Republic v TWG (Criminal Case 42 of 2017)
[2022] KEHC 2058 (KLR) (Crim) (24 February 2022) (Sentence)

Republic v TWG [2022] eKLR

Neutral citation: [2022] KEHC 2058 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CRIMINAL

CRIMINAL CASE 42 OF 2017

SN MUTUKU, J

FEBRUARY 24, 2022

BETWEEN

REPUBLIC ..... PROSECUTOR

AND

TWG ..... SUBJECT

The proper sentence to be imposed on an offender who had transitioned from the minor at the time the offence was committed to an adult at the time of sentencing.

The court discussed the dilemmas that courts faced when sentencing child offenders who had transitioned to adults during sentencing. The court noted section 191(l) of the Children Act, 2001 provided a solution by empowering the courts to deal with the case in other other lawful manner. Applying that provision, the instant court sentenced the convicted subject to imprisonment for a period of five (5) years in each of the ten counts she was facing, to run concurrently.

Reported by Moses Rotich

Children Law *- sentencing of convicted children - where the offender had transitioned from the minor at the time the offence was committed to an adult at the time of sentencing - factors to consider - what was the proper sentence to be meted on an accused person who was charged and tried of a capital offence as a child but had turned an adult during conviction and sentencing - , No 8 of 2001, section 191*

Brief facts

The instant matter was a ruling on sentence. The subject, TWG, was charged and tried for ten counts of murder contrary to section 203 as read with section 204 of the , cap 63, Laws of Kenya. It was alleged that on the night of September 2, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County, TWG jointly with others not before court murdered ten people as were identified in counts 1 to 10.

At the end of the trial, the instant court, on December 16, 2021, found the subject guilty of manslaughter instead of murder in all the ten (10) counts. The instant court made a finding that all the ingredients for

the offence of murder, specifically malice aforethought, had not been proved beyond reasonable doubt hence reducing the ten (10) offences of murder to manslaughter contrary to section 202 as read with section 205 of the .

Consequently, mitigation was conducted wherein some of the ten families that lost their daughters in the fire gave their victim impact statements. Pre-sentence Report was also filed.

Issues

What was the proper sentence to be meted on an accused person who was charged and tried of a capital offence as a child but had turned an adult during conviction and sentencing?

Held

1. From the victim impact statements and the pre-sentence report, it was clear that the families of the victims felt that the court was lenient in finding the subject guilty of manslaughter. It was their view that the court should grant a custodial sentence against the subject in order for them to ease the pain and anguish they were undergoing.
2. The circumstances of the instant case were that the subject transitioned from a minor aged 14 years in form one in 2017 when the offence was committed to a young adult aged 18 years at the time the case was concluded and the instant court found her guilty of ten counts of manslaughter. It was obvious that the court was faced with the dilemma of the criteria to be applied in sentencing her;
    a. whether the court take into consideration the age of the subject at the time of committing the offence; or,
    b. whether the subject should be sentenced as an adult or as a minor.
3. If the court were to sentence the subject as an adult that dilemma would not occur. It was different when the offender was a minor or was a minor at the time the offence was committed.
4. Other courts had dealt with similar circumstances in sentencing where the offender had transitioned from the minor at the time the offence was committed to an adult at the time of sentencing. Although no cases could be exactly similar in circumstances, the issue of trying a minor for a particular offence and that minor transitioning into an adult by the time conviction was entered were common.
5. The offender was being punished for the offence committed during his minority and not at the time of majority, hence the dilemma. The penalties for child offenders were provided in section 191(1) of , No 8 of 2001. The court could deal with the offender in any manner provided in the scenarios provided under that section. A court operated with the tools available. The tools available to the instant court was section 191 (1) of the Children Act and caselaw.
6. Paragraph 4 of the provided objectives of sentencing as:
    a. Retribution: To punish the offender for his/her criminal conduct in a just manner.
    b. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.
    c. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.
    d. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasioned victims', communities' and offenders' needs and justice demanded that those were met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.
    e. Community protection: To protect the community by incapacitating the offender.
    f. Denunciation: To communicate the community's condemnation of the criminal conduct.
7. In the instant case, the offence being dealt was manslaughter. That was a matter of great magnitude in the sense that ten (10) young lives were lost. The consequences of a crime was the attendant punishment even though no amount of punishment could bring back a life lost. In equal measure,

no amount of punishment could ever satisfy the families that lost their children that justice had been done. That was the state of a human heart.

8. The Probation Report recommended a combination of both custodial and non-custodial sentence. While that report was relevant in sentencing for it brought out the social circumstances of the subject, a probation report was not binding to the court.
9. None of the sentencing scenarios in section 191 (1) (a) to (k) all-inclusive would serve justice in the instant case. There was a solution under section 191 (1) (l) of the . Due to the gravity of the offences in the instant case, and the current age of the subject, she could not be released back to society without being brought to terms with the consequences of her actions or omissions by a custodial sentence. That necessitated the court to deal with the instant case in other lawful manner pursuant to section 191 (1) (l) of the
10. The offence of manslaughter attracted a maximum penalty of imprisonment for life. In view of all the circumstances of the instant case, the subject, TWG, was sentenced to imprisonment for a period of five (5) years in each of the ten counts she was facing. The period of imprisonment should run concurrently and should take effect from the date of her conviction, being December 16, 2021.

Sentenced.

Orders

i. *The subject, TWG, was sentenced to imprisonment for a period of five (5) years in each of the ten counts she was facing.*
ii. *The period of imprisonment should run concurrently and should take effect from the date of her conviction, being December 16, 2021.*

Citations

Cases

Kenya

1. *DKC v Republic* Criminal Appeal 184 of 2009; [2014] KECA 230 (KLR) - (Explained)
2. *JKK v Republic* (Criminal Appeal 118 of 2011) [2013] KECA 241 (KLR) - (Explained)
3. *Kiprotich, Daniel Langat v Republic* Criminal Petition 3 of 2015; [2018] KEHC 6153 (KLR) - (Explained)

Statutes

Kenya

1. Children Act (Repealed) (No 8 of 2001) section 191(1) — (Interpreted)
2. Constitution of Kenya article 50(6) — (Interpreted)
3. Penal Code (cap 63) sections 202, 203, 204, 205 —(Interpreted)

Texts

The Judiciary of Kenya (2016), *Sentencing Policy Guidelines* (Nairobi; The Judiciary of Kenya)

Advocates

None mentioned

SENTENCE

1. TWG, the subjectin this matter, was tried for ten (10) counts of murder. The charges are captured in this ruling for record purposes:

Count 1

Murder contrary to section203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered AAM.

Count 2

Murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered ANN.

Count 3

Murder contrary to section 203 as read with Section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered OEN.

Count 4

Murder contrary to Section 203 as read with Section 204 of the *Penal Code* Cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered MEO.

Count 5

Murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered NW.

Count 6

Murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered AHO.

Count 7

Count 8 Murder contrary to section 203 as read with Section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered WK.

Count 8

Murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence are that TWG on the night of 1st/2nd September,

2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered HJT.

Count 9

Murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence were that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered MMC.

Count 10

Murder contrary to section 203 as read with section 204 of the *Penal Code* cap 63 of the Laws of Kenya. The particulars of the offence were that TWG on the night of 1st/2nd September, 2017 at 2:00am while at MG School Nairobi in [particulars withheld] area within Nairobi County jointly with others not before court murdered LWN.

2. In the judgment of this court delivered on December 16, 2021, the Subject was found guilty of manslaughter instead of murder in all the ten (10) counts. This court made a finding that all the ingredients for the offence of murder, specifically malice aforethought, had not been proved beyond reasonable doubt hence reducing the ten (10) offences of murder to manslaughter contrary to section 202 as read with section 205 of the *Penal Code*.

3. Consequent to the delivery of that judgment, this court scheduled mitigation hearing for February 10, 2022and called for Victim Impact Statements from all the ten (10) families that lost their daughters in the fire as well as a Pre-Sentence Report. Both reports have been filed.

4. Although not all the families presented their statements, majority of them were available to give their statements. In addition to the recorded statements, two of the parents in Count 2 and in Count No. 10 gave additional oral statements in court during mitigation hearing.

5. I have read all the statements and the pre-sentence report from the Probation Officer and have considered the same together with the two verbal statements given during the mitigation hearing. Without repeating what each person stated, it is clear to me that these statements are tales of grief, sorrow and unending agony for the loss these families had to endure. It is clear to me that these families are still grieving and have not come to terms with the loss of their daughters. Their story is that life to them will never be the same again. The tears and sorrow expressed by the two parents who spoke during mitigation hearing is a reflection of the emotions of the majority victims that did not talk but whose sorrow, pain and grief is no lesser than that of those who spoke in court.

6. On the other hand is the family of the Subject who, according to the mitigation by Mr. Kang'ahi, learned counsel, had to undergo their fair share of challenges. With leave from his senior Mrs Kinyori, learned counsel, Mr. Kang'ahi presented the mitigating circumstances of the Subject. He told the court that the Subject was most remorseful and seeks leniency from this court; that the circumstances culminating in the offence are most regrettable and that the pain and agony expressed by the families extends to everyone and the entire nation. He urged the court to take into account the fact that the offence was committed when the Subject was a minor and that there was no malice on her part; that there was no display of hatred on her part to any of the victims and that the time it took to conclude this trial was as challenging to the Subject and her family as to the families of the victims.

7. He submitted that the time the Subject has spent in custody following her conviction has served as an eye opener and that she is asking the court to give her a second chance in life. His plea is that the victim families find courage and fortitude to bear the loss and find it in their hearts closure, healing and

forgiveness. He submitted that nothing done in this mortal world can bring a lost life of a loved one back and that the circumstances of family of the Subject are as painful as those of the victim families but they have to soldier on.

8. The pre-sentence report has been presented to this court. The Report shows that the Subject has joined Technical University of Kenya where she is pursuing a Bachelor's Degree Course in Counselling Psychology. It shows that the Subject accepts the role in the commission of the offence and takes responsibility for her actions; that she is contrite and genuinely sorry for the events leading to the tragic loss of the ten lives. She prays for forgiveness from the families of the victims.

9. The report further shows that she and her family are not able to approach the families of the victims due to animosity towards her.

10. It is clear to me after reading the Victim Impact statements and the Pre-Sentence Report that the families of the victims feel that this court was lenient in finding the Subject guilty of manslaughter. It is their view that this court should grant a custodial sentence against the Subject in order for them to ease the pain and anguish they are undergoing.

11. The circumstances of this case are that the Subject transitioned from a minor aged 14 years in Form One (1) in 2017 when this offence was committed to a young adult aged 18 years at the time this case was concluded and this court found her guilty of ten counts of manslaughter. It is obvious that this court is faced with the dilemma of the criteria to be applied in sentencing her: should the court take into consideration the age of the Subject at the time of committing the offence? Should the Subject be sentenced as an adult or as a minor? If this court were to sentence the Subject as an adult this dilemma would not occur. It is different when the offender is a minor or was a minor at the time the offence was committed.

12. In sentencing the Subject in view of the dilemma exhibited in this case, this court will not be re-inventing the will. Other courts have dealt with similar circumstances in sentencing where the offender had transitioned from the minor at the time the offence was committed to an adult at the time of sentencing. Although no cases can be exactly similar in circumstances, the issue of trying a minor for a particular offence and that minor transitioning into an adult by the time conviction is entered are common. Other courts have dealt with similar circumstances.

13. My starting point of reference is the statutes. The law applicable in respect of child offenders is the *Children Act*. Section (No 8 of 2001). The penalties for child offenders are provided under section 191(1) of that *Act*. This section provides as follows:

    (1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

        (a) by discharging the offender under section 35(1) of the *Penal Code* (cap 63);

        (b) by discharging the offender on his entering into a recognisance, with or without sureties;

        (c) by making a probation order against the offender under the provisions of the *Probation of Offenders Act* (cap 64);

        (d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the *Probation of Offenders Act* (cap 64);

(k) by making a community service order; or

(l) in any other lawful manner.

14. I have read the following authorities which seem to give this court the solution it is seeking:

JKK v Republic [2013] eKLR

15. This was a murder trial. The offender was found guilty of murder, was convicted and sentenced to death. On appeal, the Court of Appeal found that the appellantwas under 18 years of age at the time of committing the offence. However, at the time of the sentence four years had elapsed making him about 21 years of age. The Court of Appeal upheld the conviction and substituted the sentence from the death penalty to a custodial sentence of 12 years.

16. In arriving at that sentence, the Court of Appeal reasoned as follows:

> The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, i.e. any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

R v Dennis Kirui Cheruiyot [2014] eKLR

17. This, too, was a murder trial. The appellantwas aged 15 years when the offence was committed but had turned 20 years at the time of sentencing. He was convicted of murder by the High Court and sentenced to serve life imprisonment but the Court of Appeal reduced the sentence to 10 years imprisonment. In this case, the Court of Appeal noted the dilemma a court faces in sentencing an offender who was a minor when they committed a serious offence but has turned into an adult at the

time of sentencing or at the time of an appeal. The court in reaching its decision in this case relied on *JKK vs Republic* (*supra*).

In this case, the court had this to say:

> Whatever the case, life imprisonment is not provided for under the Children Act, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years imprisonment.

Daniel Langat Kiprotich v State [2018] eKLR

18. This is a High Court decision on a petition filed by the appellant who had been tried, found guilty and convicted by the Magistrate's Court. He had exhausted his appeal in both the High Court and the Court of Appeal. He invoked article 50(6) of the *Constitution, 2010*, seeking a fresh trial on account of having been tried and convicted as a minor. The judge in that Petition relied on the *JKK v Republic* and *R v Dennis Kirui Cheruiyot* cases above and had this to say on this issue:

> By relying on section 191(1)(l) of the *Children's Act* to fashion an appropriate sentence for the child offender in both cases, the Court of Appeal is drawing attention to the lacuna in our law regarding juvenile justice. Our statutory scheme envisages only two types of offenders: child offenders – those who are under eighteen years old – and adult offenders – those who have attained eighteen years of age. The statutory scheme does not, in any nuanced manner, distinguish the different developmental stages of children – especially those in teenage years who are, typically, both in need of care and protection but can be dangerous to the society due to their deviant behaviour. The statutory scheme stipulates that a child above sixteen years old can only be held in a borstal institution for a period not exceeding three years.

19. From the authorities I have cited with above, the courts appreciate the fact that the offender was a minor at the time of committing the offence but has attained the age of majority at the time of sentence. To my mind, the offender is being punished for the offence committed during his minority and not at the time of majority, hence the dilemma. I revisit section 191(1) of the *Children Act*. To my understanding, the court can deal with the offender in any manner provided in the scenarios provided under that section. I am alive to the fact that a court operates with the tools available. The tools available to this court is section 191(1) of the *Children Act* and the authorities, *inter alia*, cited above.

20. I have also considered the Objectives of Sentencing under the *Judiciary Sentencing Policy Guidelines*. These Objectives are found under paragraph 4 which states that sentences are imposed to meet the following objectives:

    1. Retribution: To punish the offender for his/her criminal conduct in a just manner.

    2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.

3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law-abiding person.

4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.

5. Community protection: To protect the community by incapacitating the offender.

6. Denunciation: To communicate the community's condemnation of the criminal conduct.

21. While I bear in mind the law, the authorities cited above and these guidelines, I am alive to the fact that not two cases can be similar in every respect. I am dealing with the offence of manslaughter. This is a matter of great magnitude in the sense that ten (10) young lives were lost. We cannot turn back the clock. We cannot undo what has already been done. The families of the victims and that of the subject have to live with this dark spot in their lives for the rest of their lives. With time, the pain will dissipate but the memory of their dear daughters will remain with them for as song as they shall live, always wondering what their daughters would have become had they lived their full lives.

22. This is a criminal matter. The consequences of a crime is the attendant punishment even though we know that no amount of punishment can bring back a life lost. In equal measure, no amount of punishment can ever satisfy the families that lost their children that justice has been done. That is the state of a human heart.

23. I noted that the Probation Report recommended a combination of both custodial and non-custodial sentence. While this report is relevant in sentencing for it brings out the social circumstances of the Subject, a Probation Report is not binding to the court.

24. I have taken into account the Victim Impact statements of all the families that provided these reports as well as the oral additional statements given in court during mitigation hearing. I have taken into account the probation report filed herein. I have taken into account the fact that the Subject is a first offender and the mitigation of the defence team. I have taken into account the legal principles of sentences as expounded in the authorities I have cited above and as well as the Objectives of the *Sentencing Police Guidelines*. It is clear to my mind that none of the sentencing scenarios in Section 191 (1) (a) to (k) *Children Act* all-inclusive will serve justice in this case. I find a solution under section 191 (1) (l) of the *Children Act*. Following the Court of Appeal decision in *JKK v Republic* cited above, it is my view that due to the gravity of the offences in this case, and the current age of the Subject, she cannot be released back to society without being brought to terms with the consequences of her actions or omissions by a custodial sentence. I will therefore deal with this case in any other lawful manner as did the Court of Appeal and the High Court in the authorities I have cited above and as provided under section 191(1)(l) of the *Children Act*.

25. In relying on section 191(1)(l) of the *Children Act*, I am alive to the fact that the offence of manslaughter attracts a maximum penalty of imprisonment for life. In view of all the circumstances of this case, I hereby sentence the Subject, TWG, to imprisonment for a period of five (5) years in each of the ten counts she is facing. The period of imprisonment shall run concurrently and shall take effect from the date of her conviction, being the December 16, 2021. It is so ordered.

26. The Subject is hereby notified that she has a right of appeal within 14 days from today.

DATED, SIGNED AND DELIVERED TODAY, THE 24TH FEBRUARY 2022.

S. N. MUTUKU

JUDGE