Obwog v Republic (Criminal Appeal E021 of 2023)
[2024] KEHC 7460 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7460 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E021 OF 2023

WA OKWANY, J

JUNE 13, 2024

BETWEEN

DENNIS ANGWENYI OBWOG ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Sentence in the Principal Magistrate's Court at Keroka in MCSO E021 OF 2022 by Hon. C. Ombija, Resident Magistrate on 6th June 2022)

JUDGMENT

1. The Appellant herein was convicted for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* on his own plea of guilty. The particulars of the charge were that on the 26th day of March 2022 at [Particulars Withheld] within Nyamira County, intentionally caused his penis to penetrate the vagina of IN (particulars withheld) a child aged 17 years.
2. The Appellant was, upon conviction sentenced to serve 15 years' imprisonment.
3. Aggrieved by the sentence imposed by the trial court, the Appellant filed the present Appeal and listed the following grounds of appeal in his Petition of Appeal: -
    1. That he did not plead guilty to the charges herein.
    2. That he was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of the *Sexual Offences Act* No. 3 of 2006.
    3. That he was a first born in his family and was remorseful and begged the Honourable Court to have mercy and reduce the sentence of 15 years imposed to a lesser sentence.
    4. That it was his first time to be in prison and he had learned a lot and promised not to repeat the same mistake or involve himself in any criminal activities.

5. That he had undergone several courses in prison such as machine operation and carpentry which would enable him to work and earn a living without depending on anybody.

6. That for the time he was in prison, he lost two important people in his life namely his mother and wife who left behind two children with no one to support them.

7. That he promised not to involve himself in any crime and become a law-abiding citizen and was ready to educate people within the community and the society on the dangers of committing crimes and the consequences.

4. The Appeal was canvassed through written submissions which I have considered.

5. The Appellant submitted that the sentence imposed by the trial court was harsh and excessive considering the circumstances of the case and the tenets of *the Constitution*. He argued that the trial court should have sought guidance from recent court precedents where courts have departed from imposing the minimum mandatory sentences.

6. He noted that the Probation Officer's Pre-Sentencing Report recommended a non-custodial sentence and argued that the *Sexual Offences Act* had been converted into a business for purposes of punishing the boy child even in instances of 'Romeo and Juliet' relationships. He urged the Court to consider a more lenient sentence.

7. The Respondent, on the other hand, submitted that the Appellant could only appeal against the sentence as provided under Section 348 of the Criminal Procedure Code because he had pleaded guilty to the charge. It was submitted that the sentence was neither harsh nor excessive as Section 8 (4) of the *Sexual Offences Act* provides for a minimum mandatory sentence of 15 years imprisonment.

8. The duty of a first appellate court was restated in the case of David Njuguna Wairimu vs. Republic [2010] eKLR where the Court of Appeal cited the case of Okeno v. R [1972] EA. 32 and held thus: -

> " The duty of the first appellate court is to analyse the re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."

9. I have carefully considered the record of appeal and the parties' respective submissions. I find that the main issue for determination is whether this Court can interfere with the sentence passed by the trial court.

10. It is trite that sentencing is at the discretion of the trial court which discretion must however be exercised in accordance with set standards and principles of law. The High Court at Kwa Zulu Natal in S. v Nchunu & Another (AR 24/11) [2012] ZAKZPHC6, stated that:-

> " It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be..."

11. Section 8(4) of the *Sexual Offences Act* stipulates as follows: -

> 8. Defilement

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

12. The above provision prescribes a minimum mandatory sentence. Case law is replete with decisions on the import of minimum mandatory sentences. For example, in S v Malgas 2001 (2) SA 1222 SCA 1235 para 25, the court held thus:-

> "What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

13. In the present case, the trial court stated that even though it sympathized with the Appellant, it could only sentence him according to the prescribed sentence as the offence in question attracted a mandatory sentence. In other words, the court was of the view that its hands were tied by the law that only provides for a minimum mandatory sentence. The reasoning in the above cited case is that prescribed or mandatory sentences fetter the court's discretion thus preventing it from considering the circumstances of a case in meting out sentences.

14. In the present case, the Appellant, who was not only 25 years old and a first offender, admitted that he invited the 17-year-old victim into his house after she threatened to commit suicide over the allegation that her father was mistreating her. The victim also admitted that the Appellant was her boyfriend and that she willingly went to the Appellant's house for refuge following mistreatment by her father.

15. While this Court strongly condemns acts of sexual assault against minors, it cannot turn a blind eye to the conduct of the victim and the actual circumstances of the case. This court is of the view that the victim in this case was old enough to make informed decisions and to appreciate the fact that she was vulnerable around the Appellant.

16. I have also considered the pre-sentencing report filed before the trial court which reveals that the Appellant was a law-abiding citizen prior to this case. The report also indicates that the Appellant was a responsible member of the society. The Appellant submitted that he was a first offender and was remorseful for his actions.

17. Considering the circumstances of this case in totality, I find that even though the sentence passed by the trial court was legal, excessive punishment does not serve the interests of justice and that there are exceptional instances where the trial court can depart from the prescribed minimum sentence. It is my finding that the punishment imposed was excessive and ought to be set aside. I am guided by the decision in Wagude v R (1983) KLR 569 where Kneller, Hancox JJA. & Chesoni, Ag. JA. held that: –

> "The Court may interfere with the sentence only if it shown that it was manifestly excessive...."

18. In the final analysis, I find that the Appeal is merited and I hereby allow it. Consequently, I set aside the sentence of 15 years imprisonment passed by the trial court and substitute it with a sentence of 5 years imprisonment. Having already served two years of his sentence period, I direct that the Appellant shall serve the remaining part of his sentence under the Community Service Order under terms that will be determined by the Probation Officer.

19. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 13TH DAY OF JUNE 2024.

W.A. OKWANY

JUDGE