Kwemoi v Republic (Criminal Appeal E044 of 2023)
[2024] KEHC 2682 (KLR) (8 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E044 OF 2023

REA OUGO, J

MARCH 8, 2024

BETWEEN

DAN HOSEA KWEMOI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the acquittal of the accused person by Hon. J.O. Manasses (RM) in Sirisia PMCC No. E003 of 2023 on 14/6/2023)

JUDGMENT

1. The appellant was convicted of two counts of defilement before the subordinate court after a plea of guilty was entered for both counts. On the first count, he was charged with defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on 19th January 2023 at [particulars withheld] Forest, [particulars withheld] location, within Bungoma County, he intentionally caused your penis to penetrate the vagina of F.C., a child aged 11 years.

2. In the second count, he faced the charge of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars being that on 19th January 2023 at [particulars withheld] Forest, [particulars withheld] location, within Bungoma County, you intentionally caused your penis to penetrate the vagina of C.C., a child aged 12 years.

3. The appellant was sentenced to 30 years imprisonment for each of the counts and the sentence was to run concurrently.

4. The appeal before the court is therefore challenging the sentence meted by the trial magistrate on the following grounds:

    1. That I am a first-time offender.

2. That I pleaded guilty to the said charges.

3. That I am the sole bread winner for my family.

4. That in the circumstances of this case, the sentence of 30 years on each count as meted out against me was manifestly too harsh and excessive and do kindly, humbly and prayerfully pray without prejudice that the same favourably reviewed with a view to ameloriate allerate (sic) the situation and kindly pray so.

5. That the trial magistrate acted inhumanly by awarding a harsh and excessive sentence without considering the mitigating factors put forward for the court's discretion.

6. That this honourable court considers reducing the sentence imposed on humanitarian grounds.

7. That I wish to raise more grounds at the hearing thereof.

5. The appeal was canvassed by way of written submissions and the appellant and respondent have both filed their respective submissions.

6. The appellant argues that the sentence imposed diminished provisions of Articles 27 and 28 of *the Constitution* of Kenya, 2010. He also argued that harassment, intimidation, threats and coercive circumstances by the police occasioned the plea of guilt. He further submits that he is the sole breadwinner and that his family would suffer irreparably due to the length of his sentence.

7. The respondent opposed the appeal. They submit that the age of the victims was proven. As per the record, their age bracket was between 10 and 11 years. Section 8 (2) of the *Sexual Offences Act* provides for life imprisonment and in this case, the appellant pleaded guilty to the offence and was sentenced to 30 years imprisonment on both counts. It was submitted that this was commensurate to the offence considering the circumstances and the age of the two minors. They cited the decision in Misc. Criminal Application No. E014/2021 where the court observed that it is not in doubt that the court still has discretion even with the sentence provided for in the *Sexual Offences Act*.

Analysis And Determination

8. I have considered the rival submissions by the parties and the entire evidence adduced before the lower court and the issues raised in this appeal are whether the plea of guilty entered was unequivocal and whether the sentence meted by the trial court was excessive.

9. Section 348 of the Criminal Procedure Code provides that-

> " No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence.".

10. The procedure for taking a plea of guilty is laid down under sections 207(1) and (2) of the Criminal Procedure Code which provides:

> " (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;
>
> (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words

used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

11. The Court of Appeal in dealing with the manner of recording a plea of guilty in Ombena vs. Republic [1981] eKLR laid down the following procedure:

> "In Adan v Republic [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —
>
> 'Held:
>
> (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
>
> (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
>
> (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
>
> (iv) if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;
>
> (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

12. In this case, on 25/1/2023 when the appellant was first arraigned in court, the charges against him were read to him and he pleaded guilty. However, when the facts were read to him the next day, he denied committing the offence and a plea of not guilty was recorded.

13. On 14/6/2023 after the matter had been set down for hearing, the appellant sought to plead guilty to both counts. A fresh plea was taken for the second time. The appellant's rights were explained to him in Kiswahili and the consequences of pleading guilty were explained to him but he insisted on taking a fresh plea. The charges in count I and II were read to him in Kiswahili and a plea of guilty entered. The facts were read to him and the appellant told the court that the facts were true on both counts. The appellant was therefore convicted of his own plea of guilty. In the circumstances, the trial magistrate complied with the provisions of sections 207(1) and (2) of the Criminal Procedure Code and I find that the plea wasunequivocal.

14. I now turn to consider the sentence meted by the trial court. According to the charge sheet on both count I and II the children were both 12 years of age. Age in defilement cases is crucial as it determines the sentence to be meted out by the court. According to the charge sheet, F.C., the child in count I, was 11 years old. However, the birth certificate of F.C. indicates that she was 12 years old at the time of the offence as she was born on 20/11/2011. On the other hand, on count II the charge sheet indicates that C.C. is 12 years yet her birth certificates reveal that she was 11 years as at the time of the offence. There

was a mix-up with the ages of F.C. and C.C. It is clear that F.C was 12 years and therefore section 8 (3) of the *Sexual Offences Act* will apply to both counts.

15. In Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where Odunga J. (as he then was) held that:

> "My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under article 28 of *the Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than *the Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.
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> 112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed."

16. In the case of Chigongo Dzuye v Republic, CRIMINAL APPEAL NO 31 OF 2022, the Court of Appeal sitting at Malindi held as follows:

> "37. In the Joshua Gichuki Mwangi v Republic (supra), the Court was clear in its mind that the sentences prescribed under the *Sexual Offences Act* are not unconstitutional and can still be meted out in deserving cases. We therefore disabuse the notion that the sentences prescribed under the *Sexual Offences Act* are unconstitutional. The Court only held that when imposed merely because they are mandatory without considering the circumstances of the case, then just like in Muruatetu 1 they contravene the constitutional principles.
>
> ...
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> 47. In our view, even without the application of the ratio in Muruatetu 1, we find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same, as the minimum mandatory sentences, does not meet the constitutional threshold particularly Article 28 of *the Constitution*."

17. The 30-year imprisonment meted by the trial court was therefore high in the circumstances. I therefore set aside the sentence of the trial court and sentence the appellant to twenty-five (25) years for each count and the sentences shall run concurrently.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 8TH DAY OF MARCH 2024.

R.E. OUGO

JUDGE

In the presence of:

Dan Hosea Kwemoi / Appellant – Present in person

For the Respondent

Wilkister - C/A