Mnjala v Republic (Criminal Appeal E024 of 2021)
[2022] KEHC 642 (KLR) (22 April 2022) (Judgment)

Neutral citation: [2022] KEHC 642 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VOI

CRIMINAL APPEAL E024 OF 2021

JN ONYIEGO, J

APRIL 22, 2022

BETWEEN

CLEMENT MWASARU MNJALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(This was an appeal arising from the judgment of Hon. E. M. Nyakundi Resident Magistrate in Wundayi RMCCR No 23 of 2019 delivered on 4th November, 2021)

JUDGMENT

1. The appellant was arraigned before Wundayi SPM's court on 11th June, 2019 facing the charge of defilement contrary to Section 8 (1) as read with Section 8(4) of the *Sexual Offences Act* No 31 2006. Particulars were that on the 21st April, 2019 at around 0600 hours in Maktau Location at Mwatate Sub-county within Taita Taveta county intentionally and unlawful caused his penis to penetrate in the vagina of AW a girl child aged 15 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to Section 2 (1) as read with Section 11(1) of the *Sexual Offices Act* No 3 of 2006. Particulars were that on 21st day of April, 2019 at around 06 hours in Maktau location in Mwatate Sub county within Taita Taveta County intentionally and unlawfully touched the vagina of a AW a minor aged 15 years using his penis.

3. Having entered a plea of not guilty, the case proceeded to full trial. Finally, the appellant was convicted of the main count and consequently sentenced to 10 years imprisonment based on alleged holding in the case of *Ochieng v Republic*.

4. Aggrieved by the sentence, the appellant filed his petition of appeal on 24th February 2021 citing the following grounds;

    i. That , the learned trail magistrate when convicting did not consider that I am a first offender;

ii. That the learned magistrate erred when she convicted me and gave me the prescribed punishment;

iii. That the learned trail magistrate failed to consider that I was the only bread winner of my family;

iv. That this court be pleased to reduce the sentence imposed.

5. When the matter came up for hearing, both parties agreed to canvass the appeal only on sentence through written submissions.

6. The appellant adopted his submissions filed on 9th November, 2021 wherein he reiterated his grounds of appeal thus expressing himself that his appeal was only challenging imposition of excessive sentence. He contended that the court did not consider the fact that he was a first offender. In support of this position the court was referred to the holding in the case of *Josephine Arissol v Republic* (1957) E.A 447 where the court allegedly held that " it would be wrong to impose the maximum sentence on a first offender". He further submitted that having expressed the willingness to support the child (product) born out of the defilement affair, the court ought to have considered this fact as a ground to give a more lenient sentence.

7. On its part, the state filed its submissions on 30th December, 2021. Mr Chirchir appearing for the state submitted that the mandatory sentence for the offence of defilement is 20 years hence a penalty of 10 years imposed by the trial court is unlawful and extremely lenient. Although learned counsel was not challenging the illegality of the sentence, he was of the view that the court should not interfere with the same. As to whether the sentence was imposed without taking into account the mitigation on record, counsel referred the court to pages 22 lines 9 and 11 and 24 and 26 to express the point that the court did consider mitigation on record.

8. I have considered the grounds of appeal against the record of appeal. I have also considered the brief submissions by both parties. The appeal herein is purely anchored on two main grounds. Firstly, the sentence is excessive in the circumstance. Secondly, the court did not consider the mitigation on record.

9. It is trite that sentencing is an act of discretion of the court based on the prescribed legal parameters and principles. Ordinarily, an appellate court should not interfere with a trial court's discretionary power in sentencing unless the same sentence is excessive in the circumstances of the case or that the trial court relied on wrong legal principles or took into consideration irrelevant factors or overlooked material factors.

10. In the case of *Shardrack Kipkoech Kogo v Republic* Eldoret Cr Appeal No 253 of 2003, the court of appeal had this to says;

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be inferred"
>
> See also *Sayeko v Republic* (1989) KLR 306

11. Similar position was expressed in the case of *Bernard Kimani Gicheru v Republic* (2002) e KLR.

12. There is no dispute that the charge of defilement under Section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* does attract a minimum sentence of 15 years. The trial court citing the case of

Ochieng Vs Republic (no citation quoted) expressed itself that it had the discretion to impose a sentence commensurate to the offence and mitigation on record.

13. There is no doubt that the issue of minimum sentence under the *Sexual Offences Act* has been a thorny issue yet with contradicting decisions by both superior courts. However, the state is not challenging what it refers to as the legality of the sentence. The question begging for an answer is whether 10 years imprisonment is excessive. Going by the statutory sentence of not less than 15 years, and further considering the age of the minor who was forcefully made pregnant and eventually gave birth to a child thus making her a mother prematurely, it is my finding that the sentence imposed was lenient. In all respect, I do not find it excessive in the circumstances although its legality is not the subject of this appeal.

14. Regarding the court's failure to consider mitigation, it is clear from the learned trial court's sentence that the magistrate did not consider the mitigation on record. However, this is not a serious omission given that the sentence meted out is below the minimum sentence provided by statute. That is not a ground on its own to interfere with the sentence imposed. In view of the above holding, the appeal herein is dismissed for lack of merit and the sentence imposed confirmed. Right of appeal 14 days.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL, 2022.

J.N.ONYIEGO

JUDGE