GN v Republic (Criminal Appeal E036 of 2021)
[2024] KEHC 12462 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12462 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

CRIMINAL APPEAL E036 OF 2021

WM MUSYOKA, J

OCTOBER 18, 2024

BETWEEN

GN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from conviction and sentence by Hon. PY Kulecho, Senior Resident Magistrate, SRM, in Busia CMCSOC No. E041 of 2020, of 2nd December 2021)

JUDGMENT

1. The appellant,GN, had been charged before the primary court, of the offence of defilement, contrary to section 8(1)(4) of the *Sexual Offences Act*, Cap 63A, Laws of Kenya, and an alternative charge of committing an indecent act with a child, contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the charge were that on 26th October 2020, at [particulars withheld] Sub-Location, [particulars withheld] Sub-County, within Busia County, he unlawfully caused his genital organ to penetrate the genital organ of SN, a female child aged 16 years. The appellant denied the charges, and a trial ensued, where 5 witnesses testified.

2. PW1, SW, was the minor complainant. She met the appellant for the first time on 26th October 2020, and he convinced her to go with him, and they went to Malaba, where he locked her in his house until 9th November 2020, and during that time they had sex. She claimed that she was coerced into the act, on a promise of marriage. PW2, EW, was the mother of PW1. She testified that PW1 disappeared, and that she looked for her in vain, until PW1 herself contacted her on phone. She eventually met her at Malaba, and brought her home, and took her back to school, but she attempted to go back to Malaba, where she claimed her husband was. She got PW1 subjected to medical tests, and it was established that she was pregnant. She was taken to a police station, where she implicated the appellant.

3. PW3, Deogratius Emong'ojei Ekadakada, was the clinical officer who examined PW1. He noted nothing abnormal, save that her hymen was missing and she was pregnant. He stated that pregnancy was proof of defilement. PW4, No. xxxxxx Police Constable Esther Chege, was the investigating and arresting officer. PW5, Godwin Khamala Waliama, was a government analyst, who conducted a chemical analysis on samples from the complainant, the appellant and the baby of the complainant, and established that the said infant was a biological child of the complainant and the appellant.

4. The appellant was put on his defence, vide a ruling that was delivered on 16th November 2021. He made an unsworn statement, on the same date, and he did not call a witness. He denied the charges.

5. In its judgment, delivered on 2nd December 2021, the trial court found the appellant guilty, as all the elements of the offence had been positively proved. He was sentenced to 15 years imprisonment, on the same date.

6. The appellant was aggrieved, and brought the instant appeal, revolving around the evidence lacking probative value; the sentence being harsh; the trial court pegging its determination on the best interests of the child; the trial court violating the constitutional fair trial principles in Articles 49 and 50 of the *Constitution*; his family suffering on account of the incarceration; the defence and mitigation being disregarded; and allowing production of evidence by a person who was not authorised, under the *Evidence Act*, Cap 80, Laws of Kenya, to produce it.

7. He later filed amended grounds of appeal, which turned on the sentence being harsh and excessive; the time spent in custody not being considered in sentencing, contrary to section 333(2) of the *Criminal Procedure Code*, Cap 75, Laws of Kenya; discrimination contrary to Article 27 of the *Constitution*; and being remorseful, and pleading for reduction of sentence.

8. Directions were given on 14th May 2024, for canvassing of the appeal by way of written submissions. Only the appellant filed written submissions, limited to the ground on sentence. His arguments turn on 2 points, the period spent in remand custody, and minimum sentences.

9. Although the appellant had initially raised several grounds of appeal, around the sentence, the evidence and violation of rights, in the end he has reduced his appeal to just the question of sentence. He has issues with the period spent in custody not being factored, and the court sentencing based on the minimums set out in the *Sexual Offences Act*.

10. The proviso to section 333(2) of the *Criminal Procedure Code* makes it mandatory, that, where the person being sentenced, had, prior to the sentence being pronounced, spent time in custody, the sentence should take into account such duration of remand custody. The judgment of 2nd December 2021 did not make any reference to sentence, and, therefore, it provides no indication as to whether what is required by section 333(2) was considered. The sentencing order states that the sentence was to run from the date plea was taken. That would mean that the period spent in custody was reckoned. There was, therefore, compliance with section 333(2).

11. The record reflects that on the day of arraignment, on 17th November 2020, the appellant was admitted to a cash bail of Kshs. 300,000.00. The bond terms were varied, on 2nd December 2020, to a bond of Kshs. 100,000.00, with 1 surety. I have scrupulously gone through the trial record, and I have not come across any minute, indicating that the bond was ever processed, which would mean that the appellant was in remand custody throughout his trial, which ran from 17th November 2020, when he was arraigned, and took plea, to 2nd December 2021, when he was sentenced, a total of 1 year and 15 days. That time was reckoned in the sentence, in keeping with section 333(2) of the *Criminal Procedure Code*, and the sentence of 15 years in prison included that 1 year and 15 days that were spent in remand

custody. I note that he had been arrested on 14th November 2020, which was a Saturday, before the arraignment on 17th November 2020, a Tuesday. I do not think much weight should be given to the pre-arraignment detention, given that it happened, largely, over a weekend.

12. The second issue is about minimum sentence. He submits that it takes away the discretion of the court, and he has cited a number of judicial authorities to support this argument. In the sentence order of 2nd December 2021, the trial court made no mention of any minimum sentence. However, under the charging provision, section 8(4) of the *Sexual Offences Act*, where the victim of the defilement is aged between 16 and 18 years, the punishment prescribed, upon conviction under that provision, is imprisonment for a term of not less than 15 years. The trial court must have had that in mind, and the sentence it imposed was the minimum under that provision.

13. Was the trial court wrong in doing so? No. That was the law then. There is a sense in which a minimum sentence is mandatory, as the trial court would have no discretion to consider a lesser sentence. By 2nd December 2021, the Supreme Court had pronounced itself on mandatory sentences, in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ), where it stated a principle on the unconstitutionality of mandatory sentences. There was an attempt, in *Francis Karioko Muruatetu & another v. Republic; Katiba Institute & 5 others* (Amicus Curiae) [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ), to explain that the earlier decision was limited to sentences for murder, and was of no application to other offences, where the issue of mandatory sentences arises. With profound respect, that explanation does not take away from the fact that *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ) did set a principle of universal application, regardless of whether or not that that was what was intended by the Supreme Court, and I doubt whether a court, once it sets a principle, can get back to it and try to explain it away, in the manner of *Francis Karioko Muruatetu & another v. Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ).

14. Be that as it may. The High Court, in *Maingi & 5 others v. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v. Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J), set principles specific to mandatory minimum and maximum sentences under the *Sexual Offences Act*, and declared that such sentences were unconstitutional, to the extent that they limited or took away the discretion of the court to determine sentences, by taking into account the all prevailing and surrounding circumstances. *Maingi & 5 others v. Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) (Odunga, J) and *Edwin Wachira & 9 others v. Republic* Mombasa HC Petition No. 97 of 2021 (Mativo, J) came after 2nd December 2021, but the principle in them is no different from that set in *Francis Karioko Muruatetu & another v. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki & Lenaola, SCJJ). No doubt, the trial court ought to have exercised discretion in sentencing the appellant, without feeling constrained by the minimum sentence set in section 8(4) of the *Sexual Offences Act*.

15. On the matter of sentence, there is some basis for interference. The respective ages of the complainant and the appellant ought to have been taken into account. The complainant was said to be aged 16, at the time of the commission of the offence. She said that she was 17 at the time of trial. The register of convicted sexual offences indicates that the appellant was aged 24, at the time of conviction. The complainant was not a child of tender years, but a young woman at the threshold of maturity. The appellant was a young adult, in his early 20s. The age difference between the 2 was not remarkable. The act in question brought forth offspring, in respect of whom the appellant should have statutory parental obligations, under the *Children Act*, Cap 144, Laws of Kenya, which he cannot discharge

while in prison. Under the *Constitution* and the *Children Act*, there is an obligation to take the best interests of the infant into consideration.

16. Guided by the above, I do hereby set aside the sentence of 15 years imprisonment, imposed on the appellant, on December 2, 2021, in Busia CMCSOC No. E041 of 2020, and substitute it with a sentence of 6 years imprisonment, to run, as ordered by the trial court, from the date when the appellant took plea. It is so ordered.

JUDGMENT IS DELIVERED, DATED AND SIGNED IN OPEN COURT, AT BUSIA, THIS 18TH DAY OF OCTOBER 2024

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Mr.GN, the appellant, in person.

Advocates

Mr. Onanda, instructed by the Director of Public Prosecutions, for the respondent.