DKB v Republic (Criminal Appeal E008 of 2024)
[2025] KEHC 2278 (KLR) (13 February 2025) (Judgment)

Neutral citation: [2025] KEHC 2278 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E008 OF 2024

AC MRIMA, J

FEBRUARY 13, 2025

BETWEEN

DKB .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.W. Ghati (RM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. E169 of 2023 delivered on 8th January 2024)

JUDGMENT

1. Danson Kipkurui Bitok , the Appellant herein, was charged with the offence of Defilement contrary to Section 8(1) as read with section 8(3) of *Sexual Offences Act* No. 3 of 2006 whose particulars were that on diverse dates between May 2023 to 12th June 2023 at Trans-Nzoia County of intentionally and unlawfully inserted your male genital organ namely penis into a female genital organ of namely vagina of MNM a child aged 15 years which caused penetrating.

2. The Appellant also faced the 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 of the alternative charge were that on diverse dates between May 2023 to 12th June 2023 at within Trans-Nzoia County of intentionally and unlawfully touched the vagina of MNM a girl aged 15 years with your penis.

3. The Appellant pleaded not guilty on both charges. Four witnesses testified on behalf of the prosecution. Upon close of its case, the trial Court made the finding that a prima facie case had been established against the Appellant. The Appellant gave sworn testimony. At the close of the defence case, the Appellant was found guilty of the offence of defilement contrary to Section 8(1) as read with section 8(3) the *Sexual Offences Act*. He was convicted and sentenced to 30 years imprisonment.

The Appeal:

4. The Appellant was dissatisfied with the conviction and sentence. Through an undated Petition of Appeal, he urged that his conviction be quashed and sentence set aside on the following grounds;

    1. That both the learned judicial officers erred in fact and in law by sentencing the Appellant to a term of 30 years imprisonment which was against the provision of section 8(1) as read with 8(3) of the *Sexual Offences Act* and Article 27 of *the Constitution*.

    2. That both the learned judicial officers herein erred in both law and fact when she sentenced the appellant to serve 20 years imprisonment yet failed to note that the gravity of the case against the appellant was not water tight therefore a harsh sentence.

    3. That the Appellant's right to mitigate was infringed since the Appellant did not mitigate before sentencing.

    4. That both the earned judicial officers herein erred in both law and fact by failing to note that Article 25(c) and 50(6)(b) of *the Constitution* of Kenya was totally violated.

    5. That both the learned Judicial officers herein erred in fact and law by failing to allow the Appellants re-trial hence his fundamental right were grossly violated, infringed and contravened under Article 27, 28, 47, 49 and 50 of *the Constitution* of Kenya 2010.

    6. That the learned judicial officers herein erred in both law and fact by sentencing the appellant to 30 years yet failed to note that the appellant alibi defence was plausible, believable and that it revealed contagious issues which magistrate overlooked when giving verdict.

    7. That the learned trial magistrate erred in both law and in fact by failing to comply with the provision of the Judiciary policy guidelines 2023 to exercise discretional powers during sentencing.

    8. That the appellant prays to be present during the hearing and determination of the appeal.

    9. That other further grounds to be adduced at the hearing of this appeal.

5. The Appellant did not file any written submissions despite opportunity to do so.

6. The Respondent challenged the appeal through written submissions dated 14th May 2024. It was its case that it proved the essential ingredients for the offence of defilement, namely; age, penetration and identity of the perpetrator, to the required standard.

7. It was its submission that on the aspect of age, the complainant's Birth Certificate proved her age, a fact that was corroborated by her mother's testimony, PW2. The Respondent further relied on Misc. Criminal Appeal No. 24 of 2015 Mwalango Chichoro -vs- Republic where it was observed that age can be proved through documentary evidence such as Birth Certificate, Baptismal Card or the evidence of the parents or the guardian or medical evidence among other credible forms of proof.

8. As regards the ingredient of penetration, the Respondent submitted that the complainant's testimony that she went to the Appellant's home twice where he (the Appellant) removed his penis and inserted

it in her vagina was enough evidence of penetration. The Respondent relied further on the decision in Supreme Court Criminal Appeal No. 35 of 1995, Bassita Hussein -vs- Uganda where I t was observed: -

> .... The act of sexual intercourse may be proved by direct and circumstantial evidence. Usually, the sexual intercourse is proved by the victims over evidence and corroborated by medical evidence or other evidence.

9. On the last limb of identity of the perpetrator, the Respondent submitted that the complainant knew the offender since he used to have the act in his house on day to day. On the defence, the Respondent submitted that the claim of alibi was not proved during evidence.

10. On legality and propriety of the sentence, the Respondent submitted that it was sound in light of the provision of section 8(1) and 8(3) of the *Sexual Offences Act*. This Court was urged to abide by the objective of sentencing as was observed in the case of R. -vs- Scott (2005) NSWCCA 152 where it was observed that sentence imposed must be proportional to the offence committed and must be aimed at denouncing the conduct of the offender.

Analysis:

11. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

12. In order to discharge the above duty, this Court will, in the first instance, look at the evidence on record. Four witnesses testified on the part of the prosecution. They were the complainant testified as PW1. RN, the complainant's mother testified as PW2. Kennedy Ogalo, a Clinical Officer at Cherangany Subcounty hospital testified as PW3. No. 235855 PC Samuel Wasila was the Investigating Officer. He testified as PW4.

13. Upon voir dire examination being conducted PW1 stated that she goes to school at [Particulars Withheld] Secondary school. While referring to her Birth Certificate, it was her testimony that she was born on 20th September 2008 and that she was 15 years of age. She stated that in March 2023, the Appellant met her on her way home from Kachibora, stopped her and asked her to be his girlfriend and thereafter accompanied her to her home. It was her further evidence that they met once again in the month of May when she went to his home at Serem, went to his house and had sex at around 11pm. She also stated that the Appellant removed his clothes and hers and inserted his penis in her vagina. It was her evidence that he retuned her back home at around 7pm and thereafter used to meet severally on the road.

14. PW1 testified further that on 12th June 2023, she went to his home again where they had sex. She stated that they did not use protection. She claimed that on 22nd June 2023 she missed her periods, went for a pregnancy test where it turned out to be positive. It was her evidence that the appellant told her to keep the pregnancy since he would take care of the baby and allow her to go back to school. The complainant testified further that she feared to tell her mother but she noticed the changes in her body prompting her to conduct a home pregnancy test using a pregnancy kit. It was her evidence that the test turned out to be positive.

15. PW1 then stated that the Appellant suggested that they terminate the pregnancy to avert his imprisonment. To that end, the Appellant took PW1 on 2nd October 2023 to a chemist where he bought four drugs. Two of them were to be placed under the tongue and two were to be inserted in

her vagina after having dinner. She claimed that the Appellant threatened to kill her if she did not use the drugs. She testified further that she was in pain and her mother found her sleeping. She informed her what had happened and at about 1.00am the pain was unbearable. She was taken to Cherangany Hospital. PW1 stated that on 4th October 2023, she found herself in hospital, the pregnancy had terminated. She was cleaned in the womb, given medication and released. It was her case that she was later given a P3 form to fill.

16. On cross-examination, PW1 stated that there was no witness to prove that the pregnancy was terminated since going to the hospital was a secret.

17. PW2 stated that her daughter was born in the year 2008. She claimed that on 2nd October 2023, PW1 informed her that she was not feeling well and at about 2 am, she was crying painfully. PW1 claimed that 'Danson' had impregnated her and had taken medicine to terminate the pregnancy. It was her evidence that on 4th October 2023, PW1 woke up with a lot of pain. She was rushed to the hospital at Kachibora but the pregnancy terminated in the ambulance. It was her testimony that PW1 was treated, became well and thereafter and recorded a statement.

18. The Clinical Officer at Cherangany Hospital, PW3, testified that the complainant had come to the facility from 2nd October 2023 to 7th October 2023 with stomach pains and bloody discharge. It was his evidence that she was 4 months pregnant and had tried to terminate the pregnancy but did not work. He stated that on the evening of 4th October 2023, the discharge had gotten worse and was subjected to Manna Vacuum Aspiration (MVA), a process done for incomplete abortion. He stated that the complainant had a torn old hymen with elements of invasive procedure due to the MVA process.

19. PW5, the Investigation Officer, stated that when the case was reported by PW2, he commenced investigations where he established that the Appellant had a relationship with the Appellant and had been given drugs to terminate the pregnancy. It was also his evidence that the complainant was born on 20th September 2008 and produced her Birth Certificate as an exhibit.

20. Upon closure of the prosecution's case, the trial Court placed the Appellant on his defence. The Appellant gave a sworn defence and stated that he was arrested on his way to work and was forced to sign a statement that was already recorded. He stated that the victim aborted but the Doctor did not take samples to confirm that the pregnancy was his.

21. It was on the basis of the foregoing evidence that the Appellant was found guilty, convicted of defilement and eventually sentenced.

22. With the foregoing, this Court will now consider the elements that constitute the offence of defilement with a view to ascertain whether they were established to the required standard.

Age of the complainant:

23. Age is a critical component in sexual offences due to their centrality in computation of the appropriate punishment.

24. In this case, this component was not in dispute. PW4 produced the complainant's Birth Certificate as an exhibit. It shows that the complainant was born on 20th September 2008. As of May 2023, when the complainant was allegedly first defiled, she was four months shy of 15 years. It, therefore, can categorically be stated that the complainant was 14 years of age.

25. The documentary evidence was corroborated the complainant's own testimony as well as that of PW2 when they both stated that she was 15 years at the time of the commission of the offence.

Penetration:

26. PW1 gave a vivid account of the relationship she had with the Appellant. She recounted how she would meet with the Appellant by the roadside and how eventually he asked her to be his girlfriend. PW1 was very candid about the sex escapade they had at the Appellant's house. She testified that once they were in his house, the Appellant removed his clothes then hers and inserted his penis into her vagina. She stated that they had sex on two occasions and protection was not used.

27. At this juncture it is necessary to appreciate Section 2 of the *Sexual Offences Act*. It defines 'penetration' as follows: -

> " penetration" means the partial or complete insertion of the genital organs of a person into the genital organs of another person;

28. The medical evidence produced by PW3, corroborated the occurrence of penetration. He stated that the Complainant had tried to terminate her pregnancy but did not happen as planned hence their intervention. PW3 further stated that upon examination of the complainant, she found that he had an old torn hymen. He concluded that there had been penetration.

29. Having intently reconsidered the evidence of the Complainant and appreciated it against the evidence of PW2 and PW3 alongside the treatment notes and the P3 form, it leaves no doubt that the element of penetration was proved to the required standard.

30. The claim by the Appellant that PW3 did not carry out examination to ascertain who the pregnancy belonged to was irrelevant for purposes of proving penetration. As rightly cited by the trial Court, the Court of Appeal decision in AML -vs- Republic (2012) eKLR settled the issue when it observed that the fact of rape or defilement is not proved by DNA test but by way of evidence.

Identity of the Perpetrator:

31. The evidence that was availed to this end was ample. PW1 knew the Appellant. She categorically stated that she used to meet him by the roadside. It was her evidence that the Appellant was his boyfriend. The evidence that ensued after the complainant revealed to the Appellant that he was pregnant leaves no doubt that the Appellant was the person at the heart of it. The Complainant stated that after the test turned positive, the Appellant took the initiative to purchase drugs for purposes of terminating the pregnancy. The complainant's recount of events as to who was behind the intense coercion that the Appellant takes the abortion drugs lends credence to the fact that it is the Appellant who had personally taken responsibility of the pregnancy and was determined to have it terminated. This Court notes that the Appellant did not rebut that specific claim by PW1 in any way whatsoever.

32. The Appellant's defence of alibi was uncorroborated and without substance. That evidence did not come out during his cross-examination in Court. It is this Court's finding that the same is an afterthought deserving to be dismissed. This Court is, hence, fully satisfied that it was the Appellant who had carnal knowledge of the complainant.

33. With such a finding, the Appellant was rightly found guilty and convicted. The appeal against the conviction, hence, fails.

34. The Appellant also appealed against the sentence. He was sentenced to 30 years imprisonment. Section 8(3) of the *Sexual Offences Act* provides as follows;

> A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable is liable upon conviction to imprisonment for a term of not less than twenty years

35. This Court has intently interrogated the Probation Pre-sentence report and agonized over the predicament that the Appellant finds himself in as against what the law provides. The Appellant was aged 19 years whereas the complainant was 15 years old.

36. This is a clear case where the Complainant and the Appellant were in a teenage romantic relationship. The complainant admitted that they had an affair. Their age difference is one that cannot be said to be so wide that the Appellant was exceedingly manipulative as to win over the complainant's exercise of discretion. It is this Court's hope that in the very near future such scenarios will be addressed by taking into account the realities of teen age life and the purpose of sentencing.

37. The law, as is now, precludes Courts from exercising discretion irrespective of the circumstances of the case. That was the position of the Supreme Court in Petition No. E018 of 2023 Republic -vs- Joshua Gichuki Mwangi when it observed thus;

    (63) Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

    (64) The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against *the Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional. The Court of Appeal in the present appeal did not declare any particular provision of the *Sexual Offences Act* unconstitutional, failing to refer even to the particular Section 8 that would have been relevant to the Respondent's case.

    (66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes

based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.

(67) We reiterate the above exposition of the law and the answer to the two questions under consideration is that, unless a proper case is filed and the matter escalated to us in the manner stated above, a declaration of unconstitutionality cannot be made in the manner the Court of Appeal did in the present case.

(68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.

38. Based on the above guidelines, the only available recourse for the Appellant herein, in view of the circumstances of their case and in appreciation of the entitlement of the least severe sentence under Article 50(2)(p) of *the Constitution*, the Appellant's sentence is reduced from the 30 years handed down by the trial Court to the minimum of 20 years prescribed by the law.

Disposition:

39. As I come to the end of this judgment, I wish to render my unreserved apologies to the parties in this matter for the delay in rendering this decision. The delay was occasioned by the fact that since my transfer from Nairobi, I have been handling matters from the Constitutional & Human Rights Division, Kitale and Kapenguria High Courts. Further, I was appointed as a Member of the Presidential Tribunal investigating the conduct of a Judge in March 2024 and subsequently elected into the Judicial Service Commission thereby mostly being away from the station. Apologies galore.

40. In the premises, this Court makes the following final orders: -

    a. The appeal against the conviction is hereby dismissed whereas the appeal on the sentence succeeds.

    b. The Appellant is admitted to the minimum sentence under Section 8(3) of the *Sexual Offences Act* and is hereby sentenced to 20 years imprisonment.

41. It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

A. C. MRIMA

JUDGE

Judgment delivered virtually in the presence of:

Danson Kipkurui Bitok, the Appellant.

Mr. Mugun, Learned Prosecutor instructed by the Director of Public Prosecutions for the Respondent/State.

Chemosop/Duke – Court Assistants.