EMG v Republic (Criminal Appeal 32(E027) of 2022)
[2024] KEHC 4266 (KLR) (11 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4266 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL 32(E027) OF 2022

PN GICHOHI, J

APRIL 11, 2024

BETWEEN

EMG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal arising from the Judgment /sentence in Kisii Sexual Offence Case No. E041 of 2021 dated 06/12/2022 by Hon. P.K. Mutai, SRM)

JUDGMENT

1. The background of this appeal is that the Appellant (EMG) was arraigned before the trial court 06/07/2021 and pleaded not guilty to a charge of defilement contrary to Sections 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No. 3 of 2006. He also faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of main count are that on 3rd day of July 2021 within Kisii County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of FK a child aged 13 years.

3. In the alternative charge, the particulars are that on 3rd day of July 2021 within Kisii County, the Appellant unlawfully rubbed his penis against the vagina of FK a child aged 13 years.

4. The Appellant denied the charges and after full hearing, the trial magistrate found convicted him of the main count and sentenced him on 06/12/2021 to serve twenty (20) years imprisonment.

5. Aggrieved by the sentence, the Appellant preferred this appeal, vide a Petition of Appeal dated 20/12/2022 on a single ground that the trial magistrate erred in law in meting out which was manifestly excessive in the circumstances.

6. He therefore urged the Court to set aside the sentence and impose one which is in accordance with the law.

7. The Appeal was canvassed by way of written submissions. Through the firm of J.O. Soire & Co Advocates, the Appellant filed on 04/07/2023, his submissions dated 02/07/2023. He submitted that the 20 years imprisonment was basically based on the mandatory provisions of Section 8 of the *Sexual Offences Act* which sentence was unconstitutional as it denied the trial magistrate discretion depending on the circumstances of the case.

8. While citing the case of Maingi & 5 others v Director of Public Prosecutions & another [2022]eKLR, he submitted that as a first offender and the fact that the Appellant was remorseful, the sentence ought to be set aside and a shorter sentence imposed on him.

9. On its part the Respondent, through Mr. Justus Ochengo learned Counsel on behalf of the State, opposed the Appeal and filed his submissions on 22/6/2023. He submitted that the charge brought under Section 8(1) as read with Section 8 (3) of the Sexual offence Act attracts a minimum of sentence of 20 years.

10. He further submitted that the Appellant forcefully defiled the victim until she had to undergo corrective surgery. That the horrendous experience will haunt the victim for the rest of her life.

11. Arguing that the Appellant was not remorseful at all during submissions, he submitted that the sentence imposed on the Appellant was the minimum sentence provided for by the law hence proper. He therefore urged the Court to dismiss the Appeal.

Determination

12. After considering the above submissions and the trial court record, the issue for determination is whether the sentence herein was based on minimum sentence and therefore unconstitutional.

13. There is no dispute or doubt that the minor was aged 13 years as at the time this offence was committed. There is also no doubt from the medical records that there was penetration. There is no challenge on the finding by the trial court that it is the Appellant who caused that penetration. Indeed, there is no challenge on conviction. Section 8. (3) of the *Sexual Offences Act* provides that:-

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

14. It need not be overemphasised that minimum sentences have been declared unconstitutional. It is therefore this Court's duty to re- examine the sentence meted on the Appellant bearing in mind the Judiciary Sentencing Policy Guidelines on Sentencing on factors to be considered before a custodial sentence is considered.

15. In this case, the evidence was that after she was defiled, the child exhibited withdrawal symptoms. On examination by the Clinical Officer (PW4) on 03/07/2021, there was blood clot on the vaginal wall and underwear stained. She had a posterior tear on the vaginal wall which required corrective surgery. She was admitted at Kisii Teaching and Referral Hospital for one week for that purpose. No doubt the child underwent a lot of pain and trauma during and after the ordeal by the Appellant who was an adult. He forcefully defiled her hence the tear.

16. The factors for consideration during sentence were set out in the Court of Appeal decision in the case of Dismus Wafula Kilwake v Republic [2018] eKLR when it held:-

> " We hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

17. In this case, the Appellant was treated as a first offender and further, the record shows that in mitigation, the Appellant had this to say:-

> " I did not commit this offence. I was at home alone. My mother is absent."

18. There was no evidence of remorse at all or any mitigating factors provided by the Appellant so as to be considered by the trial court. In sentencing, the trial court stated:-

> " Mitigation considered. Considering the age of the victim, the offender is convicted to serve 20 years imprisonment. Right of Appeal 14 days."

19. In order to interfere with the sentence herein, and bearing in mind that sentencing is a matter of discretion by the court, this Court is mindful of the Court of Appeal decision in Bernard Kimani Gacheru V Republic [2002] eKLR thus:-

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

20. Despite the Respondent's submissions that the sentence herein was the mandatory minimum provided for by the Act, the trial magistrate did not make any explicit comment that he based the sentence on the mandatory minimum sentence. However, the wording in that sentence appears to show that the trial court had the mandatory minimum sentence in mind. That could be the reason why both the Appellant and the Respondent assumed the sentence was based on the provision of the said Act.

21. It is therefore important that to avoid any ambiguity, the trial magistrate ought to have clearly pronounced why it passed the said sentence and not a lesser or higher sentence. As long as it is apparent that he was influenced by the mandatory minimum sentence as provided by the Act, then to that extent and in the circumstances, the Appellant is justified in seeking interference by this Court.

22. This Court however considers that the physical and psychological damage caused on the victim herein. It is also clear that the Appellant was not remorseful . He was however a first offender.

23. In the circumstances, the Court makes the following orders:-

    1. The appeal be and is hereby allowed.

    2. The sentence of Twenty (20) years imprisonment is set aside and substituted with a sentence of Fifteen (15) years imprisonment.

    3. The sentence to run from 06/12/2022 being the date the Appellant was committed to serve prison sentence.

DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 11TH DAY OFAPRIL, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

N/A for Appellant

Mr. Kihara for Respondent

Yego/Aphline , Court Assistant