SKN v Republic (Criminal Appeal E002 of 2022)
[2025] KEHC 2538 (KLR) (27 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2538 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL E002 OF 2022

JK NG'ARNG'AR, J

FEBRUARY 27, 2025

BETWEEN

SKN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Case Number 61 of 2020 by Hon. Kiniale L. in the Principal Magistrate's Court in Bomet)

JUDGMENT

1. The Appellant was initially charged with the offence of incest contrary to section 20(1) the *Sexual Offences Act*. The particulars of the offence were that on 29th August 2020 in Chepalungu Sub-County within Bomet County, the Appellant caused his penis to penetrate the vagina of MC who to his knowledge was his daughter.

2. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 29th August 2020 in Chepalungu Sub-County within Bomet County he intentionally and unlawfully touched the vagina of MC, who to his knowledge, knew to be his daughter of 14 years.

3. The Appellant pleaded not guilty to the charges before the trial court and a full hearing was conducted. The prosecution called five (5) witnesses in support of its case. The Appellant on the other hand testified and called two witnesses.

4. In a Judgment dated 12th January 2022, the trial court convicted the Appellant of the charge of incest and sentenced him to serve life imprisonment.

5. Being aggrieved with the Judgment of the trial court, the Appellant, SKN appealed through an undated home-made Appeal against his conviction and sentence on the following paraphrased grounds: -

i. That I pleaded not guilty at trial and still maintain the same.

ii. That the learned trial Magistrate erred in law and fact by relying on inconsistent and irregular evidence.

iii. That the Prosecution did not discharge their burden of proof.

iv. That, the learned trial Magistrate erred in law and fact by relying on contradictory and uncorroborated evidence.

v. That the learned trial Magistrate erred in law and fact by rejecting my plausible defence without any further explanation.

vi. That I wish to be present during the hearing of this Appeal.

6. This being the first appellate court, I have a duty to re-evaluate the evidence on record afresh. This duty was succinctly stated by the Court of Appeal in the case of David Njuguna Wairimu vs Republic (2010) eKLR where it held:-

> " The duty of the first appellant court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so. Provided it is clear that the court has considered the evidence on the basis of the law and the evidence on basis of the law and the evidence to satisfy itself on the correctness of the decision".

7. I proceed to briefly consider the case that was before the trial court in the succeeding paragraphs and the submissions in the Appeal.

The Prosecution's Case.

8. It was the Prosecution's case that the Appellant had sexual intercourse with his daughter MC (PW1) who was aged 14 years old. PW1 testified that on the material day, the Appellant asked her to follow him to his bedroom where he inserted his penis into her vagina. PW1 further testified that her mother found them (PW1 and Appellant) in the act and raised an alarm attracting the attention of her neighbours.

9. Dr. Nixon Mutai (PW4), then a clinical officer at Longisa Hospital testified that he examined PW1 and found that her genitalia was normal though she had an old broken hymen. PW4 further testified that he found numerous epithelial cells and that PW1 was 5 weeks pregnant. PW4 concluded that the victim (PW1) had been defiled.

10. In the Appeal, the Prosecution filed its written submissions dated 7th August 2023. The Prosecution submitted that they established penetration. That the victim's testimony was manifestly clear that she had been penetrated. The Prosecution further submitted that the medical evidence produced by PW4 led credence to the victim's testimony.

11. It was the Prosecution's submission that they proved that the victim was the Appellant's relative. That it was not disputed that the victim was the Appellant's daughter. It was the Prosecution's further submission that the Appellant was found having sexual intercourse with the victim and was arrested at the scene.

12. The Prosecution submitted that the Appellant's defence of a grudge between him, his wife and PW1 was refuted by the victim who admitted that she had engaged in sexual intercourse prior to the incident with one Dennis which resulted in a pregnancy. The Prosecution further submitted that the absence of the victim's mother's testimony was sufficiently explained by PW5.

13. It was the Prosecution's submission that their evidence was overwhelming and the conviction and sentence were safe and proper respectively.

The Appellant's defence.

14. The Appellant (DW1) denied committing the offence. He testified that PW1 had been at her grandmother's house where she had gone without permission. That her mother brought her (PW1) back home and when he asked her if she knew the reason why the girl (PW1) ran away, his wife became rude. He further testified that he lost his temper and beat his wife.

15. DW1 testified that on the material day, his wife found PW1 washing utensils and picked a quarrel with her asking her (PW1) why she was in the bedroom. That his wife raised an alarm and neighbours came. DW1 further testified that his wife and PW1 conspired to frame him due to a dispute they had.

16. Evaline Barchok (DW2) and Loyce Ngeno (DW3) who were the Appellant's neighbours all testified that they responded to the Appellant's wife's alarm and found PW1 who denied being penetrated by the Appellant.

17. In the Appeal, the Appellant filed his submissions dated 14th January 2025. He submitted that the trial court erred when it found that penetration had been proven. That the clinical officer found the victim to be 5 weeks pregnant and the trial court failed to establish who defiled the victim. He further submitted that a DNA test ought to have been conducted to determine who defiled her. He relied on Raphael Wambua Mulwa v Republic [2021] KEHC 12984 (KLR).

18. It was the Appellant's submission that the testimonies of PW2 and PW4 were insufficient and ought to be corroborated.

19. The Appellant submitted that the Prosecution failed to call GN (victim's mother) who was crucial in corroborating the victim's evidence. That her absence cast doubt on the Prosecution case. He relied on LOW v Republic [2022] KEHC 878 (KLR).

20. It was the Appellant's submission that the life sentence imposed was unconstitutional, harsh and excessive.

21. I have gone through and considered the trial court's proceedings, the undated home-made Petition of Appeal, the Appellant's written submissions dated 14th January 2025 and the Respondent's submissions dated 7th August 2023. The following issues arise for my determination:-

    i. Whether the Prosecution proved its case beyond reasonable doubt.

    ii. Whether the Appellant's defence cast any doubt on the Prosecution's case

    iii. Whether the sentence preferred against the Appellant was just and fair.

i. Whether the Prosecution proved its case beyond reasonable doubt.

22. The offence of incest is defined in section 20(1) of the *Sexual Offences Act* as:-

> 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 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.

23. In FOD v Republic [2014] KEHC 8847 (KLR), Majanja J. (as he then was) held:-

> " While in the case of incest, the prosecution was only required to prove either penetration or an indecent act, in defilement the prosecution was required to prove penetration. The additional element of the relationship between the accused and the child is what makes the offence incest."

24. Further, in MG vs Republic (Criminal Appeal E051 of 2021) [2022] KEHC 14454 (KLR) (27 October 2022) (Judgment), Mativo J. (as he then was) held:-

> " Thus the ingredients for the offence of incest are:
>
> (i) Proof that the offender is a relative of the victim.
>
> (ii) Proof of penetration or indecent Act.
>
> (iii) Identification of the perpetrator.
>
> (iv) Proof of the age of the victim."

25. I agree with the above persuasive authorities which aptly explain the ingredients of the offence of incest.

26. Regarding the age of the victim, No. 260314 PC Benard Musyoka (PW4) testified that the victim (PW1) was aged 14 years and produced a Birth Certificate as P.Exh 1. I have looked at and considered the Birth Certificate. It shows that the victim was born on 20th August 2006 which would make the victim 14 years old at the time of the commission of the offence. Additionally, the victim herself while undergoing voire dire examination stated that she was aged 14 years old. It is therefore my finding from the overwhelming evidence above that at the time of the commission of the offence being 29th August 2020, PW1 was aged 14 years old.

27. With regard to the issue of identification, it was undisputed that the Appellant was the victim's father. The victim (PW1) identified the Appellant as her father, the area Assistant Chief (PW2) also identified the Appellant as the victim's father. The Appellant in his defence acknowledged the victim to be his daughter and his neighbours (DW2 and DW3) confirmed and corroborated the same. It is therefore my finding that the issue of identification of the Appellant as the perpetrator of the offence and father of the victim was beyond doubt. The Appellant's relationship with the victim was in consonance with the provisions of section 20(1) of the *Sexual Offences Act*.

28. In any event, the Appellant had a rebuttable presumption that he knew of the relationship between him and the victim prior to the commission of the offence. Section 22(3) of the *Sexual Offences Act* provides:-

> An accused person shall be presumed, unless the contrary is proved, to have had knowledge, at the time of the alleged offence, of the relationship existing between him or her and the other party to the incest.

29. With regard to penetration, Section 2 of the *Sexual Offences Act* defines penetration as the partial or complete insertion of genital organs into the genital organs of another person. Penetration can be proved through the evidence of the victim corroborated by medical evidence.

30. I thus proceed to carefully evaluate the victim's testimony and other oral evidence presented by the Prosecution witnesses.

31. The victim (PW1) testified that on the material day, the Appellant called her into his bedroom and asked her to remove her clothes. PW1 further testified that the Appellant removed his inner clothing and defiled her by inserting his penis into her vagina. When PW1 was cross examined by the Appellant, she reiterated that the Appellant defiled her.

32. Dr. Nixon Mutai (PW4), a clinical officer testified that he examined the victim (PW1) and found that she had an old broken hymen. PW4 further testified that the victim's genital organ was normal but he found numerous epithelial and white blood cells and a few red blood cells. It was PW4's conclusion that the victim (PW1) had been defiled. When PW4 was cross examined, he stated that he did not find bruises on the victim's genitalia. Upon re-examination, PW4 stated that in some cases, it was difficult to note bruises because a condom was used or the sexual intercourse was consensual. In a clarification by the trial court, PW4 stated that the numerous epithelial cells found in PW1's genital organ indicated friction or bruising of the vaginal wall.

33. PW4 produced the P3 Form, treatment notes, and PRC Form as P.Exh 2, P.Exh 3 and P.Exh 4 respectively. I have looked at the exhibits and the findings on the treatment notes, P3 and PRC Forms mirrored the testimony of PW4. I accept the medical evidence and PW4's conclusion that the victim (PW1) had been penetrated. It is therefore my finding that the Prosecution proved the element of penetration to the required legal standard. The medical evidence corroborated the victim's evidence of having been defiled.

34. In his submissions, the Appellant faulted the trial court's finding that the Appellant was positively identified as the perpetrator of the offence. He based his submission on the fact that the victim was pregnant and the trial court failed to order a DNA test to determine the identity of the father of the foetus. It was an effort to link the pregnancy to the defilement. From the victim's testimony, the victim was very clear that she had engaged in sexual intercourse with one Dennis before the material day when the Appellant defiled her.

35. Section 36(1) of the *Sexual Offences Act* provides that: -

> Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

36. In expounding Section 36(1) of the *Sexual Offences Act*, the Court of Appeal in the case of Robert Mutungi Muumbi v Republic [2015] KECA 584 (KLR) held that: -

> "Section 36 (1) of the Act empowers the Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly, that provision is not couched in mandatory terms. Decisions of this court abound which affirm the principle that medical

> or DNA evidence is not the only evidence by which commission of a sexual offence may be proved."

37. It was not therefore not mandatory for the Appellant to be subjected to a DNA test to provide a link between him and the offence. What the Prosecution needed to prove was among others, penetration, which they have.

38. The Appellant submitted that the Prosecution failed to call the victim's mother who was a crucial witness. Section 143 of the *Evidence Act* provides as follows:-

> No particular number of witnesses shall in absence of any provision of the law to the contrary be required for proof of any fact.

39. In Julius Kalewa Mutunga v Republic [2006] KECA 79 (KLR),the Court of Appeal held as follows:-

> "...As a general principle of law, whether a witness should be called by the prosecution is a matter within their discretion and an appeal court will not interfere with the exercise of that discretion unless, for example, it is shown that the prosecution was influenced by some oblique motive."

40. This court holds the position that the Prosecution has the discretion on the number of witnesses it wishes to call. The court cannot therefore dictate or compel the Prosecution on the number of witnesses it should avail as long as the Prosecution proves its case through the witnesses it presents.

41. This court agrees with the Appellant that the victim's mother (GN) was a necessary witness. This is because according to the victim, her mother found the Appellant on top of the victim and in the act and would have been an eye witness. That said, it is my view that the Prosecution produced sufficient evidence to prove the charge of incest.

ii. Whether the Appellant's defence cast any doubt on the Prosecution's case

42. The Appellant denied committing the offence. He stated that he was being set up and framed by the victim and his wife. He testified that on the material day, his wife found the victim washing utensils and picked a quarrel with her asking what she was doing in the bedroom. The further testified that at this point, the wife raised an alarm and neighbours responded. Evaline Barchok (DW2) and Loyce Ngeno (DW3) testified that they were the Appellant's neighbours and they responded to the alarm raised by the Appellant's wife. DW2 and DW3 further testified that they did not witness the offence and when they asked the victim if she had been defiled, the victim was hesitant in her answers.

43. I have looked at the defence in its entirety and it is my finding that it is an afterthought. I say so because the Appellant did not raise the issue of being framed by his wife and the victim when he cross examined the victim. Further, in my view DW2 and DW3 defences did not add value to the Appellant's defence as their testimony revolved around what they saw after the alarm had been raised. In total, it is my finding that the Appellant's defence was weak and did not cast any doubt on the Prosecution case.

iii. Whether the sentence preferred against the Appellant was just and fair.

44. Having found that the Prosecution had proved the offence of incest, the penal section is found in section 20(1) of the *Sexual Offences Act* which provides:-

> 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

45. By virtue of the victim being 14 years old, the Appellant was to face a life sentence. I however agree with the Appellant that a life sentence was indeterminate in nature and the same was declared unconstitutional. The Court of Appeal in Manyeso *vs Republic (Criminal Appeal 12 of 2021*) [2023] KECA 827 (KLR) (7 July 2023) (Judgment) pronounced itself as follows:-

> "We note that the decisions of this court relied on by the appellant, namely Evans Wanjala Wanyonyi v Rep [2019] eKLR and Jared Koita Injiri v Republic Kisumu Crim App No 93 of 2014 were decided before the Supreme Court clarified the application of its decision in Francis Karioko Muruatetu & another v Republic [2021] eKLR and limited its finding of unconstitutionality of mandatory sentences to mandatory death sentences imposed on murder convicts pursuant to section 204 of the *Penal Code*. This fact notwithstanding, we are of the view that the reasoning in Francis Karioko Muruatetu & another v Republic [2017] eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of *the Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

46. I am guided by the above authority to consider a determinate sentence in favour of the life sentence as prescribed by section 20(1) of the *Sexual Offences Act*.

47. In line with the above, the life sentence passed by the trial court is vacated and substituted with 30 years' imprisonment. The sentence will run from 29th August 2020 being the date of his arrest and pre-trial custody.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 27TH DAY OF FEBRUARY 2025.

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HON. JULIUS K. NG'ARNG'AR

JUDGE

Judgement delivered in the presence of the Appellant, Ngeno for the Appellant Mr. Ayiekha for the Respondent and Siele and Susan (Court Assistants)