



**Sammy v Republic (Miscellaneous Criminal Application
E023 of 2023) [2023] KEHC 24500 (KLR) (31 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 24500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
MISCELLANEOUS CRIMINAL APPLICATION E023 OF 2023**

TM MATHEKA, J

JULY 31, 2023

BETWEEN

PAUL MBEVI SAMMY APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. Paul Mbevi Sammy was charged with Defilement Contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences No. 3 of 2006 - that between 2nd December 2022 and 5th January, 2023 at unknown time in Makueni Sub county within Makueni County intentionally caused his penis to penetrate the vagina of RMK a child aged 16 years.
2. In the alternative, he was charged with committing an indecent act with a child Contrary to Section 11(1) of the same Act No. 3 of 2006. It was alleged that during the same time place - he touched the vagina of RMK a child aged 16 years.
3. When plea was taken on 9/1/2023 he replied that it was not true and did not know that she was a child.
4. The complainant had disappeared from home and was found on 5/1/2023. Upon examination by PW1 - Stella N. Mwasia a Clinician at Makueni County Hospital, she was found to be 14 weeks and 1 day pregnant on 16/1/2023.
5. RMK testified that in December, 2022 she was in class 8. On 2/12/2022 she went to the home of the accused who was her boyfriend. She stayed there for 2 days during which day she had sexual intercourse with him. Her father came looking for her and accused they went back home.
6. On 17/12/2022 her brother chased her away because she had conceived - she went to her aunt's home . A week later she went back to the home of the accused and they had intercourse.



7. Her father called the accused's father and summoned him, the accused and herself to her father's home. When they arrived the accused was arrested.
8. On cross-examination she said that she was already pregnant when she went to his home - and that he was not responsible for her pregnancy. She however recognised him as her husband.
9. The complainant's father PKM testified that he noticed that his daughter was missing on 2/12/2022. He reported to the village elder. A week later his own son told him that the sister was in the home of the accused person. He went there. He found the accused and the complainant. He waited for the father of the accused to arrive. The mother is the one who came and told her father that she was the accused's friend.
10. The Assistant Chief came and the complainant's father, accused's mother took complainant back home.
11. However a week later the complainant ran away to her aunt (PW2 wife's sister's place). The complainant stayed there for only one week and the accused went for her and both ran away together. Parents of the accused then went to his home with the accused, the complainant and accused was arrested.
12. On cross-examination he told the court that the complainant was found in the home of accused because accused lied to her and slept with her. That he lied he was going to marry her. He claimed accused befriended complainant when she was in class 7.

The village elder Paul Mutua Munyao testified how the father of PW2 the complainant called him to his home - he found the accused, PW2 and that accused had eloped with the 16 year old girl. He and other village elders arrested the accused and took him to Kwakathoka Police Post. No. 247669 PC Kimani received a report that the accused had defiled the complainant. She escorted the complainant to the hospital for examination. She obtained PW2's certificate of birth. The accused was brought to the Makueni Police Station from Kwakathoka Police Post

13. In his defence the accused person gave a sworn statement. He said he was a student. That on 5/1/2023 he met a man on the road - he arrested him and took him to Kwakathoka Police Post. He said he did not know his case - he said he did not know the complainant. He said he heard the evidence of the prosecution witnesses against him. He said there was no reason for them to lie.
14. In his judgment dated 28/3/2023 the learned trial magistrate found the accused guilty convicted him - and on 30/3/2023 sentenced him to 15 years imprisonment.
15. The accused filed this petition of appeal (given a Misc. Criminal Application number) on 1/5/2023 on the grounds that he is a form 2 student still in school and would suffer irreparable harm if he is forced to serve the 15 years imprisonment term. That there was insufficient evidence to warrant a conviction.

When the appeal came for hearing the court fast tracked it on the basis that the accused may have been a minor at the time of trial conviction and sentence. I perused the record and the charge sheet stated he was 20 years old – the records at prison indicate that when he was committed to remand he was 20 years old and when his prisoner's health records were taken down it stated that he was 20 years old.

16. I proceed to seek a social inquiry from Probation and After Care Services to verify the age of the accused person. The head teacher at [Particulars Withheld] Secondary School wrote a letter to court that the appellant was admitted to form 1 on 6/8/2021 and his date of birth in the register was 14/10/2007. The appellant presented the court with certificate of birth showing that he was born on 14/10/2006 however and when we sent it for authentication the same was declared not authentic as it turned



- out that the authentic date of birth as per the records of the serial no of the certificate of birth was 14/10/2002.
17. The Probation and After Care Service's report ref No. Ps/3/1/1/5 indicated that the appellant had a birth certificate saying he was born on 14/10/2006, however his school records showed he was born "in 2017" I assume a typo that should have read 2007. That he was arrested in 2021 when he was in form 1. The report seemed to confirm that he was a minor when he committed the offence.
 18. The report referred to the accused as the subject and provided his age as 16 years 8 months. Neither the accused nor his mother could say when he was born.
 19. The ODPP left it to the court to make the appropriate decision in the circumstances of the matter.
 20. The issue is whether the appeal is merited.
 21. As a first appellate court I am required to re-evaluate the evidence and arrive at my own conclusion taking into consideration that I never saw/heard the witnesses.
 22. On whether there was sufficient evidence to prove the charge – if defilement - the complainant told the court that she was 16 years and at the time of these incidents she was pregnant by another person but went to live with the accused who was her boyfriend and they had sex. When her parents came for her she still ran away and went back to the accused's house where they had sex again. The accused was later arrested by the village elder.
 23. The P3 confirmed that she was pregnant - but she already testified that the accused was not the one responsible for the pregnancy hence the pregnancy by itself could not be used as evidence of defilement as against the accused.
 24. However defilement can be proved by the oral evidence of the victim as well whose evidence is believed by the trial court. In this case it is noteworthy that in her testimony the complainant was not even saying that she was defiled she was asserting that she considered the accused to be her husband and had sexual intercourse with him. She told the court "...I went to the accused's home. He was my boyfriend. I had been visiting him ...I stayed there for two days...we had sexual intercourse for the two days ..." And on cross examination she told the court. "I had conceived before I came to your home ... you are not the one who is responsible ...I know you as my husband". Looking at the record it is evident that this is a relationship that was going on between the two and the same can be read from the record as when the charge was read to the accused his answer was that he did not know that she was a child. I must hasten to add here that while sexual intercourse does happen between a child and another child, or a child and a youth whose ages may be close to each other, the law does not recognise that as a legally acceptable act even if there was an agreement between the two to do it. However, we cannot run away from the fact adolescents will have sex and the duty of the child justice system is not to punish but to rehabilitate, to counsel, to guide and affirm the correct behaviour.
 25. From the evidence on record the accused and the complainant had sexual intercourse as they were boyfriend and girlfriend. Even though the accused denied it - there was no reason not to believe that the complainant when she said she ran away and went the accused 's home and that they had sexual intercourse.
 26. In his defence the accused merely denied the offence - In the Probation and After Care Services Report, he concedes he had a sexual relationship with the complainant who was his girlfriend . There is no doubt that there was a relationship existed that was sexual. As far as age is concerned the appellant was anywhere between 16 years and 20 years old - the complainant was 16 years old - and hence technically there was defilement.



27. On sentence the learned trial magistrate applied the minimum sentence under section 8(4) of the Sexual Offence.
28. This is one of those cases that demonstrates how the lack of the exercise of discretion by the Judicial Officer can lead to injustice. The question that begs is whether the circumstances of this case call for the minimum sentence - or whether if the learned trial magistrate was able to exercise discretion - taking into consideration the circumstances of the offence, he would have imposed 15 years imprisonment?.
29. Looking at the present case - the appellant and the complainant were both youthful - appellant in high school despite being anywhere between 16 and 20 years old. In the number of years he was older than the complainant but the age bracket – age difference brings them into the adolescent bracket. Again the manner in which the offence was committed calls to mind section 33 of the Sexual Offence Act with respect to the circumstances of the offence and the sentence.

Evidence of surrounding circumstances and impact of sexual offence Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove-

- (a) whether a sexual offence is likely to have been committed- (i) towards or in connection with the person concerned; (ii) under coercive circumstances referred to in section 43; and
 - (b) b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned
- (Emphasis mine)
31. Going by the sentencing trends in Sexual Offence Act matters as may be gathered from the Kenya Law Reports- the minimum sentence has been found to cause injustice in numerous cases where an accused person ends up getting a sentence that person does not deserve.
 32. The question is whether the circumstances of this case as set out herein above called for the minimum sentence. I am alive to the and respect the trial magistrate’s discretion to sentence. However, on the other hand this court on appeal has power to change the sentence under s. 354 of the Criminal Procedure Code which states that in an appeal against the conviction;
 - (3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may
 - (a) in an appeal from a conviction—
 - (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or
 - (ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or
 - (iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;



33. This court is empowered on appeal to increase or reduce the sentence. In this I find illumination in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) the court held inter alia

The judicial system provided for appellate process where parties were dissatisfied with decisions of the lower court. To remove from the courts, the power to mete appropriate sentences merely because the lower courts or any other court for that matter were not imposing sensible sentences amounted to judicial coup. All the tiers of the judiciary could not be said to be wrong and if they arrived at the same decision then everyone had to live with that decision however unpalatable it might appear since according to the law, that was the right decision.

Sentencing was a matter within the discretion of the trial court. The Kenya Judiciary Sentencing Policy Guidelines appreciated that whereas mandatory and minimum sentences reduced sentencing disparities, they however fettered the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.

34. See also *Yusuf Shiunzi v Director of Public Prosecution* [2020] eKLR on the unconstitutionality of mandatory minimum sentences.
35. In this case two adolescents engaged in sexual activity. One was slightly older than the other. No force or threats or coercion or abuse power was evident from the record. This was not a case for the minimum mandatory sentence.
36. The appellant came to court stating that he was a minor at the time the offence was committed. He came to court on the basis that he was a student in form two a fact that was confirmed by Probation and After Care Services, He did not have the requisite document and clearly there was an effort to trick the hand of the court that at the material time he was a child. PACs reported that he was 16 years and 8 months but when he was charged he was 20 years old. PACS appeared to have fallen for this without conclusive evidence. His mother tried to recreate his age to fall into the bracket of a minor saying that he was 16 but if he was it would have been evidence available from the date of arrest. The age of 20 years appears consistent in the records from the date of arrest and appears supported by the evidence from Civil Registration.
37. Evidently someone out there was trying to circumvent the system by cheating the system. Definitely that takes away some of the mercy that would have been due to him.
38. The Probation Officer's report indicated that the accused was born in 2006 and that he missed out on proper parental guidance at a critical time in his life. It was proposed that he would need to continue with his formal education, guidance and counselling to reinforce positive behaviour. A non-custodial option was recommended where he would continue with school and his mother and PACS would supervise him.
39. The victim was found not to have any post traumatic psychological issues though she had dropped out of school due to the pregnancy. It is noteworthy that no mention is made of the person responsible for her pregnancy and what efforts were being made for her to go back to school after having her baby although the report indicates that she is willing to go back to school. To that extent she is a child in need of care and protection and PACs ought to have liaised with the DCS to get a P & C opened to ensure that the welfare of the victim and that of her child were taken care of. In the circumstances the PACs officer is directed to ensure that such a file is opened and the Victim Impact report placed therein for the guidance of the Children Magistrate in dealing with the matter.



40. Having stated that I find that the sentence imposed of 15 years was harsh. I have taken into consideration the period of time the appellant spent in time since the arrest and substitute the sentence with a sentence of 5 years imprisonment. Right of Appeal 14 days

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 31ST JULY 2023

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MUMBUA T MATHEKA

JUDGE

CA Mwiwa

Appellant present

Ms Nyakibia for state

