Korir v Republic (Criminal Appeal 51A of 2017)
[2024] KECA 810 (KLR) (12 July 2024) (Judgment)

Neutral citation: [2024] KECA 810 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 51A OF 2017

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JULY 12, 2024

BETWEEN

WELDON KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Nakuru, (L.N. Mutende, J.) dated 25th March 2019 in HCCRA No. 92 of 2017)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No. 3 of 2006.

2. The particulars of the offence were that on 15th January 2017 at Molo Sub-county within Nakuru County, the appellant intentionally caused his penis to penetrate the vagina of MJ a girl, aged 15 years.

3. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

4. The appellant denied the charges and thereafter stood trial. At the end of the trial, the appellant was found guilty of the offence. He was convicted and sentenced to 20 years imprisonment. Being aggrieved, the appellant appealed to the High Court, but the appeal was dismissed.

5. The prosecution's case was that; the complainant, who testified as PW5, left her home on the material date to go to the salon, but she never returned. She was later seen with the appellant. The complainant told the Court that for the two weeks that she and the appellant had been together, they stayed at his grandmother's home, and engaged in consensual sex. The appellant was then arrested on 28th January 2017.

6. PW4 was the doctor who examined the complainant. He stated that the complainant had bruises on both the labia and minora, and that her hymen was missing. He concluded that there had been penetration into the genital organs of the complainant.

7. When put to his defence, the appellant told the Court that he intended to marry the complainant. The mother of the complainant had also been desirous to take dowry, but she changed her mind after they disagreed, leading to the case against him. The appellant also told the Court that although he was arrested on a Saturday, he was arraigned in Court on a Tuesday contrary to Article 49(1)(f)(i)(ii) & (g) of the *Constitution*. According to the appellant, his continued detention was unlawful, and a gross violation of his rights.

8. The learned Judge held that although the appellant should have been arraigned in Court on Monday, and that he was not given an explanation for the continued detention on the day he should have been produced in Court, the breach did not entitle the appellant to an acquittal. While citing the case of *Julius Kamau Mbugua v Republic*, Criminal Appeal No. 50 of 2008, the learned Judge held that if the appellant suffered prejudice following the contravention of the law, this was a civil wrong, which could be compensated by damages.

9. The learned Judge held that since the complainant had been subjected to age assessment, and her age was determined to be 15 years old, she did not fall under the category of "a child of tender years" as provided for under Section 19 of the *Oaths and Statutory Declarations Act*, and as was defined in the case of *Kibageny Arap Korir v Republic* [1959] EA 82.

    Therefore, it was not necessary to conduct voire dire on the complainant as she was above the age of 14 years.

10. The learned Judge also held that the complainant was a child for all purposes under Section 2 of the *Children Act*. Therefore, she had no capacity to consent to the act of defilement.

11. The learned Judge held that the appellant's defence did not suggest that he was deceived by the complainant such that he believed she was an adult pursuant to Section 8(5) of the *Sexual Offences Act*. The appellant knew that the complainant was a pupil, and he had seen her severally in her school uniform. Therefore, the defence contemplated in law was not available to the appellant.

12. The learned Judge held that the sentence imposed having been the minimum prescribed sentence, there was no reason to interfere with it. Consequently, the appellant's conviction and sentence were upheld.

13. Being dissatisfied with the judgment, the appellant lodged the appeal herein in which he raised the following grounds:

    a. The learned Judge erred by failing to appreciate that the complainant's age was not ascertained.

    b. The learned Judge erred in failing to re-evaluate the evidence.

    c. The learned Judge erred in declining to attach consideration to the appellant's defence.

14. When the appeal came up for hearing on 12th March 2024, Ms. Ekesa, learned counsel holding brief for Mr. Konosi was present for the appellant while Mr. Omutelema, Senior Assistant Director of Public Prosecutions was present for the respondent. The parties relied on their respective written submissions which they briefly highlighted.

15. Ms. Ekesa informed us that Mr. Konosi no longer represented the appellant. The appellant thus represented himself. The appellant abandoned his appeal on conviction and urged us to review the

mandatory sentence meted against him in light of the current jurisprudence on the mandatory nature of sentences.

16. The appellant submitted that at the time of the offence, he was only 19 years old and did not know that taking the complainant as a wife was an offence. He was young then, but having been in jail, he has learned his lesson and other things that he can educate others about. He abandoned his appeal on conviction and urged the Court to reduce his sentence from 20 years.

17. In his written submissions, the appellant faulted the trial court for failing to take into consideration the circumstances of the case and his mitigation, in passing the sentence. The Court sentenced him to the minimum sentence provided for under the Act. While relying on the case of *Thomas Mwambu Wenyi v Republic* [2017] eKLR, the appellant submitted that in light of the *Judiciary Sentencing Policy Guidelines*, the act herein was consensual, hence a lesser sentence would be appropriate, and that the sentence of imprisonment for 20 years does not serve the objectives listed under paragraph 4:1 of the guidelines.

18. The appellant also urged us to consider the time he had spent in custody while his trial was ongoing. To buttress this submission, he relied on the *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR case and Section 333(2) of the *Criminal Procedure Code*.

19. Opposing the appeal against sentence, Mr. Omutelema submitted that the sentence of imprisonment for 20 years is the minimum sentence provided for the offence for which the appellant was convicted. Further, the appellant had purported to marry a child who could not consent to such an arrangement.

20. The respondent urged us not to interfere with the findings of the two Courts below, and to uphold both the conviction and the sentence.

21. This is a second appeal. Section 361(1) of the *Criminal Procedure Code* enjoins us to consider only questions of law. In the case of *Karani v Republic* [2010] 1 KLR 73 the court stated thus:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

22. We have carefully considered the record of appeal, the submissions by both parties, the authorities cited, and the law. As the appellant abandoned his appeal on conviction, the issue for determination is whether the mandatory minimum sentence meted out against the appellant was lawful.

23. As this appeal is limited to sentence, Section 8(3) of the *Sexual Offences Act* 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."

24. It is trite that a sentence is passed at the discretion of the trial court. In this instance, the trial court had the discretion to sentence the appellant to any term as long as it was not below 20 years, as that was the understanding of the law at the material time. The Court sentenced the appellant to 20 years imprisonment. The High Court upheld this sentence.

25. In the case of *Christopher Ochieng v Republic* [2018] eKLR the Court stated thus:

> " In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. .....
>
> Needless to say, pursuant to the Supreme Court's decision in *Francis Karioko Muruatetu & another – v- Republic* (*supra*), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court."

26. We are alive to the fact that the Supreme Court clarified that the case of *Francis Karioko Muruatetu & another v Republic* [2017] eKLR only applied to murder trials. Be that as it may, in our view, what renders a sentence unconstitutional is the fact that the prescribed mandatory sentence completely precludes the court from exercising any discretion, regardless of whether or not the circumstances so require.

27. In the light of the current jurisprudence on sentencing, and after giving due consideration to the circumstances in which the offence was committed, the mitigating factors, especially the fact that the appellant was 19 years old at the time when the offence was committed, and the *Sentencing Policy Guidelines, 2023* we reduce the appellant's sentence from 20 years to a sentence of 15 years.

28. As the appellant was in custody during the trial, we order, pursuant to Section 333(2) of the *Criminal Procedure Code* that the sentence shall be computed from 31st January 2017, which is the date when the appellant took plea.

Orders accordingly.

DELIVERED AND DATED AT NAKURU ON THIS 12TH DAY OF JULY, 2024.

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F. OCHIENG

JUDGE OF APPEAL

.....

G. W. NGENYE-MACHARIA

JUDGE OF APPEAL

.....

W. KORIR

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR