencing the appellant, and imposed a sentence that was double the minimum of 10 years provided for the offence, it was not open to the learned Judge to review the sentence upwards. In this regard, the situation is similar to **Joseph Muerithi Kanyita v Republic [2017] eKLR** where this Court stated:

> ***"In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant.***

[**22**] Likewise we find that the first appellate Court erred in enhancing the sentence. The upshot of the above is that we dismiss the appeal against conviction, but allow the appeal against sentence, set aside the sentence of 35 years imprisonment imposed by the first appellate court and re-instate the original sentence of 20 years imprisonment that was imposed by the trial court.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 4th day of December, 2020.

M. K. KOOME

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

ASIKE MAKHANDIA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR