Chirchir v Republic (Criminal Appeal 102 of 2019)
[2023] KECA 1431 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1431 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 102 OF 2019

F SICHALE, LA ACHODE & WK KORIR, JJA

NOVEMBER 24, 2023

BETWEEN

ROBERT KIBET CHIRCHIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High of Court at Eldoret (Kimaru. J) delivered on 18th October 2018 in HCCRA No.25 of 2016)

JUDGMENT

1. This is the second appeal of Robert Kibet Chirchir (the appellant) against the judgment of Kimaru J (as he then was) delivered on 18th October 2018 at the High Court in Eldoret. The appellant was charged in the Magistrate's court at Kapsabet with the offence of defilement contrary to section 8 (1) as read with Section 8(3) of the *Sexual Offences Act*. He was convicted and sentenced as charged.

2. The particulars of the offence were that on the 5th of April 2014 in Nandi County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JC (complainant), a child aged fifteen years.

3. In a bid to prove its case, the prosecution called 5 witnesses. At the close of the prosecution's case, the appellant was placed on his defence. He opted to give unsworn evidence and call no witnesses.

4. It was the prosecution's case that on the material day, the appellant who was the complaint's neighbour, went to the complainant's house, and invited her to his house to tutor her in mathematics. The complainant accepted his invitation. At the appellant's house, the appellant told the complainant that he did not want to revise mathematics. Instead the appellant held the complainant by force, pushed her to the seat, warned her not to scream, and defiled her.

5. The complainant did not disclose the incident to anyone immediately after it happened. She disclosed it several months later, after her father AK (PW2) found out that she was pregnant and demanded to know who had impregnated her. She gave birth on the 5th January 2015. DNA test conducted in Kisumu sometime in April 2015 confirmed that the appellant was the father of the child. The complainant's birth certificate produced in court confirmed her age at the time of the incident to be 15 years.

6. Put on his defence the appellant testified that he and PW1 were lovers. They had a child together and were living together as husband and wife with the knowledge of their parents'. That his parents assisted PW1's parents in paying her school fees. However, he did not know that she was a minor and the accusations of defilement arose out of a disagreement with PW2 over a boundary dispute. In conclusion he stated that he was willing to take care of his child.

7. Upon considering the evidence, the learned magistrate, Hon Adhiambo (SRM), found the appellant guilty as charged. Following his mitigation, she sentenced him to 20 years imprisonment, holding that the hands of the court were tied by the minimum mandatory sentence provided under section 8(3) of the *Sexual Offences Act*.

8. Aggrieved and dissatisfied by the above decision the appellant filed an appeal to the High court against both conviction and sentence.

9. The learned judge considered his appeal and affirmed the decision of the trial court on both conviction and sentence. He dismissed the appeal in its entirety.

10. Undeterred, the appellant filed the instant appeal on sentence. He filed the main grounds of appeal and later filed supplementary grounds of appeal. Collectively in the said grounds, he says as follows:

> " a) That I am a first offender and seek for leniency for the sentence was too harsh.
>
> b) That I pleaded guilty at the trial, and I was ready to uphold my parental responsibilities.
>
> c) That the offence was not deliberate, and I am remorseful, repentant reformed and rehabilitated for I have learned a lot in incarceration.
>
> d) That I am the only son in the family, first born and depended upon by the whole family.
>
> e) That may this honourable court invoke the provisions under section 39 (2) of the SOA and admit me on probation."

11. The appellant was in person during the hearing of the appeal. He filed undated written submissions. The State was represented by Prosecution Counsel Ms. Asiyo and Mr. Mugun. They filed written submissions dated 11th July 2023 and supplementary written submissions dated 24th July 2023.

12. In his submissions the appellant urged that he was a first offender and was 22 years old at the time of the offence. That he was innocent and was under their Kipsigis traditional notion that once one had passed through the initiation period, he was ready to marry any girl who portrayed mature behaviour.

13. He contended that he pleaded guilty to the charges because he was ready to take up his responsibility as a father and as a husband. However, he was denied the opportunity to execute those mandates even after the DNA test proved that he was the biological father of his daughter. He urged that his daughter

was denied her rights under article 53 of the *Constitution*. He prayed to be placed on probation or be acquitted for the remaining part of the sentence, to be able to execute his fatherly duty to his daughter.

14. He submitted that during his term in prison he has learnt so much in the social, economic, religious, and political spheres. He has trained in building and construction and has acquired Trade Test Grade iii. That he is currently training in Tailoring. He has also acquired a diploma in Theology with AFCM International Bible College, and has also studied with Prisons Fellowship International, and acquired a Certificate in Prisoners Journey. He is remorseful and rehabilitated and is fit to rejoin society.

15. He further urged that he is the first born in their family of a single parent. The whole family looked upon him for prosperity in their future life. He urged this Court to consider his mitigation and invoke the provisions of section 39 (2) of the *SOA* and admit him on probation. That he has spent more than a third of his sentence in prison in accordance with the requirement of the section.

16. In rebuttal, the respondent in its submission dated 11th July 2023 stated that the appellant's defence does not qualify under section 8(5) of the *SOA* as a statutory defence. That in his defence the appellant did not indicate that the complainant deceived him into believing that she was an adult, neither did he give evidence of any steps that he took to establish the complainant's age.

17. On the legality of the sentence, it was submitted that the finding of the supreme court in the *locus classicus* case of *Francis Kariokor Muruatetu & Another v Republic* (2017) eKLR does not apply to sexual offences as was clarified by the supreme court in *Muruatetu 2 (Francis Karioko Muruatetu & Another v Republic, Katiba Institute & 5 Others (Amicus Curiae)* (2021) eKLR. Further, that this Court has taken divergent approaches since the Muruatetu 2, on the constitutionality or otherwise of the minimum mandatory sentences provided for in the *Sexual Offences Act*.

18. That notwithstanding, they contended that the courts have remained steadfast that sentencing is discretionary, and they will not interfere with the finding of a trial court unless there is evidence of impropriety in the exercise of such discretion. They relied on the decision in Eldoret Criminal Appeal No. 385 of 2019, *Geofrey Kipchumba v R* (2023) Unreported that each case must be considered on its own merits and that there is no blanket application to the effect that the statutorily provided sentences under the *Sexual Offences Act* are unconstitutional. They urged that the sentence meted by the trial court and affirmed by the High Court was commensurate to the offence committed.

19. The respondent reiterated that the 20 years' imprisonment sentence was based upon consideration of the evidence presented by the prosecution and the aggravating and mitigating facts of the case. In their view the appellant was properly sentenced.

20. It was their further submissions that this is not a case of teenage love gone awry, akin to the infamous "Romeo and Juliet story" since the appellant was a married man and not an innocent and naïve boy that he now falsely portrays himself to be. Further, that article 53 (1) (d) of the *Constitution* mandates that a child be protected from harmful cultural practices. That owing to the illegal arrangement following the defilement, the victim may have been left with no option but to survive and as such ended up developing feelings for her assailant.

21. They urged that there is no legal framework for Alternative Justice System (AJS) which is intended to supplement and not to supplant the existing legal framework as can be discerned from article 159 (3) of *the Constitution*. Further, the framework allowing reconciliation in section 204 and 176 of the *Criminal Procedure Code*. Section 204 of the *Criminal Procedure Code* can only be properly invoked before the final order, which in sentence, is pronounced. While section 176 of the *Criminal Procedure Code* can be invoked only when the offence is a common assault, or an offence of a personal or private nature that does not amount to a felony and is not aggravated in degree.

22. We have meticulously considered the record of appeal, written submissions, and the law. This being the second appeal, our role is as held in this Court's decision in *David Njoroge Macharia v Republic* [2011] eKLR thus:

> " That being so only matters of law for consideration - see section 361 of *Criminal Procedure Code*. As this court has stated many times before, it 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 *Chemagong v R* (1984) KLR 611."

23. As stated earlier the appellant was charged under section 8 (1) as read with 8 (3) of the *Sexual Offences Act*. He was convicted as charged and sentenced. The said section provides:

> 8 (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> 8 (3) 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. In their written submissions, both parties have extensively submitted to support their respective views on the Alternative Justice System. We appreciate this effort. However, our role as the second appellate court does not include delving into matters that were not determined before the superior court. As such, the only issue for our consideration is whether the appellant's sentence was excessive and harsh or unconstitutional.

25. The appellant's submissions revolve around mitigation. He submits that he is a first offender; the sole provider; is remorseful for his action; and vows not to repeat this offence. He further submits that he is willing to take responsibility for his child, who needs a complete family and urges that the sentence was too harsh given the circumstances.

26. On the other hand, the State applauds the appellant for reconciling with the complainant, but is adamant that the appellant should complete his debt to the state too. That the sentence meted upon the appellant is lawful as it was imposed after his mitigation was considered, and it is commensurate to the offence he committed.

27. During sentencing, this is what the trial court said:

> " I have considered the nature and gravity of the offence which the accused committed, his mitigation the fact that he is a first offender. The accused has abused the trust placed upon him by the society which expected him to be a law- abiding citizen and to protect children. A person with the character of the accused does not deserve to be released to the society until he reforms. I have considered the age of the complainant at the time she was defiled. I have read the provisions of section 8 (1) as read together with section 8(3) of the *Sexual Offences Act* no. 3 of 2006. The offence which the accused committed is prevalent and I find that he deserves a deterrent sentence. I hereby sentence the accused to serve 20 years imprisonment. The hands of the court are tied as the penalty section that is section 8 (3) of the sexual offences Act no. 3 of 2006 gives the court the minimum sentence to be meted on the accused." (emphasis added)

28. This position was affirmed by the superior court.

29. From the record the magistrate's decision on sentence was constrained by the provision of the law that provides for minimum mandatory sentence. This is evident in her last remark where she stated that "the hands of the court are tied." This blanket sentencing means that the court failed to individualize the circumstances of the offence and the offender. The discretion of the court was thus, fettered and such intrusion is unconstitutional.

30. The Supreme Court of India in *Alister Antony Pariera v State of Mahatashtra* (2012) 2 SCC 648 stated as follows regarding the objective of sentencing

> " 70. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."

31. There is an emerging jurisprudence both locally and internationally that by imposing mandatory sentences the legislature is infringing on the purview of the judiciary. We echo this position, and are guided by the comparative jurisprudence in *S v Tom* 1990 (2) SA 802 (A) at 806 (h) -807(b) where the South Africa Court of Appeal held that:

> " The infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

32. Further, we are of the view that mandatory sentencing infringes on the appellant's right to fair trial as stipulated in article 25(c) of the *Constitution* and right to dignity as provided by article 28 of the *Constitution* which should not be limited. This position was well articulated in Muruatetu 1 as follows:

> " 47. Indeed, the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in article 10 of the *Universal Declaration of Human Rights*, and in the same vein article 25(c) of the *Constitution* elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
>
> 48. Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform

to the tenets of fair trial that accrue to accused persons under articles 25 of the *Constitution*, an absolute right.

50. We consider Reyes and Woodson persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. Article 28 of the *Constitution* provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a Judge discretion to take into consideration the convicts' mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

53. If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict."

33. We are further guided by this Court's decision in *Momanyi v Republic* (Criminal Appeal 21 of 2018) [2023] KECA 1254 (KLR) (6 October 2023), where it pronounced itself thus:

> "The state concedes that our emerging jurisprudence is that the statutorily mandated minimum sentences in the *Sexual Offences Act* are unconstitutional for the reasons that they do not permit a trial court to consider the individual circumstances of a convict when sentencing. This was held so in a constitutional petition before the High Court in *Mangi & 5 Others v Director of Public Prosecutions & Another* (Petition E017 of 2021) (2022) KEHC 1318 (KLR). That the decision has been cited with approval by this Court in *Joshua Gichuki Mwangi v Republic* (2022) eKLR. The learned state counsel is, thus, right to make this concession. To the extent that the trial court felt hamstrung by the prescribed minimum and so expressed itself, we hereby set aside that sentence."

34. In the case before us, it was stated that the appellant was a first offender, in his mitigation he stated that:

> "The complainant abandoned the child at our home after the case was finalized. My mother was involved in a road traffic accident after that, so I heard that it is a neighbour who is taking care of the child. I want the court to assist me so that I can go back and take care of Brenda Chepkorir. That is all"

35. We have considered the rival arguments of the parties herein, the unique circumstances of this case, the appellant's mitigation in the trial court and on appeal and his age at the time of commission of the offence. We have also considered that the total period of his incarceration from the time of his arrest to date is a few months shy of ten (10) years. We are of the considered view that our intervention in the sentence is called for. Consequently, we allow this appeal on sentence only and we review the sentence to the time served. The appellant is therefore, set at liberty forthwith unless otherwise lawfully held.

Orders accordingly.

DATED AND DELIVERED IN ELDORET THIS 24TH DAY OF NOVEMBER 2023.

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR