SK v Republic (Criminal Appeal 304 of 2019)
[2024] KECA 685 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KECA 685 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 304 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JUNE 13, 2024

BETWEEN

SK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from Judgment of the High Court of Kenya at Kisii (R. Ougo, J) dated 8th January, 2019 in HCCRA NO. 43 OF 2018)

JUDGMENT

1. In the late seventies, a pop song that filled the airwaves with the title, "Puppy Love", swept the teenage space globally. Oxford's dictionary defines "puppy love" as intense but relatively shallow romantic attachment, associated with adolescents. What happens when a 14-year old boy falls inlove with a 15-year old girl, takes her to his parents' home and keeps her for days as his supposed wife? Such was the situation which led to the Appellant, Samwel Koros, being charged in the Principal Magistrate's court at Kilgoris with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offence Act*.

2. The prosecution's case was that on diverse dates between the 2nd and 4th of April, 2013 at Tepengwet village in Angatia division in Transmara West District in Narok County, the recalled being left with a lady and her children at a different house. She was later taken back to the appellant's home but did not have sex on that day. On the third day in the morning the appellant was arrested; and later charged.

   Initials used to protect her identity

3. Although in his defence the appellant stated that he was arrested without cause, the storyline from the defence witnesses' was that MC went to the appellant's home, and refused to leave. Whatever the version, the bottom line is that the appellant and MC shared a room, mattress,blanket and more for at least three days; and a lot happened behind the closed door.

4. The appellant was tried, convicted and sentenced to serve 20 -years imprisonment by the magistrate's court. Being dissatisfied with the decision of the trial court, he appealed to the High Court at Kisii in Kisii High Court Criminal Appeal No. 43 of 2019 on both conviction and sentence. The same was dismissed in its entirety.

5. The Appellant, still being dissatisfied with the Superior Court's decision, preferred the present appeal, initially on both conviction and sentence, but at the hearing, he abandoned the appeal on conviction, and urged us to consider only his appeal on sentence. The relevant grounds of appeal are that the trial court erred in not sentencing him as a minor; and that the mandatory custodial sentence was unconstitutional.

6. Our duty as a second appellate court, under section 361 of the *Criminal Procedure Code* limits us to addressing matters of law only, and not to delve into matters of fact which have been dealt with by the trial court; and subsequently re- evaluated by the first appellate court. This duty has been reiterated in the case of *David Njoroge Macharia v Republic* (2011) eKLR thus:

> " ...That being so, only matters of law fall for consideration - see section 361 of the *Criminal Procedure Code*. For purposes of this section, severity of sentence is defined as a matter of fact... As this Court has stated many times before, it will not normally interfere with concurrent finding of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings"

7. As correctly pointed out by Ms. Kitoto on behalf of the DPP, at no point did the appellant specifically raise the issue of his age; and indeed it was not a ground of appeal before the High Court. However, at the trial upon cross examination of MC, who testified as PW,1 she responded to a question as follows:

> " You are younger than me, may be you love me."

8. The appellant explains in his submissions that at the time of the incident, he was a minor, but being a lay person, he did not expressly provide his age to the court as he did not even know that such information would earn him a place in the law. To be fair to the learned judge, the issue that the appellant was a minor was never brought to her attention.

9. The other limb of this appeal urges us to interfere with the mandatory minimum sentence which was meted out on the strength of a legislative enactment as there is an emerging jurisprudence regarding the constitutionality of minimum and maximum sentences vis a vis the independence of the Court in exercise of its discretion while sentencing. On sentence, the learned Judge had this to say

> " The trial magistrate in sentencing took into consideration the provisions of Section 8(3) of the *Act* which 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. This is the minimum sentence allowable by the law upon conviction for an offence of defilement under section 8 (3) of the *Act*. Therefore, no appeal against sentence is possible here"

10. The appellant urges us to find that such sentences have since been declared unconstitutional, if meted as the only available options. Indeed, this was expressed in *Julius Kitsao Manyeso v R*; Malindi Cr. Appeal No.12 of 2021 at paragraph 21 with the observation that;

> flood of decisions departing from fidelity to the minimum and mandatory sentences in sexual offences. Subsequently the jurisprudence impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* has found expression in cases such as *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and *Edwin Wachira & Others v Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was). The rationale behind this is pegged to the act that a minimum mandatory sentence takes away the jurisdiction conferred on judicial officers to exercise their discretion when meting out sentence.

11. We have considered the circumstances which led to the appellant being sent to prison, in his pursuit of what was obviously "puppy love." While we cannot blame the two courts for not going the extra mile in inquiring about the appellant's "puppy-hood" status, what piqued our attention was his obvious youthful look. We, also, pay due regard to the transformation and rehabilitation the appellant eloquently speaks of after more than six years in adult prison : he says he has learnt his lesson; that he must never indulgein romantic liasons with girls under 18 years, something he wishes to spread as a gospel among the young men (vijana); that he is reformed, rehabilitated and socially re-adapted hence what seemed to be the primary justification of his sentence at the start of the sentence is not so after a lengthy period of 6 years into the service of the sentence.

12. The appellant has been incarcerated since 20/6/2018, and given the circumstances under which the offence took place, in our view, that is adequate punishment and the appeal on sentence succeeds. We thus set aside the 20 years sentence meted; and reduce it to the term served. This means the appellant shall be set at liberty forthwith unless otherwise lawfully held.

DATED AND DELIVERED AT KISII THIS 13TH DAY OF JUNE, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.