DTS v Republic (Criminal Appeal E037 of 2023)
[2024] KEHC 4483 (KLR) (3 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E037 OF 2023

AC MRIMA, J

MAY 3, 2024

BETWEEN

DTS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the sentence of Hon. D. K. Mutai (Principal Magistrate) in Kitale Chief Magistrate's Court Criminal Case (S.O) No. 108 of 2017 delivered on 10{{^th}} May, 2023)

JUDGMENT

1. The Appellant herein, DTS, was charged with the offence of Defilement of an 8-year-old girl. He was aged 16 years old as at that time.
2. He denied the offence and he was tried. He was subsequently found guilty as charged and convicted. He was sentenced to life imprisonment.
3. The Appellant thereafter filed Kitale High Court Constitutional Petition No. E020 of 2022 wherein the life sentence was set-aside. A re-sentencing by the trial Court was ordered.
4. The Appellant was eventually re-sentenced on 10th May, 2023 to 30 years' imprisonment. The sentence was to run from 14th September, 2017 when the Appellant was charged.
5. Aggrieved by the sentence, he lodged the instant appeal.
6. In his written submissions, the Appellant claimed that he was aged 16 years old when he committed the offence and as such, the sentence was very harsh. He prayed for a lesser sentence to be compounded to the period already served. He also alleged that he had changed to a good law-abiding citizen.
7. The State opposed the appeal urging this Court to consider that the victim was an 8-year-old girl who was still undergoing medication from the injuries she sustained in the ordeal with the Appellant.

8. This Court is the first appellate Court.

9. The Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

10. The Court considered the nature of the offence and the mitigation, among other relevant actors.

11. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the Sentencing Guidelines published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

12. The Appellant raised the issue of him having been a minor at the commission of the offence. This Court, therefore, will briefly look at the issue of sentencing of a culprit who was a minor at commission of the offence, but had turned into adulthood at sentencing.

13. Courts have dealt with the above issue in sebveral decisions. In the Court of Appeal in Kisumu in Criminal Appeal No. 52 of 2015 *Duncan Okello Ojwang v Republic* (2019) eKLR, my Lordships, in referering to several decisions, had the following to say: -

> Section 191(1) of the *Children Act* sets out different ways in which the Court can deal with a child offender. The trial Court is required to exercise judical discretion in determining the manner in which to deal with a child offender. Section 191(1)(j) of the same Act empowers the Court to deal with an offender in any other lawful manner and therefore does not in any way conflict or oust the penalty prescribed under Section 25(2) of the *Penal Code*. However, the Court gives effect to the best interests of the child as required under Section 4(2) of the *Children Act*. The Court should also bear in mind the principles of proportionality, deterrence and rehabilitation; and as part of the proportionality analysis, mitigation and aggravating factors should also be considered. This Court while faced with a similar case in *Richard Mwaura Njuguna & another v Republic* [2019]eKLR observed thus:
>
> It is worth mentioning that this Court as well as the High Court have come across similar situations as the case before us, where the offender in question was a minor during the commission of the offence in issue is the High Court case of *Daniel Langat Kiprotich v State* [2018]eKLR wherein the petitioner therein had challenged the death penalty meted out to him on account of the offence of robbery with violence on the ground that during the commission of the offence he was a minor. Ngugi, J. expressed the dilemma faced by courts in such situations. He expressed:
>
> This often creates a dilemma for trial courts which may be faced with a juvenile who is only slightly below eighteen years old but who committed a serious offence such as (depraved heart) murder or rape or particularly vicious armed robbery. Since the statutory scheme provides that such a child cannot be sent to a borstal institution for no more than three years,

the options are limited to trial Courts even where on analysis and evidence such a Court might be persuaded that the almost - adult it is dealing with is a danger to society; and has failed to acknowledge or come to terms with his or here errors.

A similar dilemma is created when the offender has already turned eighteen at the time of conviction or at the time of appeal as is the case here. Where the offence committed was a particularly vicious or serius one, the option of releasing such an offender back to the society is not an attractive one. It may even be downright dangerous for the society. Further, it might deny the individual offender a true opportunity to reflect on his actions in a custodial setting and take the rehabilitative turn".

Earlier on, this Court in the case of *J M K v Republic* [2015]eKLR had observed: -

....A critical issue in this appeal relates to the appropriate senetnce for a minor who has been convicted of murder. At the time of the offence, the appellant was a minor 16 years of age. The offence of murder attracts a mandatory death sentence. In of Nyeri Criminal Appeal No. 118 2011 (JKK -v- R, (2013)eKLR, this Court had an opportunity to consider the appropriate punishment for a minor offender. The Court stated that the offence of murder committed by the minor appellant was serious and an innocent life was lost. The appellant though a minor at the time of the offence was to serve a custodial sentence so that he could be brought to bear the weight and responsibility of his omission or lack of judgment. The Court expressed that the appellant who was now of age of majority could not be released to society before being helped to understand the consequences of his mistakes. (See also Republic -v- S. A. O., (A MINOR) [2004]eKLR and Nyeri Criminal Appeal No. 184 of 2009, Dennis Kirui Cheruiyot -v- R).

The Court went further and held that:

The appellant in this case was not found to be of unsound mind to be detained at the pleasure of the Presidnt. No legal provision was cited to us to support the order that if a minor offender is found guilty of murder he should be detained at the pleasure of the President. Due to the gravity of the offence and the current age of the appellant, he cannot be released to society. The *Children Act* prohibits a death sentence to a child offender, life sentence is also not provided for; we, therefore, allow the appeal to the extent that we substitute the order directing the appellant to be detained at the pleasure of the President with a custodial term of imprisonment for 10 years from the date of conviction by the trial court on 5th May, 2011. We have considered this custodial sentence as appropriate to give time to the prison authorities and perhsphs the probation department to take the apepllant through the rgours of coming into terms with his mistake and poor judgment which have consequences such a loss of liberty.

We are in total agrement with the above sentiments and observations. Accordingly we find that committing the apepllant to a borstal institution as prescribed under Section 6(1) of the *Borstal Institutions Act* is not foreseable in view of the appellant's current age. The appellant is no longer a minor. Instead, we are inclined to impose a sentence of 10 years imprisonment which we think is commensurate with the apepllant's culpability.

14. The State submitted that the victim was still undergoing treatment as a result of the ordeal. However, that position was not supported by any medical evidence. The Clinical Officer who testified as PW4 did not allude to such. The victim was only given antibiotics and HIV protection drugs. It was only the mother to the victim who alleged as much when she was interviewed by the Probation office.

15. Given that there is no medical evidence to confirm that the alleged complications resulted from the incident herein, this Court will be hesitant to affirm what the victim's mother stated.

16. This Court, however, takes note that the offence was a very serious one more so it was committed against an 8-year-old child. On the other hand, the Appellant was also a minor at the commission of the offence. Nevertheless, the Appellant must be brought to bear the weight and responsibility of his omission or lack of judgment. Since the Appellant is now of age of majority, he ought to be helped to understand the consequences of his mistakes.

17. This Court believes that such has already happened by now. The Appellant has undergone theological studies, tailoring course and studied computer packages while in prison. According to a letter dated 16th August, 2021 from the GK Prison in Kitale, the Appellant was described as a fully changed person and quite optimistic in life. It was proposed that the Appellant be given another chance in life.

18. The above sentiments were replicated in the Probation Report dated 25th Aril 2023. Further, the victim and her family relocated from Kesogon to Aruba and the victim has continued with her studies.

19. By now, the Appellant must have learnt his life lessons. Having been in custody for the last 7 years, he has definitely changed for the good.

20. Whereas this Court agrees with the Probation officer and the Prisons Department that the Appellant, further to his young age, ought to be accorded a second chance in life, he will still be placed under further guidance while out of prison.

21. To that end, this Court will, with utmost respect to the Learned sentencing Court, interfere with the sentence rendered.

22. Deriving from the above, the following final orders of this Court do hereby issue:

    a. The appeal against the sentence rendered by the trial Court is hereby allowed. The sentence of 30 years imprisonment is set-aside and is substituted with a custodial sentence for the period already served further to serving a probation period of 3 years.

    b. Unless otherwise lawfully held, the Appellant be released on the above terms.

    c. This file is hereby marked as closed.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KITALE THIS 3RD DAY OF MAY, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

DTS, the Appellant in person.

Miss. Kiptoo, Learned Prosecutor instructed by the Director of Public Prosecutions for the State.

Chemosop/Duke – Court Assistants.