Nyongesa v Republic (Criminal Appeal 56 of 2019)
[2022] KEHC 16701 (KLR) (21 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16701 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL 56 OF 2019

HK CHEMITEI, J

DECEMBER 21, 2022

BETWEEN

MESHACK NYONGESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of Hon J N Nthuku (SRM) dated 29th August 2018 in Criminal Case No 06 of 2018)

JUDGMENT

1. The appellant had been charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on the 27th day of January 2018 at around 2000 hours at [particulars withheld] village in Koibatek Sub County within Baringo County wilfully and unlawfully committed an act which caused the penetration of his penis into the vagina of MN a child aged 14 years old.

2. The alternative charge was indecent with a child contrary to section 11(1) of the *Sexual Offences Act* No 3 of 2006. The particulars of the charge were that on the 27th day of January 2018 at 2000 hours at [particulars withheld] village in Koibatek Sub County within Baringo county wilfully and unlawfully committed an act which caused his penis to come into conduct with the vagina of MN a child aged 14 years old.

3. The appellant after a full trial was convicted and sentence to serve 20 years' imprisonment. He filed his appeal which he later amended the grounds on March 15, 2022. The grounds therein are basically mitigation and implores the court to consider that the sentencing was harsh in the circumstances, that he was 24 years of age and he wishes to start life afresh, that he had a mother and young siblings who depended on him among other grounds.

4. When the matter came up for hearing the court directed the same to be heard by way of written submissions. The parties have complied save to state that the respondent submitted on the original grounds raised by the appellant. I think all that the respondent ought to have done was to consider the amended grounds of appeal in which as stated above the appellant was no longer pushing for the main grounds.

5. Be it as it may the court has perused the proceedings herein and is of the considered opinion that the conviction and sentencing was on sound facts and law. The appellants appeal would not have stood any chance given the fact that he was found with the minor in his house. The prosecution witnesses totally sealed any loophole the appellant would have taken to escape the offence.

6. It was therefore wise for the appellant to have taken the route of mitigating the sentence. It is common knowledge now that the discretion which had been fettered by the Act has been found wanting by this court and the appellate court in recent decisions. In other words, the mandatory nature of sentencing has been successfully challenged and thus the courts have found that judicial officers ought to exercise discretion in such a case.

7. The imposition of 20 years' imprisonment by the trial court was lawful as it was within the provided territory in the act. Nevertheless, the court was not in a position to consider the mitigating factors which would have granted it the discretion on sentencing.

8. My brother Gikonyo J put in succinctly in *Sammy Wanderi Kugotha v Rep* [2021] eKLR when he stated that;

> " The trial court sentenced the appellant to life imprisonment after considering his mitigation. The sentence is also lawful. Nonetheless, the manner section 8(2) of the Sexual Offences Act is couched portend and has been understood by many judicial commentators to portend a mandatory sentence. Such fettering of judicial discretion in sentencing is inconsistent with the Constitution. But, I proclaim a new approach; a new yardstick. Section 7 of the transitional provisions under the sixth schedule of the Constitution foresaw the dilemma of application of the Constitution upon existing law. It permitted existing laws to continue in force, but, provided courts with legal tool to construe such law with such modifications or adaptations or alterations or exceptions in order to bring it into conformity with the Constitution. The section provides: -
>
> 7 Existing laws
>
> (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> [66] In light thereof, I do think, it is no longer a peremptory rule or requirement that courts should always strike down a provision of a statute- especially existing law- if the offensive or objectionable element thereto could be resolved in the manner commanded in section 7 stated above. I will therefore, read the word ''shall'' in section 8(2) of the Sexual Offences Act to mean ''may'' in order to bring the section into conformity with the Constitution.
>
> [67] Be that as it may, Parliament and other state organs with legislative mandate should embark on harmonizing existing law with the Constitution. In the meantime, they should take up pronouncements such as this one, and carry

out appropriate legislative enactments or amendments to existing law in order to bring it into conformity with the Constitution.

[68] The possibility of fetter-real or perceived- on the discretion of the trial court in sentencing under this provision is likely. This is an important consideration here.

[69] I note also that the appellant is a young person. The need to rehabilitate and reintegrate offenders into society to eke meaningful life after imprisonment is one of the objectives of punishment; it should never recede to the background in sentencing. In the circumstances of this case, life sentence may not serve such restorative or rehabilitative purposes for this young soul. I shall, therefore, impose a sentence that punishes the offender but also gives him an opportunity of re-integration into society to eke a meaningful life after imprisonment."

9. In essence the legislature curtailed the liberty of the court by undermining its discretion which in such circumstances causes injustice and makes mitigation by the convicted persons an exercise in futility or to put it clearly an academic exercise.

10. Looking at the evidence before the trial court, it is true that the appellant was found having committed the offence but it appears from the evidence of the minor complainant that she wilfully and without any protest acquiesced in the act. Looking at her testimony it is evident that she was not perturbed at all as she went to the extent of requesting the appellant to text her home and telling her siblings that she was okay where she was and that they should not bother looking for her.

11. I also note that by then the appellant was about 20 years old and according to the complainant they were mutual friends.

12. Taking the totality of the evidence presented to the trial court, I find that had the trial court considered that the appellant was as well a first offender and the culpability and acquiescent by the complainant it would perhaps have considered the period of imprisonment it meted against the appellant.

13. The punishment meted against the offender is essentially meant to reform and ameliorate the suffering and pain caused to the victim. Other considerations like the circumstances of each case ought to be taken into consideration. The punishment must change the offender for his own good in the society.

14. Consequently, and taking the totality of the facts herein, the nature and the circumstances as well as the character of the complainant, I find that this is a case in which the court ought to exercise some discretion. The appellant who is in his early 20s needs to be granted an opportunity to integrate into the society. The period he has served in custody of close to five years is sufficient to have taught him lifelong lessons.

15. In the premises, the appeal succeeds only on sentencing and not on conviction. The appellant is set free unless lawfully held and shall serve a two (2) years' probation period under the relevant county probation office.

16. Orders accordingly.

DATED SIGNED AND DELIVERED AT KABARNET THIS 21ST DAY OF DECEMBER 2022.

H K CHEMITEI.

JUDGE