Chelanga v Republic (Criminal Appeal 63 of 2019)
[2023] KECA 494 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 494 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 63 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MAY 12, 2023

BETWEEN

MONICA JEMUTAI CHELANGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the judgment of the High Court of Kenya at Nakuru, (Omondi, J. as she then was), dated 20th September 2018 IN HC. CRA NO. 1 OF 2016)

JUDGMENT

1. The appeal before us is a second appeal in which Monica Jemutai Chelanga (the appellant herein), had been initially charged at the Senior Principal Magistrate's Court in Iten 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 between the months of June 2015 and December 20, 2015 at (particulars withheld), she unlawfully and intentionally caused her vagina to be penetrated by the penis of TKK, a boy aged 15 years old.

3. The appellant was convicted on her own plea of guilty and sentenced to serve 20 years' imprisonment by Hon NC Adalo (the then Resident Magistrate).

4. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal on the grounds *inter alia* that she did not understand the language in which the charges were read to her and *vide* a judgment delivered on September 20, 2018, Omondi, J (as she then was), found the appeal to be lacking in merit and dismissed the same in its entirety, upheld the conviction and affirmed the sentence.

5. Unrelenting, the appellant has now filed this appeal *vide* a Memorandum of Appeal filed in Court on October 26, 2019, which is barely legible contending *inter alia* that she was a first offender, that she had

been rehabilitated during the period she had served in prison and that her health has been deteriorating during the period that she has been incarcerated.

6. When the matter came up for plenary hearing on February 13, 2023, the appellant who was in person and while relying on her undated written submissions abandoned her appeal on conviction and submitted that she had admitted that she had made a mistake and that she was a first offender who pleaded guilty at the trial and that since then, she had learnt to take the responsibility of her actions and pleaded for leniency vowing to be an ambassador, a mentor and role model to other people in the society. She further submitted that she had spent 7 years in prison and urged this Court to grant her a second chance.

7. Ms Ayuma learned counsel for the State on the other hand while opposing appeal submitted that the appellant having been convicted on her own plea of guilty, she could only appeal on legality of sentence and that the sentence imposed on the appellant was lawful pursuant to the provisions of Section 8(1)(3) of the *Sexual Offences Act* No 3 of 2006 as it was the minimum sentence prescribed by the Act.

8. We have considered the record, the rival oral and written submissions, the authorities cited and the law.

9. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code*, we are mandated to consider only matters of law. In *Kados vs Republic* Nyeri Cr Appeal No 149 of 2006 (UR) this Court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

In *David Njoroge Macharia vs Republic* [2011] eKLR it was stated that under Section 361 of the *Criminal Procedure Code*:

> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings 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. (See also *Chemagong vs Republic* [1984] KLR 213)."

10. The facts in this appeal are quite straightforward. It is indeed not in dispute that the appellant was convicted on her own plea of guilty. Pursuant to the provisions of Section 348 of the *Criminal Procedure Code*, the appellant's appeal can only be as regards the extent or otherwise legality of sentence. Indeed, when the appeal came before us for plenary hearing on February 13, 2023, the appellant abandoned her appeal on conviction.

11. We have carefully perused the record and it is not in dispute that the appellant was handed a sentence of 20 years' imprisonment which is the minimum sentence provided for under Section 8(1)(3) of the *Sexual Offences Act* that she was charged with.

12. The jurisprudence that has been emerging from this Court recently is that the imposition of minimum sentences under Section 8 of the *Sexual Offences Act* interferes/fetters the discretion of the Court in sentencing and imposing an alternative sentencing in an appropriate case and is to a large extent an affront on the doctrine of separation of powers.

13. This Court in *Dismas Wafula Kilwake vs Republic* [2019] eKLR, while considering minimum sentences provided for under Section 8 of the *Sexual Offences Act* stated thus:

> " Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the Court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing." (emphasis ours).

Again in *Korir vs Republic* (Criminal Appeal 100 of 2019) [2021] KECA 305 (KLR), this Court stated as follows:

> " The appellant has contended that he was a first offender and a young man whose life is greatly affected by the imprisonment and that while in prison he had taken full advantage of the rehabilitative programmes offered in the correctional facility. It is also not lost on this Court that the appellant has been in custody since February 2015, a period of slightly over 6 years to date. We also note that the appellant had serious intentions of marrying G.C, a girl aged 15 years. However, the law does not allow for the marriage of girls below the age of 18 years. In our considered opinion and in view of the above, these factors coupled with the facts in this case mitigate for leniency. The appellant had the intention of marrying PW1. He took her to his grandparents' place and left her to stay there. In applying the Muruatetu decision (supra) that removed the bar to discretion posed by minimum sentences, and considering that the appellant has been in custody for slightly over 6 years, we consider the period that he has served to be sufficient sentence in the circumstances of this case."

14. It is trite law that imposition of sentence is at the discretion of the trial court which discretion must obviously be exercised judiciously and depending on the facts and circumstances of each case. We have considered the circumstances under which this offence was committed and the same appear to be aggravated as the offence is said to have been committed on diverse dates between the months of June 2015 to December 2015. Be that as it may, we have considered the appellant's mitigation before the trial court where the appellant stated thus:

> "I pray for leniency, when I worked for a club at Kapsowar, he used to come and we agreed when he seduced me. I did not know him much that he was in school. He could also drink at the club. I am sorry."

15. We also take note of the fact that the appellant pleaded guilty of the offence thus saving the court of precious judicial time and even when she appeared before us for plenary hearing on February 13, 2023{{^}}, she appeared remorseful and took responsibility for her actions and admitted that she had indeed made a mistake. We also take note of the fact that she was a fairly young woman at the time of the commission of the offence aged 21 years.

16. For these reasons and taking into consideration the fact that the appellant has already served 7 years in prison, we are inclined to exercise our discretion in her favour to reduce the sentence.

17. Accordingly, we set aside the sentence of 20 years' imprisonment meted out on the appellant by the trial court and substitute the same with a sentence of 15 years' imprisonment to run from the date of sentencing in the trial court.

18. The appellant's appeal only succeeds to that extent. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF MAY, 2023 .

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR