



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: MWERA, GATEMBU & J. MOHAMMED, JJ.A.

CRIMINAL APPEAL NO. 125 OF 2010

BETWEEN

J R W ..... APPELLANT AND

REPUBLIC .....RESPONDENT

(An appeal from the judgment of the High Court at Nairobi (Warsame, J) dated 10th September, 2009

in

H.C.CR.A NO. 215 OF 2008)

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JUDGMENT OF THE COURT

Background and Introduction

This is a Second Appeal to this Court by the *appellant*, J R W, on conviction and sentence of 40 years imprisonment for incest of a child contrary to *section 20 (1) of the Sexual Offences Act No 3 of 2006* confirmed by the High Court, sitting as the 1st appellate court. The appeal originates from a trial in the subordinate court where the appellant was charged with incest of a child contrary to *section 20 (1) of the Sexual Offences Act, 2006*, convicted and sentenced to life imprisonment.

The particulars are that on the night of 23rd and 24th September, 2007 at [*particulars withheld*] Village in Kiambu District within Central Province, the appellant had carnal knowledge of MWW (PW1) a child aged 7 years who to his knowledge at the time of the act, was his daughter.

The appellant was unrepresented before the subordinate court at Githunguri and pleaded not guilty to the charge. The matter proceeded to full hearing with the prosecution calling a total of five (5) witnesses. In his defence, the appellant tendered unsworn evidence and did not call any witnesses.

The brief facts of the case were that, on the night of 23rd and 24th September, 2007 the complainant, MWW aged 7 years, was sleeping in the same bed with her father, the appellant. She testified that he undressed her and then undressed himself before he pushed his penis (*described by the complainant as a*

*'pen' and which the appellant uses to relieve himself)* into her private parts. She identified her private parts by touching the same. The complainant, (PWI), in her unsworn evidence stated that although she experienced pains from the ordeal, the appellant warned her not to report the incident to anyone. She, however, stated that she had informed one “*Jicho*” (PW3) and one “*Kijana*” of the incident, who took her to hospital where she received treatment. She also testified that her father had defiled her previously when her mother was away.

S N K, (PW2), testified that on 25th September, 2007 at 7.00 p.m., he returned home from work when he was informed by his wife that the complainant had been defiled. He stated that the following day the complainant informed him that the appellant had defiled her. He further testified that he informed the Assistant Chief of the incident and requested the appellant to take the complainant to the hospital. PW2 stated that the appellant complied. Accompanied by SGG PW3 and other neighbours, PW2 accompanied the Complainant and the appellant to Gitihia Health Centre where the complainant was treated and advised to report the matter to Githunguri Police Station. PW2 further stated that the appellant was detained at the said police station. He further stated that after reporting the incident at the police station, he took the Complainant to his house where his wife took care of her until her mother returned.

S G G (PW3) testified that his mother had informed him that the complainant had been defiled. He further testified that when he was informed that PW2 and other neighbours had taken the complainant to Gitihia Health Centre. He proceeded to the said Health Centre. He further testified that the Medical Officer advised them to report the matter to Githunguri Police Station where the appellant was detained. He stated that at Githunguri Health Centre the Complainant was referred to Nairobi Womens Hospital for further treatment.

Eric Ogutu PC No 77726, (PW4,) in his evidence deposed that on the 26th September, 2007, while he was at the police station, some members of the public escorted the appellant to the station with an allegation that he had defiled a minor. PW4 testified that he made the report and escorted the

Complainant to Githunguri Health Centre. He further testified that he recorded witness statements and issued the complainant with a P3 form, which was duly filled. He further stated that he escorted the appellant to the hospital for examination and extraction of samples for analysis at the Government Chemist.

DR. NGURU (PW5) based at Githunguri Health Centre, gave evidence on behalf of Faith Muigai a clinical officer, who examined the Complainant and completed the P.3 form. He testified that Faith Muigai was indisposed and was bed ridden and could therefore not give evidence in court. He testified that the medical examination carried out on the complainant revealed that her lower abdomen was tender and that her hymen was perforated and the wall of her vagina had several bruises. He further testified that the complainant was treated and referred to Nairobi Womens Hospital. He further testified that the report from Nairobi Women Hospital was obtained and the same confirmed the findings made at Githunguri Health Centre.

In his defence, the appellant tendered unsworn evidence and confirmed that the Complainant was his daughter. He testified that on 26th September,

2007, he went to work leaving his wife with their children. When he returned home at about 2.00 p.m he found the children alone and was informed that his wife had left. He was then informed by a neighbour who was also a relative that the Complainant had been defiled by one Njuguna. The Appellant testified that he proceeded to the police station to report the matter. He further testified that the said Njuguna and other members of the public informed the police that the Appellant had defiled the complainant. He further testified that the charge of defilement was a frame up against him by his wife and other prosecution witnesses.

The trial court considered the evidence and found the appellant guilty as charged, convicted him and sentenced him to life imprisonment.

Aggrieved by the decision of the trial court, the appellant filed an appeal in the High Court which was heard by Warsame, J. (*as he then was*). The High Court re-analysed and re-evaluated the evidence tendered before the trial court and concluded that the prosecution case was watertight. Based on its findings, the High Court held that the trial court took into account all the relevant factors but nevertheless proceeded to give a maximum sentence as provided under *section 20(1) of the Sexual Offences Act No 3 of 2006*. The learned Judge held that although the offence committed by the appellant was very serious and could not be underestimated, the trial court should not have given the maximum sentence without stating the reason for doing so. The court therefore affirmed the conviction and set aside the sentence of life imprisonment and substituted the same with a prison term of 40 years from the date of sentence.

Aggrieved by the decision of the High Court, the appellant preferred this appeal. He filed a Memorandum of Appeal on 30th October, 2009 and Supplementary Grounds of Appeal dated 25th June, 2012.

The appellant's Memorandum of Appeal and Supplementary grounds of Appeal raised the following issues:-

1. *That the High Court erred in both law and fact by failing to acknowledge that the appellants constitutional and fundamental rights enshrined under S72(3), 77(1) and 84 of the retired Constitution were violated and thereby occasioned prejudice.*
2. *That the High Court erred in both law and fact by holding that there was sufficient and sound evidence to establish the charge against the appellant.*
3. *That the sentence passed by the High Court was extremely harsh and manifestly excessive.*

At the hearing of the appeal, the appellant was unrepresented and stated that he wished to rely on the Memorandum of Appeal, the Supplementary Grounds of Appeal and his written submissions.

He submitted that he was held in custody for 9 days before being arraigned in court which was a breach of his constitutional rights.

In his written submissions, the appellant averred that the charge against him was framed by his wife and prosecution witnesses and challenged the credibility of the Complainants' evidence and that of all the prosecution witnesses.

He further submitted that *Section 48 of the Evidence Act* was violated when Dr. Nguru, (PW4) testified on behalf of Faith Muigai, a Clinical Officer who had examined the Complainant and did not testify in court.

The appellant also submitted that the sentence of 40 years meted out by the first appellant court was harsh and excessive.

Miss. Mary C. Oundo, learned Principal Prosecuting Counsel for the State, opposed the appeal. She submitted that the learned Judge's decision was right in the circumstances of this case. Learned counsel submitted that the High Court in its 1st appellate jurisdiction re-evaluated and analyzed the evidence afresh and arrived at its own conclusions. She submitted that the evidence of PW1, a minor of 7 years old, was corroborated by the evidence of PW2 and PW3 as well as the medical report submitted in evidence in court. She further stated that the evidence adduced supported the finding that the Complainant was sexually assaulted by the appellant. She further stated that the court found the evidence of PW1, PW2, PW3, PW4 and PW5 consistent, straightforward, truthful and cogent.

Learned counsel further submitted that the charges against the appellant were proved beyond reasonable

doubt. There was a concurrent finding in the trial court and the High Court and, therefore, in her view, the appeal must fail.

On the issue of the appellant having been in custody for 9 days, she contended that the same should have been raised at the earliest opportunity to enable the prosecution to respond to the claim. She concluded by saying that the appellant's submission was an afterthought and was misplaced and therefore the appeal should be dismissed.

We have carefully considered the submissions and the law. This being a 2nd appeal, this court is restricted to address itself only on matters of law by dint of the provisions of Section 361(1) 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 their findings. See CHEMAGONG V R, [1984] KLR 611. In KARINGO V R, (1982) KLR 219 this Court stated:-

*“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 S/O KARANJA V. R. (1950) 17 EACA 146)”*

In this appeal, the main issues of law arising for the court's determination are:-

- 1) *Whether the appellant's rights as enshrined under Section 72(3) & 77(1) of the retired Constitution were violated.*
- 2) *Whether there was sufficient and sound evidence to establish the charge against the appellant.*
- 3) *Whether the sentence of 40 years meted by the High Court was lawful.*

On the issue whether the appellant's rights as enshrined under section

*72(3) & 77(1) of the retired Constitution* were violated, the appellant alleged contravention of his constitutional rights under *section 72(3) of the former Constitution*. The appellant alleges that he was detained at the police station for 9 days after his arrest before being arraigned in court. We however, note from the record that this issue was not raised at the trial court but was only raised at the High Court. *Section 84 (1) of the retired Constitution* permitted a person who alleged that their right to a trial, among other rights, had been contravened, to apply to the High Court for a redress, *vide Section 84 (2)*, on such application, the High Court:-

*“may make such orders issue, such writs and give such directions as it may consider appropriate”.*

In JULIUS KAMAU MBUGUA V REPUBLIC, [2010] eKLR, this Court held:-

*“In our view, it is not the duty of a trial court or an appellate court dealing with an appeal from a trial court to go beyond the scope of the criminal trial and adjudicate on the violations of the right to personal liberty which happened before the criminal court assumed jurisdiction over the accused. However, the trial court can take cognizance of such pre-charge violation of person liberty, if the violation is linked, to or affects the criminal process. As an illustration, where the prolonged detention of a suspect in police custody before being charged affects the fairness of the ensuing trial e.g. where an*

*accused has suffered trial – related prejudice as a result of death of an important defence witness in the meantime, or the witness has lost memory, in such cases, the trial court could give the appropriate protection – like an acquittal. Otherwise the breach of a right to personal liberty of a suspect by police per se is merely a breach of a civil right, though constitutional in nature, which is beyond the statutory duty of a criminal court and which is by Section 72 (6) expressly compensatable by damages.”*

From the foregoing, it can be concluded that a breach of Section 72 (3) (b) does

not render the trial a nullity but entitles an appellant to compensation as stipulated in Section 72 (6) of the *retired Constitution*.

On the issue whether there was sufficient and sound evidence to establish the charge against the appellant, we note that the trial court warned itself of the danger of relying on a single witness and found the complainant’s evidence to be truthful and cogent. The High Court in re-evaluating the evidence tendered in the subordinate court, in its judgment stated that:-

*“..... The evidence of PW1, PW2, PW3, PW4 and PW5 is consistent and straight forward that it is the appellant who sexually assaulted the complainant. In deed there is no material to show that the appellant was set up in the way he was charged with the present offence. The history as indicated in the two medical reports clearly shows that the complainant had a history of defilement carried out by the person who had the trust and security of the complainant.....”*

A trial court and the first appellate court are enjoined to examine the evidence of a minor and the only eye witness very carefully and to be satisfied that they were favourable and free from the possibility of error before they can safely make it the basis of a conviction.

In the appellant’s memorandum of appeal he stated that the conviction proceeded upon uncorroborated evidence of the complainant who was a minor. The proviso to section 124 of the *Evidence Act* clearly states that conviction on sexual offences can proceed on the evidence of a child victim even without corroboration so long as the court is certain that the evidence reflects the full truth of what took place.

*Section 124 of the Evidence Act* provides:-

*“124. Notwithstanding the provisions of section 19 of the Oaths and Statutory Declarations Act, where the evidence of alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.*

*Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth.”*

The trial court and the first appellate court also found that indeed the complainant was a truthful witness and her evidence was credible. That being the case, the conviction could and was properly founded on her evidence even in the absence of corroboration. Medical evidence in this case confirmed penetration of the complainant's genital organ. The High Court stated at page

4 of its judgment:-

*“This evidence is supported by the medical report from Nairobi Women Hospital and the P3 form which was produced as exhibit 2 and 3 respectively. I therefore agree with the*

*trial court that as a result of the evidence given by the complainant and the two medical reports which support the assertion by the complainant is a clear indication that the complainant was actually sexually assaulted. The question is whether the sexual assault was carried out by the appellant? In my assessment of the evidence of the complainant and the medical evidence, I am satisfied that it is the appellant who sexually assaulted his own daughter ..... In the premises there is sufficient and overwhelming evidence to link the appellant with the commission of the offence .....*

We find that the evidence of the complainant was beyond reproach and sufficient to sustain a conviction. In addition the evidence was nonetheless, fully corroborated by the evidence of other witnesses and the medical report.

See JASON AKUMU YONGO V R, Court of Appeal Cr. Appeal No.1 of 1983.

The appellant's defence was considered by both the subordinate court and the High Court. The appellant in his defence admitted that he was the father of the complainant. The trial court in consideration of the appellant's defence found that the same was:-

*“A mere denial which evidence failed to discredit that of the prosecution which evidence has clearly incriminated the accused in the commission of the offence herein.”*

Regarding whether sections 21, 33 and 48 of the Evidence Act were violated, Dr. Nguru (PW5) based at Githunguri Health Centre produced a P3 form which was filled by his colleague, Faith Muigai, a Clinical Officer who had examined the Complainant and who was unwell and bedridden. The form was completed, signed and dated by Faith Muigai. PW5 stated that he had worked with her and was conversant with her signature and handwriting. Section 21 of the Evidence Act provides that an admission may be proved as against the

person who makes it or his representative in interest. Section 33 of the

Evidence Act provides that statements, written or oral of admissible facts made by a person who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable, are admissible when the statement was made by such person in the ordinary course of business.

Section 48 of the Evidence Act provides that an expert witness can assist the court to form an opinion as to identity or genuineness of handwriting or other impressions. PW5 could, therefore, testify on Faith Muigai's behalf. The reasons given for Faith Muigai not testifying were therefore, satisfactory. Accordingly, sections 21, 33 and 48 of the Evidence Act were not violated.

On the issue whether the sentence imposed by the High Court was lawful, Section 361(1) (a) of the Criminal Procedure Code provides:-

*“361 (1) a party to an appeal from a subordinate court may, subject to subsection 8 appeal against a decision of the High Court in its appellate jurisdiction on a matter of law and the Court of Appeal shall not hear an appeal under this section:-*

*(a) On a matter of fact, and severity of sentence is a matter of fact. ... ”*

Accordingly, the only appeal that can lie to this Court by virtue of section 361 of the Criminal Procedure Code is on the issue of the legality of sentence imposed by the High Court. Severity of sentence is a question of fact by dint of section 361 (1) (a) of the Criminal Procedure Code. In the case of

KENNEDY INDIEMA OMUSE V REPUBLIC, Criminal Appeal No. 344 of

2006, this Court held:-

*“We know by dint of section 361(1) of the Criminal Code this court has no jurisdiction to entertain appeals on severity of sentence.”*

In the case of *BENARD OMARI KIGWARO V REPUBLIC*, [2009] eKLR it was

held:-

*“In short, much as on matters of severity of sentence in respect of second appeals, we have no jurisdiction, when it comes to matters of the principles of sentencing so as to ensure certainty and consistency of the sentencing in the country, this Court must accept that these are matters of law and hence we are in law entitled to intervene.”*

This court has no jurisdiction to review or interfere with sentences imposed by subordinate courts on the grounds of severity of sentence unless the issue is on the legality of the sentence which is a point of law.

See *PETER MAINA MACHARIA V REPUBLIC*, CRIMINAL APPEAL NO. 133 OF

2009 and *ROTICH V REPUBLIC*, [1983] KLR 541.

Section 20 (1) of the Sexual offences Act prescribes a mandatory sentence of life imprisonment of any male person convicted of the offence of incest of a female person below the age of eighteen years. Section 20 (1) of the Sexual Offences Act stipulates:-

*“(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge 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 ten years:*

*Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen 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 the consent of the female person.”*

[Emphasis added].

The Sexual Offences Act provides for minimum sentences and Parliament gives no discretion to the courts to impose sentences in tandem with the main objective of the Act which is *“prevention and protection of all persons from harm from unlawful sexual acts.”*

A reading of Section 20(1) clearly shows that the only sentence provided for a person who commits incest of a child aged eleven years and below is life imprisonment.

This court is guided by the case of *JOSEPH KIPLIMO v R*, CR. No 416 of 2010 where this court stated:-

*“... the issue of sentence in this case is a matter of law as it is the issue as to whether the sentence meted out to the appellant is lawful or not. It is not a question of severity of sentence. It is whether a lawful sentence was awarded. We have jurisdiction to interfere.”*

Accordingly, we hold that that in accordance with Section 20(1) of the Sexual Offences Act, the trial court made the correct decision by imposing the mandatory sentence of life imprisonment. We hold that the first appellate court erred in reducing the sentence to 40 years.

We therefore set aside the unlawful sentence of 40 years and substitute it with that lawfully provided for by the Sexual Offences Act, being a mandatory sentence of life imprisonment.

In the result, this appeal fails and is dismissed in its entirety. We uphold the conviction and reinstate the sentence of life imprisonment given by the trial court.

Dated and delivered at Nairobi this 7th day of February, 2014.

J. W. MWERA

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR

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