



IN THE COURT OF APPEAL

AT NYERI

(CORAM: MAKHANDIA, SICHALE & KANTAI, J.J.A.)

CRIMINAL APPEAL NO. 85 OF 2015

BETWEEN

E G K.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Nyeri (Njoki Mwangi, J.) dated 2nd December, 2015

in H.C. CRA. No. 26 of 2014

JUDGMENT OF THE COURT

The appellant, **EGK**, was charged with the offence of incest by a male person contrary to section 20(i) of the Sexual Offences Act, No. 3 of 2006. The particulars were that on the 28th October, 2013 between 7.00 a.m. to 8.00 a.m in Nyeri County caused his penis to penetrate the vagina of a child namely **A.W. W.**, a female person who to his knowledge was his niece and aged 7 years.

In the alternative charge, he was charged with the offence of Indecent Act with a child contrary to **section 11 (1)** of the said Act. The particulars of the alternative charge were that on the same date and at the same venue he touched the vagina of **A.W.W.**, a child aged 7 years, an indecent act she would not have allowed.

On 30th October, 2013 the appellant appeared for plea and denied the main charge and the alternative charge. Thereafter, in a trial conducted by **Kagendo**, the then SPM Mukurweini, he was found guilty of the main charge of incest contrary to **section 20 (1)** of the Sexual Offences Act and sentenced to 40 years imprisonment.

The appellant was dissatisfied with the outcome of the trial and he preferred an appeal at the High Court of Kenya in Nyeri. The appeal was against conviction and sentence. In a judgment rendered by **Mwangi, J.** and delivered by **Mativo, J.** the appellant’s appeal was dismissed and his sentence was enhanced from 40 years to life imprisonment. In so doing, the learned Judge invoked the provisions of **section 354 (3)** of the Criminal Procedure Code. Undeterred, the appellant filed this appeal before us and in a homemade memorandum of appeal dated 2nd December, 2015 he indicated that he was dissatisfied with both the conviction and sentence.

In his memorandum of appeal, the appellant faulted the magistrate and the first appellate court for convicting him based on evidence that was contradictory, insufficient, and further, on relying on a P3 form that was produced by a person who was not its maker.

When the appeal came up before us for hearing on 12th February, 2018, the appellant relied on his written submissions filed on the same day. In his submissions, the appellant reiterated the grounds in his memorandum of appeal and contended that the learned judge was not impartial; that his conviction was based on inadmissible evidence; that the charge/s against him were not proved beyond reasonable doubt and finally that there was bias.

In response **Mr. Kaigai**, learned Senior Assistant Director of Public Prosecutions (SADPP) opposed the appeal on the basis that the appellant was the complainant’s uncle; that the complainant’s evidence was supported by the evidence of PW2 and PW5; that penetration was proved by the evidence of PW1 in corroboration with the evidence of PW2 and PW6, the Clinical Officer; that **S.77(1)** of the Evidence Act allows

another person (other than the maker) to produce a P3 form and finally that the evidence placed the appellant at the scene.

The appeal before us is a second appeal and by dint of **S.361 (1)** of the Criminal Procedure Code, only matters of law fall for our consideration. In ***Kaingo vs. Republic [1982] KLR 213*** this Court stated thus:

“A second appeal must be confined to points of law and this court will not interfere with the concurrent findings of fact arrived at by 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 Karoti S/O Karanja versus Republic [1956] 17 EALA 146*).”

We are also cognizant of the fact that we should not interfere with concurrent findings of fact by the two courts below unless such findings were based on no evidence, or they were based on a misapprehension of the evidence, or that the courts below are shown demonstrably to have acted on wrong principles in making their findings, which then becomes a matter of law.

In our evaluation of the record, we do not discern such misgivings. It is not in dispute that the appellant was the complainant’s uncle. The complainant, **A.W.W.**, testified as PW1. She lived with her grandmother who is the appellant’s mother. In her unsworn testimony in court on 13th January, 2014 she told the trial court that she was defiled by the appellant on 28th October, 2013. She reported to her grandmother who took no action. She did not go to school on 28th October, 2013. However, on 29th October, 2013 when she reported to school, her class teacher, PW2 inquired why she had been absent. She narrated her ordeal to her teacher. It was then that the matter was reported to Mukurweini Police Station. PW1 was examined and treated at Mukurweini Hospital. The P3 form which was produced by PW6 on behalf of her colleague showed that PW1 had lacerations on both labias, and her hymen was broken. She also had a foul smelling whitish discharge from her vagina. Her age was indicated as 7 years.

In his defence, the appellant denied having committed the offence and raised the defence of alibi. His witnesses, D.W.1 told the trial court that the appellant was away from home from 8.00 am to 3.00 pm. As regards the evidence of PW2, it was the appellant’s contention that this was fabricated as PW2 owed him some money.

The above facts were considered by the trial court and re-analysed by the first appellate court and the two courts arrived at concurrent findings. The 1st appellate court reminded itself of its duty thus:-

“The duty of the first appellate court was explained in the case of *Okeno vs. Republic [1972] EA 32* where it was held that:-

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and the appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court’s findings and conclusion. It must make its own finding and draw its own conclusion only then can it decide whether the magistrate’s finding should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses.”

The learned Judge analyzed and re-evaluated the evidence and arrived at a similar conclusion as the trial court. On our part, we find no compelling reasons to depart from the said concurrent findings. The first appellate court analyzed the evidence tendered in the trial court and found as a fact that the appellant was PW1’s uncle. PW1’s grandmother took no action after she was informed of the heinous crime committed by the appellant, her son. In our view, the 1st appellate court rightly came to the conclusion that the actions of the appellant constituted the offence of incest.

Be that as it may, we note that the first appellate court enhanced the appellant’s sentence from 40 years imprisonment to life imprisonment. In so doing, the 1st appellate court cited the provisions of **section 354 (3)** of the Criminal Procedure Code. In our view, the trial magistrate had no discretion to sentence the appellant to 40 years as opposed to a sentence of life imprisonment. The sentence for incest under **S. 20 (i)** of the **Sexual Offences Act** is life imprisonment. In our view, the 1st appellate court had no jurisdiction to enhance the sentence without any cross appeal and without warning the appellant. This court has had occasion to consider an enhancement of sentence without a cross-appeal and without warning an appellant in the decision of ***JJW vs Republic [2013] eKLR*** wherein it states:-

“We now consider the sentence and here we have difficulties in appreciating what the learned judge did and why he did it. As indicated above, we too feel the sentence that was pronounced upon the appellant and his colleague by the Senior Resident Magistrate was not commensurate with the nature of the offence committed and the antecedents of the appellant which were in any case not stated save that they were first offenders and had been in custody for two (2) years. We too think the circumstances of the case called for a more severe sentence than what was awarded. However, what we do not appreciate is the manner in which the learned judge enhanced the sentence. 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.”

In the appeal before us, the State did not file a cross appeal and neither did they urge for enhancement of sentence. The court did not warn the appellant of its intention but all of a sudden and at the point of dismissing his appeal invoked the provisions of S.354 (3) of the Criminal Procedure Code and enhanced his sentence to life imprisonment from 40 years imprisonment. The appeal before the 1st appellate court belonged to the appellant and had he been given notice, he may have opted to withdraw his appeal and not face the possibility of an enhanced sentence.

One more issue deserves mention. The appellant complained that the P.3 form was produced by a person other than its maker. **PW6 PATRICK NJOKI WAMBUGU** had worked with **ANNE KIRAGU** the author of the P3 form for 3 years. He knew her handwriting and her signature. We also noted that the appellant made no objection to PW6 producing the P3 form. Indeed when asked if PW6 could produce the P3, he stated *“let this officer produce the notes”*. In any event **Sections 48 and 50** of the Evidence Act permit a person who is acquainted with the signature of another to produce the document signed by that other person and the document is admissible if the person producing it confirms that he is familiar with the signature of the signatory and that it is the document of the maker. In the case before the trial court the witness who produced P3 form was familiar with the signature of the maker. We find that nothing turns on this complaint.

The upshot of the above is that the appeal on conviction is dismissed. The appeal on sentence is allowed and the life imprisonment sentence is set aside and in its place we reinstate the original sentence of 40 years imprisonment as ordered by the trial magistrate. The 40 years shall be with effect from the date the trial magistrate awarded the sentence. It is so ordered.

Dated and delivered at Nyeri this 6th day of June, 2018

ASIKE MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

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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.

DEPUTY REGISTRAR