BOO v Republic (Criminal Appeal 35 of 2015)
[2015] KEHC 610 (KLR) (15 December 2015) (Judgment)

Benard Omondi Oduakado v Republic [2015] eKLR

Neutral citation: [2015] KEHC 610 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

CRIMINAL APPEAL 35 OF 2015

JA MAKAU, J

DECEMBER 15, 2015

BETWEEN

BOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against both the conviction and the sentence in Criminal Case No. 596 of 2013 in Siaya Law Court before Hon. M.S. Kimani – R.M.)

The sentence of 20 years' imprisonment imposed on a child was unlawful for contravening the provisions of section 191 of the Children Act, 2001

The court espoused on the need for a court to give reasons for imposing a sentence on a child that was beyond the mandatory minimum prescribed by law. The case also emphasized on the importance of courts to adhere to the provisions of the Children Act, 2001 when sentencing a child offender.

Reported by Moses Rotich

Criminal Law *– sentencing of a child offender – where the appellant (a minor) was sentenced to serve 20 years imprisonment for the offence of defilement - where the sentence of 20 years imprisonment imposed by the trial court on the appellant was beyond the mandatory minimum period of 15 years - whether the sentence to serve 20 years imprisonment imposed on the appellant who was a minor at the time of commission of the offence was unlawful- Sexual Offences Act, No 3 of 2006 sections 8 (1) & 8 (4); Children Act, 2001 section 191.*

Brief facts

The appellant (a minor) had been charged with the offence of defilement contrary to section 8 (1) (4) of the Sexual Offences Act No. 3 of 2006 (Sexual Offences Act)

After a full trial, the trial court convicted him and sentenced him to 20 years imprisonment. Aggrieved by the decision of the trial court, the appellant lodged an appeal against both the conviction and sentence.

It was the appellant's contention that the trial court failed to appreciate that he was a minor at the time of commission of the offence. He argued that, being a minor, a different sentence ought to have been imposed.

Issues

i. Whether the sentence to serve 20 years' imprisonment imposed on the appellant who was a minor at the time of commission of the offence was unlawful.

Held

1. It was clear from exhibit P.3 produced in respect of the appellant's age assessment that as of October 15, 2015 at the time of the commission of offence, thus, august 8, 2013 the appellant was aged 17 years old and therefore a minor. The trial court entered a finding of guilt and made an order for appellant who was a minor to serve 20 years' imprisonment.
2. The period ordered to be served was beyond the minimum mandatory period of 15 years. Where a court was inclined to impose a sentence beyond the minimum mandatory period it ought to give reasons for imposing a sentence beyond the minimum mandatory period set by law. That although a court could impose a sentence beyond the minimum mandatory period, it ought to do the same judiciously but not to impose any sentence at its whims.
3. The appellant was a minor aged 17 years at the time of commission of the offence. Section 190 of the Children Act, 2001 (Children Act) specifically barred making an order to imprisonment or placing a child in a detention camp.
4. Given that the appellant was a minor at the time of commission of the offence, the trial court erred in using the words convicting and sentencing the appellant instead of entering the word (person found guilty of an offence, or enter a finding of guilt or an order upon such finding as the case might have been. The trial court fell into error in ordering that the appellant who was a minor to be imprisoned or to be placed under detention. The trial court in making the appropriate order ought to have applied section 191 of the Children Act. The sentence of 20 years was unlawful as it was against section 8(7) of the Sexual Offences Act No 3 of 2006.
5. The trial court erred in imprisoning the appellant to serve 20 years' imprisonment. Given that he was a minor, he ought to have been dealt with as per the provisions of section 191 of the Children Act.

Appeal partly allowed.

Orders

i. The sentence to serve 20 years' imprisonment was unlawful and was set aside.
ii. Appellant's appeal allowed against sentence but the conviction was upheld.
iii. The sentence of 20 years' imprisonment was substituted with community service order.
iv. The appellant was placed under community order and was to serve 3 years under the probation officer Siaya County.
v. The appellant was to be released forthwith unless otherwise lawfully held.

Citations

Statutes

Kenya

1. Children Act (cap 141) sections 189, 190(1); 191- (Interpreted)
2. Sexual Offences Act (cap 63A) sections 8(1)(4)(7); 11(1)- (Interpreted)

Advocates

M Odumba for the respondent

JUDGMENT

1. The appellant BOO was charged with an offence of defilement contrary to section 8(1)(4) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on August 8, 2013 in Siaya County

within Nyanza Province intentionally caused his penis to penetrate the vagina of IAO a child aged 17 years. The appellant faced alternative charge of committing an indecent act with a child contrary to section 11(1) of The *Sexual Offences Act* No 3 of 2006. The particulars are that at the same time same place the appellant intentionally touched the vagina of IAO a child aged 17 years with his penis.

2. The brief particulars of the prosecution's case are that on August 8, 2013, at 2.00 pm. The complainant PW1 IAO met the appellant on her way home, who pulled her to a certain house in a homestead. He had a knife and threatened to kill Pw1 if she screamed. He ordered PW1 to undress completely and she consented. He then pinned her on the bed, removed his clothes and he defiled her. That on seeing blood oozing from PW1's vagina the appellant left PW1 alone PW1 then went home. She informed her grandmother JO, who called PW1's mother PAA PW2, who took PW1 to Siaya District Hospital, PW1 was admitted at Siaya District Hospital for 1 week. The incident was later reported to Siaya District Hospital and P3 form issued. PW3 Omondi Oluoch, Clinical Officer at Siaya District Hospital produced P3 form as exhibit P1 Post Rape Care form as exhibit P2 and the appellant's P3 form as exhibit P3. P3 confirmed PW1 had been defiled. PW4 No 31794 Cpl Godfrey Malinga testified he took blood stained clothes of PW1 from PW2. That appellant was arrested the following day and he was handed over to PW4. He testified he took the appellant for age assessment. Pw1's age was assessed at 17 years and appellant's 18 years. He produced age assessment report for complainant as exhibit P.5 and for accused as exhibit P6 Victim's clothes as exhibits P4 (a)4(b) and 4(c).

3. The appellant on being put on his defence opted to give sworn statement. He testified that on 9.8.2015 at 3.00 pm he had come from school when an administrative Officer by the name Kibet from Bar Ogongo Chief Camp told him he was under arrest. That he was taken to Siaya Police station and booked into cells. That on 10.8.2013 he was taken to hospital and examined on 13.8.2013 he was arraigned before court and charged with an offence of defilement. He denied the charge.

4. The learned trial magistrate convicted the appellant and sentenced him to serve 20 years imprisonment.

5. Aggrieved by the decision of the learned trial magistrate's court, the appellant lodged this appeal raising, the following grounds:-

    a) The learned trial magistrate absolutely erred in law and in facts by failing to consider that the charge sheet was defective.

    b) The learned trial magistrate failed to consider that the medical examination report was negative in regard to the criminal case for factual evidence in the circumstances of the case.

    c) The trial court failed to establish and appreciate that he was 17 years old at the time of the alleged offence.

    d) That since he could not recall all that was adduced during the trial. He prayed to be furnished with a certified true copy of the court proceedings and judgment to enable him erect more grounds of appeal.

6. At the hearing of the appeal, the appellant told the court he was 17 years at the time of the commission of the offence and upon conviction different sentence ought to have been issued. This court directed before hearing of the appeal, the appellant's age be ascertained. That the appellant was taken to Siaya District Hospital and age assessment report filled on 15.10.2015, showing the appellant was as of 15.10.2015 aged 19 years, meaning that as of the time of commission of the offence thus on 8.8.2013, he was aged 17 years.

7. The appellant when his appeal commenced hearing he abandoned his appeal against conviction and proceeded on with his appeal against sentence. He submitted the trial court did not give him the

minimum sentence of 15 years but gave him 20 years. contrary to section 8(1)(4) of The *Sexual Offences Act* No 3 of 2006. He submitted that he was 17 years, as of 8.8.2013 and at [Particulars Withheld] Secondary School in form IV. He urged he was given two different ages in the P3 form thus 17 years and 18 years respectively as per exhibit P3.

8. M/s. Maurine Odumba learned state counsel appearing for State submitted that as the appellant is now aged 19 years, it means in 2013 he was 17 years and therefore a minor. She submitted the trial court erred in failing to have the appellant's age assessed at the time of the trial. On the sentence the learned state counsel, submitted it was not lawful in view of The *Sexual Offences Act* and The *Children Act*. She prayed that the sentence be substituted with the proper sentence.

9. Section 189 of the *Children Act* provides:-

> "(189) The words "conviction" and "sentence" shall not be used in relation to a child dealt with by the children's court, and any reference in any written law to a person convicted, a conviction or a sentence shall, in the case of a child, be construed as including a reference to a person found guilty of an offence, a finding of guilt or an order upon such a finding, as the case may be."

10. Section 190(1) of the *Children's Act* provides:-

    (1) No child shall be ordered to imprisonment or to be placed in a detention camp.

    (2) No child shall be sentenced to death.

    (3) No child under the age of ten years shall be ordered by a children's court to be sent to a rehabilitation school.

11. It is evidently clear from the exhibit P3 produced in respect of the appellant's age assessment as of October 15, 2015 that at the time of commission of the offence, thus 8.8.2013 the appellant was aged 17 years therefore a minor. The trial court entered a finding of guilt and made an order for appellant who was a minor to serve imprisonment for 20 years. The period ordered to be served was beyond the minimum mandatory period of 15 years. My view is where a court is inclined to impose a sentence beyond the minimum mandatory period it must give reasons for imposing a sentence beyond the minimum mandatory period set by law. That though the court may have imposed a sentence beyond, the minimum mandatory period it must do so judiciously but not to impose any sentence at its whims as justice should always be done and be seen to be done.

12. In the instant case the trial court noted the offence was serious. That the ordeal that the complainant suffered at the hands of the appellant was painful and was no doubt a painful one and may last forever. Those factors in my view justified raising of the sentence beyond the minimum sentence provided by the law. I find no error in the approach taken by trial court in reaching the sentence imposed, save that the appellant was a minor who ought not to have been imprisoned.

13. The appellant in the instant case was a minor, aged 17 years at the time of the commission of the offence. Section 190 of the *Children Act* specifically bars making an order to imprisonment or placing of a child in a detention camp.

14. The method of dealing with a minor offender is provided for under section 191 of The *Children Act*.

    Section 191(1) a – (l) of the *Children Act* provides:- "

    (191) Methods of dealing with offenders

(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 recognizance, with or without sureties;

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

(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 an 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. "

15. In view of the above and the appellant at the time of the commission of the offence being a minor the learned trial magistrate fail into an error in using the words "convicting" and "sentencing" the appellant instead of entering the word "person found guilty of an offence, or enter a finding of guilt or an order upon such finding" as the case might have been. It is further my finding that the trial court fall into an error in ordering that the appellant, a minor, be imprisoned or to be placed under detention. The trial court should have in making the appropriate order have applied section 191 of the *Children Act*. I find the sentence of 20 years unlawful as it is against section 8(7) of the *Sexual Offences Act* No 3 of 2006.

16. In view of the above i find and hold that the trial court erred in imprisoning the appellant to serve 20 years imprisonment being a minor. The appellant should have been dealt with as per provisions of section 191 of the *Children Act* (cap 141) Laws of Kenya. The finding of the appellant guilt was proper and the same is upheld. The order for him to serve imprisonment of 20 years was unlawful and is set aside. The appellant's appeal is allowed only against the sentence and conviction is upheld. The sentence is substituted with Community Service Order. The appellant is placed under Community Service Order and shall serve three (3) years under the probation officers at Siaya County. The appellant be released forthwith unless otherwise lawfully held.

DATED AT SIAYA THIS 15TH DAY OF DECEMBER, 2015.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURTTHIS 15TH DAY OF DECEMBER, 2015.

In the presence of:

M/s. M. Odumba for the Respondent.

Appellant in person - present

Court Clerk – Kevin Odhiambo

Court Clerk – Mohammed Akideh

J. A. MAKAU

JUDGE