Wesonga v Republic (Criminal Revision E002 of 2024)
[2024] KEHC 3872 (KLR) (19 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3872 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL REVISION E002 OF 2024

DK KEMEI, J

APRIL 19, 2024

BETWEEN

VICTOR WESONGA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(From the Judgement delivered on 28th November 2023 by Hon. Tom Mark Olando (P.M) in Bungoma Criminal S.O.A Case No. E053 of 2021)

RULING

1. The crux of this application is that the Bungoma Chief Magistrate's Criminal Case No. S.O.A No. E053 of 2021 Republic versus VW found the Applicant herein guilty of the offence of defilement and was sentenced to three years imprisonment. The issue of the age of both the Complainant and the Applicant was contested and that the court directed that the birth certificate of the Complainant be availed while the Applicant was subjected to an age assessment test. The court was able to establish that at the time of the commission of the offence, the Applicant was an adult as his original birth certificate showed that he was born on 20th August 2002. The matter proceeded to hearing and that the court established that the Prosecution had proved its case against the Applicant beyond reasonable doubt and he was thus convicted of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He was subsequently sentenced to three years' imprisonment.

2. Vide Chamber Summons dated 8th February 2024 and filed on 16th February 2024, the Applicant requested that the Bungoma Chief Magistrate's Criminal Case No. S.O.A No. E053 of 2021 Republic versus VW be placed before the Hon. Judge to revise and/or review the judgement of the Chief Magistrate's Court in Criminal Case No. S.O.A No. E053 of 2021 dated 28th November 2023.

3. He premised his application on the grounds inter alia : that he was a school going child when the charges were preferred against him; that he had just turned 18 years old as per his birth certificate ;

that the complainant conducted herself as an adult ; that the sentence imposed against him was illegal, discriminatory, unlawful and contrary to the provisions of Article 27 of the *Constitution* of Kenya; that the judgement pre-empts dual discrimination involving the protection of the rights of the Complainant and that it denied the right of rebuttal of presumption of incapacity and/or inability to consent.

4. It is the judgement dated 28th November 2023 that the chamber summons dated 8th February 2024 seeks review by this court under section 362 and 364 of the Criminal Procedure Code and that the file be remitted to the original Court for quashing of his conviction and sentence.

5. No response was filed by the Respondent.

6. The parties canvassed the application via oral submissions.

7. Mr. Wekesa for Namukhula submitted that the charge for defilement was preferred against his client when he was a school going child who had turned 18 years old as per the availed birth certificate. That the Applicant was sentenced to 3 years imprisonment. Counsel submitted that the issue for determination is whether this Court can interfere with the order of the trial Court where a mistake was made. He submitted that the order made was bad and contrary to Article 27 of the *Constitution* for reasons that at the time of the commission of the offence the Applicant and the Complainant were children and that the Applicant's attainment of the age 18 years at the time should not be deemed as an adult and convicted as such.

8. It was submitted that at that time, both the Applicant and the Complainant were having consensual sex for two years and it was unfair not to have treated them as children in need of care and protection. According to him, the Complainant's silence on her having consensual sex with the Applicant ought to have been deemed as one presenting herself as an adult. Counsel relied on the case of CRA No. 32 of 2015- *Martin Charo v Republic*. He further relied on the probation officer's report dated 29th February 2024 where it indicated that the Applicant and the Complainant had sexual intercourse for a long time.

9. It was submitted that the Applicant should not be blamed alone for the offence as there was no way for him to have known that the complainant was underage. He relied on the case of *Eliud Waweru Wambui v Republic* (2019) eKLR.

10. Counsel urged this Court to grant the Applicant non-custodial sentence.

11. Miss. Kibet for the Respondent submitted that the Respondent concedes to the application as the Applicant at the time of commission of offence was aged between 16-18 years and in form three while the complainant was aged 16-17 years.

12. She submitted that both the Applicant and the Complainant were teenagers and for the best interest of the Applicant, the Respondent leaves it at the prerogative of the court. Counsel also submitted that the Applicant was attending school at the time and that there is evidence that he was below the age of 18 years.

13. Counsel conceded to the revision application noting that the Applicant has been in custody for three (3) years and has learnt his lesson.

14. I have considered the application, the grounds of opposition and the rival oral submissions. This application being one of review, the question which arise is whether this Court should allow the Applicant's application.

15. It is important to examine the relevant provisions of the law in view of the issues raised in this revision. Article 23(1) provides that the High Court has jurisdiction in accordance with article 165, to hear

and determine applications for redress of denial, violation and infringement of, or threat to a right or fundamental freedom. Particularly, article 165(3)(d) of the *Constitution* provides that the High Court has jurisdiction to hear any question on the interpretation of the *Constitution* including the issue of whether anything said to be done under the authority of the *Constitution* or any law is inconsistent with, or in contravention of the *Constitution*. Under section 362 and 364 of the *Criminal Procedure Court* the High Court may call for and examine the record of any criminal proceedings before any subordinate Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate Court.

16. On whether the Applicant had been discriminated against contrary to Article 27 of the *Constitution* based on his sex/gender, Article 27 of the *Constitution* provides for the right of protection against discrimination based on inter alia gender. The term sex is not used by the *Constitution*. This right is not absolute and is subject to other laws including the *Penal Code* cap 63 of the Laws of Kenya. Section 14 of the *Penal Code* deals with criminal responsibility in relation to immature age. It provides; -

    1. A person under the age of eight years is not criminally responsible for any act or omission.

    2. A person under the age of twelve years is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission.

    3. A male person under the age of twelve years is presumed to be incapable of having carnal knowledge.

17. It is not contested that the Complainant herein was between the age of 16-17 years old at the time of the commission of the offence and according to section 14(1) she cannot be criminally liable. Therefore, she could not be charged alongside the Applicant herein and leaving her cannot be said to be discriminative. It is elaborate that the Court warned that there are wide variations in the blameworthiness of sexual behaviour and therefore the prosecutors and adjudicators have to make careful judgments about who should be prosecuted and what punishment, if any, is appropriate. In any event, in *CKW v Attorney General & another* (2014) eKLR the court dismissed an allegation of discrimination based on the Prosecution charging one child and leaving another thus: -

> "In Kenya, there is no express or implied requirement that when two children are involved in sexual penetration with each other, both of them should be charged with the offence of defilement. However, there is no legal bar to the Prosecution preferring criminal charges against both the children. In effect, if the prosecution had reasonable cause to charge both minors, they could do so"

18. Unlike in some other jurisdictions where a distinction is made between sexual activity among children of various ages and sexual activities between adults and children, our *Sexual Offences Act* does not clarify the former, despite the clear recognition that a child is as defined in the *Children Act*.

19. It is not in doubt that intentions of the *Sexual Offences Act* were superb, to protect everyone from sexual violence and in particular the vulnerable members of society who include children. However, it appears to have been overlooked that children would involve themselves in various forms of sexual activity at different developmental stages, and that there was need to provide for that. Speaking to the dilemma faced by Prosecutors in pressing charges when children are involved, his Lordship Hope of

Craighead in the English case *R v G* (Appellant) (on Appeal from the Court of Appeal (Criminal Division))[2008] UKHL 37 observed and I quote;

> " But this case is about the choices that are available where the prosecutor is satisfied that the conduct was consensual or, as consent could not in law be given, was mutual. Moreover, it is about the choices that ought to be made where the participants in sexual conduct which was mutual were both children."

20. Kenya is unlike other jurisdictions for example Scotland does not have any special procedures. Every sexual offence that is committed by children and whose facts bring it within the *Sexual Offences Act* is dealt within the ambits of criminal law. Judges and Magistrates struggle with efforts to have children who are of same age group and who indulge in consensual sexual activity treated as children in need of care and protection. This question as to whether sexual crimes committed by children should be dealt with in the same way as sexual crimes committed by adults can only be dealt with through substantive review of the *Sexual Offences Act* to create a section that speaks to sexual activities among children who must be protected from others and from themselves as well.

21. Section 143(1) of the *Children Act* states that where a person brought before the Court appears to be under eighteen years, the Court shall make due inquiry as to the age of such person including medical evidence. The charge sheet indicates the apparent age of the Applicant as adult and that the lower Court throughout the proceedings treated the Applicant as an adult due to the availed birth certificate that indicated that he was indeed 18 years. It is imperative to note that according to the evidence of the Complainant, the Applicant used to be her boyfriend since 11th July 2021 and that they had been indulging in consensual intercourse. At this point, the Applicant was also a child between the age of 16-18 years and was a school going child all through the lower Court trial. It would have been appropriate for the trial court to deal with the Applicant as provided for under section 191 of the *Children's Act* and probably placed him under probation for some reasonable period.

22. The importance of compliance with section 143(1) of the *Children Act* is portrayed in *MABI v Republic* (2018) eKLR the Court of Appeal held:-

> " Regarding the age of the appellant, serious doubts were raised from the beginning of the trial as to whether the appellant was above 18 years when he committed the offence. If the appellant was under the age of 18 years, he was then a child in terms of section 2 of the Children Act which defines a "child" to mean any human being under the age of 18 years. When the appellant was first arraigned in court, he was in school uniform, and that was noted by the trial magistrate. During the trial, the appellant's advocate told the court that the appellant was born on February 5, 1996; although no documentary evidence was availed to prove that allegation. However, as pointed out earlier, the appellant told the trial magistrate that as at the date of the trial he was 17 years old and was in form four at [particulars withheld] Secondary School. To ensure a fair trial and obviate the possibility of dealing with a child offender as an adult, the trial court ought to have ordered that the appellant's age be assessed by a doctor. Alternatively, the trial court ought to have made due inquiry as to the appellant's age, in accordance with section 143(1) of the Children Act... Here was a young person who was presented to court in school uniform, he told the investigating officer and the trial court that he was a minor; that he was a student; and without any inquiry as to his age, the trial court proceeded with the trial on the presumption that he was an adult. In the circumstances, we are satisfied that the lower courts' finding that the appellant was not a minor, in the absence of any inquiry to his age, might have occasioned a miscarriage of justice.

> Had the trial court found that the appellant was a minor but had defiled the complainant, who was also a minor, it would have dealt with him in any of the ways prescribed under section 191(1) of the Children Act. Such ways include discharging the offender under section 35(1) of the Penal Code. Section 190(1) of the Children Act expressly provides that no child shall be ordered to imprisonment or to be placed in a detention camp"

23. Having concluded that the trial magistrate did conduct an inquiry as required under section 143(1) of the Children's Act, it is important to check the powers of this Court on revision. In *Republic v Anthony Thuo Karimi* (2016) eKLR it was held:-

> " The revisional powers of a High Court are very wide. Such powers are intended to be used by the High Court to decide all questions as to the correctness, legality or propriety of any finding, sentence or order, recorded or passed by an inferior criminal court and even as to the regularity of any proceeding of any inferior court. The object of conferring such powers on the High Court is to clothe the highest court in a state with a jurisdiction of general supervision and superintendence in order to correct grave failure or miscarriage of justice arising from erroneous or defective orders. Section 364(1)(a) confers on the High Court all the powers of the appellate court as mentioned in sections 354, 357 and 358.
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> The revisional powers are entirely discretionary. There is no vested right of revision in the same sense in which there is vested right of appeal. These sections do not create any right in the litigant, but only conserve the powers of the High Court to see that justice is done in accordance with the recognized rules of criminal jurisprudence and that subordinate criminal courts do not exceed their jurisdiction, or abuse the powers vested in them by the Code."

24. In the instant revision, the proceedings were concluded and the Chief Magistrate's Court at Bungoma issued its verdict and sentence. So far, everything on the Court record indicates the lower court was non-compliant with section 143(1) of the *Children Act* thus occasioning injustice to the Applicant. Consequently, this Court finds that the proceedings at the lower Court were illegal, discriminative and unjustified occasioning a miscarriage of justice which is contrary to the mandate of caring and protecting our children.

25. A social enquiry report dated 29.2.2024 by the Bungoma County Probation officer indicated that the Applicant did not interfere with the complainant while he was out on bond and further that the applicant's school is still ready to receive him back in order for him to continue with his schooling. The report further revealed that the applicant has strong family ties with reliable supervision partners namely his parents who will support his community-based rehabilitation. It was also pointed out that the Applicant has no known criminal history prior to this offence and that the local administration has no opposition to a community supervision.

26. In the upshot, I find that this is a matter which merits an order for revision. The application dated 8.2.2024 is allowed. The sentence of the trial court is hereby reviewed and substituted with a n order that the Applicant serves under probation for a period of three (3) years from the date hereof.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF APRIL 2024

D KEMEI,

JUDGE

In the Presence of:

Wekesa for Nekesa for Applicant

Miss Kibet for Respondent

Kizito Court Assistant