



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, P.O. KIAGE & OTIENO-ODEK, J.J.A)

CRIMINAL APPEAL NO. 159 OF 2015

BETWEEN

MK .....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Kisii (J. Wakiaga, J), dated 16<sup>th</sup> June, 2015 in **HCCRA No. 15 of 2015**)

\*\*\*\*\*

JUDGMENT OF THE COURT

The appellant, MK, was arrested and arraigned before the Principal's Magistrate's Court at Kilgoris on 05/09/2012 on a charge of incest, contrary to **section 20(1)** of the **Sexual Offences Act**. The particulars of the charge were that;

“On diverse dates between May 2012 and 1<sup>st</sup> September 2012 at [Particulars withheld] Area in Trans Mara West District within Narok County, [he] unlawfully and intentionally penetrated the vagina of EK with his penis who is as to his knowledge her (sic) daughter.”

The prosecution preferred an alternative charge against the appellant of an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**.

The appellant denied the charges leading to a trial in which the prosecution called 6 witnesses in support of its case. At the close of the prosecution's case, the magistrate found the appellant had a case to answer and placed him on his defence. On 29/11/2013, the appellant gave a sworn statement and called his two wives as defence witnesses.

The magistrate (B.O Ochieng, Ag. SPM) heard the testimonies and evaluated the evidence tendered before the court. He found the appellant guilty as charged and sentenced him to 20 years imprisonment.

Aggrieved by the conviction and sentence, the appellant appealed to the High Court and its judgment was delivered by Wakiaga, J on 16<sup>th</sup> June 2015 as follows;

“On sentence as noted herein above the appellant should have been sentenced to life imprisonment and therefore the terms (sic) of twenty years given by the trial court was unlawful. I would therefore in exercise of the powers under Section 354 (3) (b) of the criminal procedure code substitute the sentence of twenty years with imprisonment for life which is the lawful sentence provided for under the Section the appellant was charged.”

The appellant was dissatisfied with the holding of the High Court and preferred the instant appeal, based on 6 grounds, which we summarize that the judge erred in law and fact by;

a. Convicting the appellant while the court was not properly constituted.

b. Convicting the appellant without re-analysing the medical evidence.

c. **Enhancing the conviction of the appellant without properly interpreting the provisions of section 20(1) of the sexual offences act and the constitutional provision to a fair trial.**

d. **Convicting the appellant based on a duplex charge sheet.**

During the hearing of the appeal, learned counsel **Mr. A Mshindi** appeared for the appellant while the respondent was represented by **Mr. L. Sirtuy**, the learned Principal Prosecution Counsel.

On behalf of the appellant, it was submitted by learned counsel that the learned judge erred by failing to give a notice of enhancement of a sentence to the appellant.

In opposition, the prosecuting counsel held that by dint of the provision of **section 359** of the **Criminal Procedure Code**, the court was properly constituted by a single judge. On the medical evidence, counsel submitted that the same was properly analysed alongside the evidence of the minor which concluded that she had been defiled as her hymen was not intact.

Counsel rebuffed the appellant's assertion that the charges were duplex and submitted that the charge sheet did not capture two offences in one charge. However, counsel acknowledged that the first appellate court did not follow due procedure prior to the enhancement of the sentence. On this, he relied on **J.J.W V REPUBLIC [2013] eKLR**. He contended that the sentence imposed by the trial court and the superior court were illegal and proposed that a sentence of 10 years would suffice.

As this is a second appeal, we are consciously aware that our jurisdiction is confined to consideration of questions of law only by dint of **section 361(a)** of the **Criminal Procedure Code**. In **DAVID NJOROGE MACHARIA V REPUBLIC [2011] eKLR** it was held as follows;

**“That being so only matters of law fall for consideration—see section 361 of the Criminal Procedure Code. As this Court has stated many times before, it 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 Chemagong v. R [1984] KLR 611.”**

The matters of law left for this Court to consider is whether the charge was duplex and whether the superior court erred in enhancing the sentence.

The appellant contended that the court erred by convicting him of the charge of incest when the charge sheet was duplex. The **Criminal Procedure Code** provides for the framing of charges in **section 137**. In **MWANIKI V. REPUBLIC [2001], EA 158 (CAK)**, the Court addressed itself on duplicity of charges as follows:

**“Where two or more offences were charged in the alternative in one count, the charge was bad for duplicity and a substantial defect was created that must be assumed to be embarrassing or prejudicial to an accused as he would not know what he was charged for and if convicted, of what he had been convicted.”**

From the reading of the charge sheet, it is clear that the same was not duplex as the appellant was charged with two counts and each was framed separately. Thus, this ground has no merit and accordingly fails.

On the second issue of sentence, the prosecution acknowledged that the superior court erred in enhancing the sentence of the appellant since the prosecution did not file a cross appeal and neither was the appellant served with a notice of the enhancement of the sentence. In **J.J.W V REPUBLIC [2013] eKLR** this Court held;

**“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.”**

A similar holding was made in **SAMMY OMBOKE & ANOTHER V REPUBLIC [2019] eKLR** as it brought to light the issue of the first appellate court's jurisdiction when it comes to enhancement of sentences;

**“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 them 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.”**

The record shows that during the appeal at the high court, the prosecution did not urge enhancement of sentence and had not filed a cross

appeal to that effect. Further, the learned judge did not warn the appellant of the possibility of enhancement of the sentence. Hence the said enhancement was done without according the appellant an opportunity of persuading the court against such a proposal. Hence the appellate court violated the right of the appellant to a fair trial. In GUSHASHI LELESIT V REPUBLIC [2016] eKLR it was held;

**“[t]he obligation on an appellate court to forewarn or caution an appellants before enhancing a sentence imposed against him by a trial court is not anchored on any legal provision but in practice that has now gained such notoriety that it is proper that an appellant be warned of the consequences of proceeding with his appeal in circumstances where such proceeding may likely result in the sentence being enhanced to his disadvantage. It is simply to enable him to weigh the options available and then make a decision that suits his best interests, especially in circumstances where like in the instant appeal an appellant is disadvantaged for not being schooled both in the law and legal procedures he may be confronted with during the course of the trial of his appeal.”**

Looking at comparative decisions made by this Court on similar matters, we found that in M K V REPUBLIC [2015] eKLR where the superior court enhanced the sentence from 20 years to life imprisonment, this Court quashed the enhanced sentence and upheld the 20 year sentence. However, in MK V REPUBLIC [2018] eKLR, this Court upheld a life sentence meted upon the appellant therein, for the following reasons;

**“[17]As regards the sentence, we are in agreement with the appellant that the use of the word “liable” in section 20(1) of the Sexual Offences Act, did not connote a minimum sentence, but gave the trial magistrate the discretion to impose a sentence of any period up to a maximum of life imprisonment from the minimum sentence of ten (10) years imprisonment. In sentencing the appellant, the trial magistrate stated as follows:**

*‘I have considered the accused mitigation but I find this act of defiling his seven year old daughter to be beastly, grossly immoral and inhuman. The accused having separated from the mother of the minor was supposed to offer moral and material support to the child. He however, turns against the expectations cast upon him and becomes the one to subject such a child of tender years to sexual abuse and physical abuse. Accordingly the accused shall serve a life sentence.’*

**[18] In our view, the trial magistrate exercised his discretion in sentencing and given the circumstances, we cannot fault him in sentencing the appellant to life imprisonment. The sentence was in accordance with the law. Accordingly, we find no substance in this appeal and do therefore, dismiss it in its entirety.”**

The foregoing case is eerily similar to the one before this Court since the appellant herein is both the father and mother of the complainant since the mother of the complainant, who was one of the wives of the appellant, is deceased. From the testimony given, the appellant not only defiled the complainant but also threatened her with death as was the testimony of the complainant when she stated that *“He told me he could kill me if I revealed and send me where mother was. She was dead.”*

There was testimony to the effect that the appellant so mistreated the complainant that she tried to commit suicide by taking DAP chemicals. She disclosed to PW2, a project manager of an organisation that used to pay the complainant’s fees, that she did it as a result of a misunderstanding with the appellant.

We find that the immoral and heartless actions of the appellant against the complainant were contrary to what is expected of a father. The appellant by virtue of being the complainant’s father was expected to be her protector and safe haven, not the perpetrator of a heinous and rapacious crime. He satisfied his sexual urges on his own flesh and blood still tender yet he had two living wives. He embodied the role of an enemy to the complainant as opposed to an ally. The defence testimony of the appellant did nothing to shake the prosecution’s case.

Further, the evidence tendered by those wives cannot be believable as it was tailored to protect the appellant. The complainant testified that one of them witnessed the unfortunate act of her defilement but after a conversation with the appellant, she did not pursue the matter. She was part of a conspiracy of silence while the young complainant suffered to the extent that her trauma led her to a contemplation of taking her young life. All these factors are germane in determining an appropriate sentence.

Be that as it may and notwithstanding that the appellant’s conduct as the full circumstances surrounding this matter may well deserve a stiffer sentence, we are guided by the consistent holdings of this Court on enhancement of sentences wherein unlawful enhancement is set aside and the sentence meted by the trial court upheld. In J.J.W V REPUBLIC (Supra);

**“We agree with Mr. Abele that the enhanced sentence was unlawful. It calls for our interference. The appeal on conviction is dismissed. The appeal on sentence is allowed to the extent that the enhanced sentence of ten (10) years imprisonment is set aside and in its place the original sentence awarded by the subordinate court of seven (7) years is reinstated with effect from the date the subordinate court awarded it.”**

In JOSEPH MUERITHI KANYITA V REPUBLIC [2017] eKLR, it was held;

**“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.**

**In the result this appeal fails as regards conviction but succeeds as regards sentence. We allow the appeal on sentence, set aside the sentence imposed by the High Court and restore the sentence imposed by the trial court.”**

For the reasons we have set out herein we dismiss the appeal against conviction. We allow it on sentence, to the extent that we set aside the life sentence as enhanced and restore the 20 year sentence imposed by the trial court.

**Dated and delivered at Kisumu this 31<sup>st</sup> day of October, 2019**

**ASIKE MAKHANDIA**

.....

**JUDGE OF APPEAL**

**P. O. KIAGE**

.....

**JUDGE OF APPEAL**

**OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**