



**DO v Republic (Criminal Appeal 19 of 2017)
[2019] KEHC 6444 (KLR) (20 June 2019) (Judgment)**

DO v Republic [2019] eKLR

Neutral citation: [2019] KEHC 6444 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CRIMINAL APPEAL 19 OF 2017**

EN MAINA, J

JUNE 20, 2019

BETWEEN

DO APPELLANT

AND

THE REPUBLIC RESPONDENT

(Being an Appeal against the Conviction and Sentence of Hon. A. C. Towett – RM dated and delivered on the 14th day of March 2017 in the Original Nyamira Criminal Case No. 967 of 2015)

Courts should take into account the age of an accused person at the time of commission of the offence during sentencing

The discretion of the court in sentencing was only restricted in the cases of offenders above 10 years but under 15 years and offenders who were 16 years old as provided for in section 191 of Children Act

Reported by Moses Rotich

***Criminal Law** - sentencing - sentencing of a child offender - appellant (a minor) charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act - appellant convicted and sentenced to serve 20 years' in prison for the offence of defilement-whether prosecution proved its case of the alleged offence of defilement by the appellant beyond reasonable doubt-whether the trial court erred in sentencing the appellant who was a minor at the time of commission of the alleged offence of defilement to 20 years' imprisonment-whether the sentence of 20 years' imprisonment imposed on the appellant who was a minor at the time of commission of the alleged offence of defilement was excessive-Children Act, 2001 section 191; Sexual Offences Act, No. 3 of 2006 section 8(1) and 8(3).*

Brief facts

The appellant lodged an appeal against the judgment of the trial court in which he was convicted and sentenced to serve 20 years' imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(3)



of the Sexual Offences Act. The appeal was against both the conviction and sentence. He argued that the charge of defilement against him was not proved beyond reasonable doubt. It was also his contention that he too was a minor at the time the offence was alleged to have been committed and hence he too could have been defiled by the complainant. The appellant claimed that the trial court ought not to have convicted him on the uncorroborated evidence of the complainant. He argued that the sentence was excessive, disproportionate, inhuman, arbitrary and a violation of his rights under article 27 of the Constitution of Kenya, 2010

Issues

- i. Whether the prosecution proved its case of the alleged offence of defilement by the appellant beyond reasonable doubt.
- ii. Whether the trial court erred in sentencing the appellant who was a minor at the time of commission of the alleged offence of defilement, to 20 years' imprisonment.

Held

1. Section 191(l) of the Children Act, 2001 (Children Act) did not prohibit a court dealing with a case involving a minor offender from sentencing such an offender to a term of imprisonment. Under that provision, the discretion of the court was only restricted in the cases of offenders above 10 years but under 15 years and offenders who were 16 years old. In any other case, the court could deal with the child offender in any other lawful manner. It could not be said that because at the time the appellant was alleged to have committed the offence he was 17 years old, the trial court erred in sentencing him to imprisonment.
2. The charge against the appellant was proved beyond reasonable doubt. Although the age of the complainant was not strictly proved, the clinical officer who examined her indicated her age as 13 years and that was also accepted by the trial court as her apparent age.
3. The complainant vividly narrated how she and her younger sister were accosted by the appellant who had a knife and who knocked her down and forced himself on her. Whereas there was no need for corroboration of the evidence of a victim of sexual offence, there was more than sufficient corroboration in the instant case. Evidence from prosecution witnesses and the medical evidence corroborated the complainant's evidence that she was defiled by the appellant.
4. The complainant's evidence of the identity of the appellant was corroborated by 3 prosecution witnesses. The witnesses gave evidence regarding what they saw and it was erroneous to refer to their evidence as hearsay. The appellant's unsworn statement could not stand the prosecution's cogent evidence. The defence did not rebut the prosecution's evidence at all. The prosecution's evidence was watertight and there was no merit in the appeal against conviction.
5. The sentence imposed on the appellant by the trial court was lawful when interpreted under section 191(l) of the Children Act. It was also the minimum sentence imposed by the law. Given that the appellant was a first offender and that he had been in custody for 2 years and also taking into account

Appeal partly allowed.

Orders

The sentence of 20 years' imprisonment was set aside and replaced with a sentence of 7 years' imprisonment with effect from the date the appellant was sentenced by the trial court.

Citations

Cases

Kenya

1. *CKW v Attorney General & another* Petition 6 of 2013; [2014] KEHC 3657 (KLR) - (Explained)
2. *DKC v Republic* Criminal Appeal 184 of 2009; [2014] KECA 230 (KLR) - (Explained)
3. *Evans Wanjala Wanyonyi v Republic* Criminal Appeal 312 of 2018; [2019] KECA 679 (KLR); [2019] EA - (Explained)



4. *JKK v Republic* Criminal Appeal 118 of 2011; [2013] eKLR - (Explained)
5. *Muruatetu, Francis Karioko & another v Republic* Criminal Miscellaneous Application 394 of 2017; [2020] KEHC 1390 (KLR) - (Mentioned)
6. *Ochieng, Christopher v Republic* Criminal Appeal 49 of 2008; [2011] KEHC 2364 (KLR) - (Mentioned)
7. *POO v DPP* Constitutional Petition 1 of 2017; [2017] eKLR - (Explained)

Statutes

Kenya

1. Borstal Institutions Act (cap 92) In general- (Cited)
2. Children Act (cap 141) section 191(1) - (Interpreted)
3. Constitution of Kenya article 27(1) - (Interpreted)
4. Evidence Act (cap 80) section 124- (Interpreted)
5. Penal Code (cap 63) section 204- (Interpreted)
6. Sexual Offences Act (cap 63A) section 8(1)(3)- (Interpreted)
7. Sexual Offences Act, 2006 (Act No 3 of 2006) In general - (Cited)

Advocates

None mentioned

JUDGMENT

1. The appellant was sentenced to twenty (20) years in jail for defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. He has appealed against both the conviction and the sentence. Apart from stating that the charge against him was not proved beyond reasonable doubt, it is his contention that he too was a minor at the time of the offence is alleged to have been committed and hence he too could have been defiled by the complainant. He refers to this as a double edged sword. He has also argued that the court ought not to have convicted him on the uncorroborated evidence of a single witness; that there was no medical report to support the allegations and further that the sentence was excessive, disproportionate, inhuman and arbitrary and a violation of his rights more especially under article 27(1) of the *Constitution*.
2. The appeal was canvassed through written submissions. In his submissions the appellant reiterated that the case was not proved beyond reasonable doubt. He submitted that the prosecution witnesses lacked consistency and credibility and that the ingredients of the offence were not proved. He relied on the case of *Hilary Nyangosa v Republic* – 2008 (citation not properly given and decision not supplied). He reiterated that he was seventeen years old at the material time as confirmed by the birth certificate supplied to the lower court. He contended that the evidence of the complainant was not in any event corroborated.
3. He stated that the knife mentioned by the complainant should have been produced in evidence and further contended that the witnesses gave hearsay evidence and that generally the evidence was shoddy and casual and did not prove the case beyond reasonable doubt. He also argued that once convicted he should have been dealt with under the *Children Act* but not sent to jail as was done.
4. Counsel for the respondent submitted that the charge against the appellant was proved beyond reasonable doubt; that the appellant was 18 years old at the material time; that the sentence meted was the minimum provided by the law and that it is a lawful sentence and this court should not interfere.



5. At the hearing of the appeal, counsel for the respondent submitted that he conceded to the appeal as the charge was unfair as the appellant was a minor at the time he committed the offence. He based this argument on the case of *POO v DPP* [2017] eKLR.
6. The appellant was undoubtedly a minor aged seventeen years at the time it is alleged that he committed this offence. He produced a certificate of birth to prove his age. A birth certificate is the best evidence of age and where it is available and its genuineness is not in question then it must take precedence over any other evidence age assessment included.
7. The question as to the proper way of sentencing an offender who at the time of the commission of a serious offence was a minor but who was an adult at the time of sentence is not new. A similar issue was considered by the Court of Appeal in *JKK v Republic* [2013] eKLR cited with approval in *DKC Vs. Republic* [2014] eKLR where the court held: -

The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the *Children Act*. The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, ie 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.”

8. In *DKC v Republic* [2014] eKLR the court held: -

..... 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.”

9. Section 191(l) of the *Children Act* does not prohibit the court dealing with a case involving a minor offender from sentencing such an offender to a term of imprisonment. My reading of section 191(l) of the *Children Act* is that the discretion of the court is only restricted in the cases of offenders above ten years but under 15 years and offenders who are sixteen years old. In any other case the court may deal with the offender in any other lawful manner. It cannot therefore be said that because at the time the appellant is alleged to have committed the offence he was seventeen years old then the trial Magistrate erred in sentencing him to imprisonment.



10. As for the argument by counsel for the respondent that it was not fair to charge the appellant as he too was a minor at the material time, the court in the authority cited by counsel was very clear that only in cases where the sexual activity is consensual does it become discriminatory to charge the boy but not the girl. The court in *POO (a minor) v Director of Public Prosecutions & Another* [2017] eKLR (Omondi J) observed: -

28. The complainant SOO (Pw1) testified to the effect that she knew the petitioner as they attended the same Church and they would spend a long time talking. He requested her to go to his home and she obliged. They removed their clothes and had sex.....

These are minors both in their teens when hormones are raging madly. They decide to experiment on their prowess mutually – then lo and behold the girl gets pregnant and an enraged parent reports to the police, who then arrest the boy

11. Omondi J then held: -

31.I find that the appellant was discriminated against on the basis of sex in that he was charged alone but in reality they both needed protection against sexual activities.”

12. Ochieng J dealt with a similar issue in the case of *CKW v Attorney General & another* [2014] eKLR. This was a petition by a minor who had been charged with defilement and convicted. His petition sought to have the provisions under which he was convicted declared unconstitutional because the impugned sexual activity between him and the complainant was consensual. Ochieng J observed: -

38. It was because of that fact that the petitioner submitted that it was wrong to criminalize consensual sexual acts between minors.....

40. The petitioner also made it crystal clear that he was not challenging the constitutional validity of those statutory provisions to the extent that they criminalize children who engaged in acts of sexual penetration or of indecent acts with other children, in a way that was non-consensual, forceful violent or exploitative.

41. The parameters of the petition have thus been clearly delineated. It deals only with the consensual sexual activity between minors.”

13. In the end Ochieng J held: -

94. I also find that the law is not discriminatory against adolescents by criminalizing their sexual conduct even when such conduct was consensual, whilst allowing adults to engage in consensual sexual conduct.”

14. I have discussed the above cases to demonstrate that the courts have not slapped a blanket prohibition of prosecution of minors in sexual offences as suggested by the learned prosecution counsel. His conceding the appeal on that ground is therefore rejected by this court.

15. In this case the complainant testified that the appellant while armed with a knife forcibly had sexual intercourse with her. She stated that she was thirteen years old and that she was in the company of her sister aged eight years when this happened. She stated that after he was done with her the appellant ran away. They shouted for help and he was arrested by people who were working in a tea farm. Their mother was among the people who responded to their screams. She took her to a nearby dispensary while the appellant was taken to the police station. The next day the complainant was examined at Nyamira County Hospital where it was confirmed that she had been defiled. Evidence (P3 Form and treatment notes) to that effect was produced.



16. In his defence the accused gave an unsworn statement in which he denied committing the offence. He stated that he was arrested at his home on August 1, 2015 and taken to Nyamira Police Station. He stayed there for three days and was not informed the reason he had been arrested until he was arraigned in court. He took issue with the fact that the knife was not produced in evidence and urged the court to disregard the evidence of Pw2, Pw3 and Pw4 on the ground that it was hearsay.
17. As the first appellate court I have considered and re-evaluated the evidence in the trial court so as to arrive at my own independent conclusion. I have done so bearing in mind that I did not see or hear the witnesses give evidence and made provision for that. I am satisfied that the charge against the appellant was proved beyond reasonable doubt. Although the age of the complainant was not strictly proved the clinical officer who examined her indicated her age as thirteen years and this was also accepted by the court as her apparent age. She vividly narrated how she and her younger sister were accosted by the appellant who had a knife and who knocked her down and forced himself on her. Whereas there is no need for corroboration of the evidence of a victim of a sexual offence (see the proviso to section 124 of the *Evidence Act*) there was more than sufficient corroboration in this case, first from her younger sister (Pw2), then her mother (Pw3) as well as a security guard (Pw4) who assisted to apprehend the appellant. Evidence that she was defiled was also corroborated by medical evidence. The evidence of these other witnesses confirms that she was a witness of truth and that her evidence is trustworthy and reliable. I am therefore satisfied that she told the truth. Her evidence was not shaken by the fact that the knife with which the appellant was armed was not produced in evidence. This offence occurred in broad daylight and the appellant was apprehended as he tried to flee. The complainant's evidence of the identity of her attacker was corroborated by three witnesses (Pw2, Pw3 and Pw4). The witnesses gave evidence regarding what they saw and it is erroneous to refer to their evidence as hearsay. I find that the appellant's unsworn statement could not withstand such cogent evidence. The defence did not rebut the prosecution's evidence at all. That evidence was watertight and there is no merit in the appeal against conviction.
18. On the sentence the appellant submitted that it was unlawful as the law provides a maximum sentence of 3 years under the *Borstal Institutions Act*. He argued that he ought not to have been imprisoned. In the petition of appeal, he described the sentence as excessive, disproportionate, arbitrary, inhuman and a violation of his rights. I do not agree with him. I had earlier discussed the ways in which courts have dealt with minors convicted of serious offences. The sentence imposed by the court was lawful when interpreted under section 191(1)(l) of the *Children Act*. It was also the minimum sentence imposed by the law. Be that as it may the Court of Appeal has now removed the stricture imposed upon courts by the minimum sentences in the *Sexual Offences Act* and the courts now have discretion to impose an appropriate sentence based on the circumstances of the case. In *Evans Wanjala Wanyonyi v Republic* [2019] EA the Court of Appeal held: -

24. On the enhanced 20-year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This court in *Christopher Ochieng v Republic* [2018] eKLR Kisumu Criminal Appeal No 93 of 2014 considered legality of minimum mandatory sentences under the *Sexual Offences Act*. This court noted that the Supreme Court in *Francis Karioko Muruatetu & another v Republic* SC Petition No 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by section 204 of the *Penal Code* was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of a fair trial that



accrue to the accused person under article 25 of the Constitution. Guided by the aforesaid Supreme Court decision, this court in Christopher Ochieng v Republic (supra) stated:-

“In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.....

Needless to say, pursuant to the Supreme Court’s decision in Francis Karioko Muruatetu & another v Republic (supra) we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court.”

19. The appellant in this case was a first offender and considering that he was in custody for two years and taking into account his age at the time he committed the offence I find that the sentence of 20 years was excessive. I accordingly set it aside and substitute it with a sentence of seven (7) years imprisonment with effect from the date he was sentenced by the lower court. it is so ordered.

SIGNED, DATED AND DELIVERED IN OPEN COURT THIS 20TH DAY OF JUNE 2019.

E. N. MAINA

JUDGE

