Kimengich v Republic (Criminal Appeal 46 of 2019)
[2023] KECA 1404 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1404 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 46 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

KENNEDY KIMENGICH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court in Kenya at Bungoma (R.N. Sitati, J) Dated 26th February, 2019 in HCCRA 154 OF 2015)

JUDGMENT

1. The Appellant, Kennedy Kimengich was charged in the Principal Magistrate's Court Sirisia Criminal Case No 416 of 2014, with the offence of defilement c/s 8(1) as read with 8(4) of the *Sexual Offences Act* No. 3 of 2006. The case against him was that on diverse dates between 2nd day of February, 2014 and 26th day of April, 2014 at Makutano Location within Tranzoia County, he intentionally and unlawfully caused penetration by inserting his male genital organ, namely, penis into the female genital organ namely vagina of NN[1] a girl child aged 17 years. He faced an alternative charge of committing an indecent act with a child c/s 11(1) of the same statute.

2. He denied the charges and was subsequently tried. The trial court, upon considering the evidence adduced by both the prosecution as well as the defence, found that the charge of defilement had been proved to the required standard. The appellant was thus convicted and sentenced to serve 15 years imprisonment.

3. He felt aggrieved by the trial court's judgment, and filed Bungoma HCCRA 154 of 2015 stating that the court failed to give proper consideration to the evidence, did not consider his defence; that there was no evidence to link him to the offence and the trial court failed to consider that the doctor's evidence proved his innocence.

4. His appeal to the High Court (Sitati, J.) was dismissed on grounds that the offence of defilement had been proved to the required standard; the evidence was neither contradictory nor lacking in weight; and that the trial magistrate had carefully [1] Initials used to protect the identity of the minor considered his alibi defence and found that it was an afterthought which did not shake the prosecution's case in any respect; and that there was no miscarriage of justice in the sentence that was meted out.

5. The Appellant challenges the outcome of the High Court's decision, hence this second appeal, which is basically on sentence only. It is his contention that the mandatory minimum sentence as provided for in the *Sexual Offences Act* is unconstitutional as it denies the trial court the discretion to sentence an accused person based on the circumstances of the case; that the sentence of 15 years imprisonment imposed against him by the trial court, and upheld by the 1st appellate court be reviewed to a less severe sentence.

6. The appellant urged us to take note that at the time of the offence, he and the complainant regarded each other as boyfriend and girlfriend; and he had even introduced her to his mother and his aunt. He also points out that he was then aged 19 years old and the victim 17 years, and that the two courts ought to have adopted the 'Romeo and Juliet' approach.

7. In opposing the appeal, the respondent argues that the age difference placed the appellant as an adult, with the responsibility of protecting the victim, and being a young adult cannot therefore sanitize his actions based on the principles of "Romeo and Juliet."

8. Further, that the *Sexual Offences Act* prescribes the sentence based on the age of the victim of the sexual assault, and in this instance there existed is an aggravating factor as NN was still in school; and impregnating her, compromised her right to education; making her a parent at a tender age. We are urged to find that due to these factors, the minimum sentence of 15 years was commensurate with the appellant's action.

9. Needless to say, the complainant's age kept oscillating between 17, then 16, then 15 plus 7 months, before eventually resting at 15 years, but whatever the age, she was under 18 years, and incapable of legal consent. Of course later on just before sentence, an age assessment report from Malakisi Health Centre dated 29/4/2014 presented to the court, gave the appellant's age as 19 years old at the time of the incident. While acknowledging this, the appellant submits that they were more or less in the same age range, and in an emotionally high octane relationship which would have required the trial court, and the first appellate court to apply the principle of "Romeo and Juliet.".

10. For the uninitiated in Shakespearean literature, Romeo and Juliet were characters in William Shakespeare's play by the same title, written around 1594–96 depicting young uninhibited love which defied reason and rhyme. That principle simply recognizes that there does exist a category of teenagers under 18 years who are too young to fall in love (but nonetheless do); and too young to know the consequences of adopting adult content behavior (which they invariably adopt and sample regularly). Unfortunately for him, 19 under the law, is past the minority age and is considered an adult – even if he has only just left the cradle!)

11. From the foregoing, what emerges for determination is whether we should interfere with the 15 years sentence that was imposed on the appellant. This being a second appeal we are limited under Section 361 of the Criminal Procedure Code to considering matters of law only, bearing in mind that severity of sentence is a matter of fact, and is not open to this Court for consideration unless a matter of law arises there from. See *Samuel Warui Karimi v Republic* [2016] eKLR.

12. The record reflects that the Appellant was given a chance to present his plea in mitigation, and he informed the trial court that he had two children who depended on him; had suffered in remand; and

he was also in ill health. The trial court took into account his age; called for a social inquiry report, and stated that the report was not favourable. Unfortunately, the record does not reflect what aspect of the appellant's makeup was not favourable; but in light of that, the trial magistrate stated:

> " The same is not favourable to the accused. That being the case, I sentence him in accordance with the relevant law. The accused is sentenced to serve a term of 15 years to be calculated from the date of plea which was 30/4/2014"

He was then sentenced to serve 15 years imprisonment under Section 8 (1) of the *Sexual Offences Act* as read with 8 (4); and which provides:

> " (4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

The first appellate court in dismissing the appellant's appeal did not make any reference to his mitigation but in considering whether the sentence imposed was appropriate, remarked that due to the age of the complainant, the only alternative would have been to sentence the appellant under section 8 (1) as read with 8 (3) 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."

13. Whatever the reason, it is demonstrable and reasonable to infer that that the discretion of the two courts below in considering the sentence that was commensurate with the circumstances of the appellant's case, was curtailed by the minimum mandatory sentence provided under Section 8(3) of the *Sexual Offences Act*.

14. We recognize that the emerging jurisprudence is that the statutorily mandated minimum sentences in the *Sexual Offences Act* are unconstitutional. For instance, in the case of *Momanyi v Republic* (Criminal Appeal 21 of 2018) [2023] KECA 1254 (KLR) (6 October 2023), this Court stated as follows:

> " ...The State concedes that our emerging jurisprudence is that the statutorily mandated minimum sentences in the *Sexual Offences Act* are unconstitutional for the reason that they do not permit a trial court to consider the individual circumstances of a convict when sentencing... The learned State counsel, is thus right to make this concession. To the extent that the trial court felt hamstrung by the prescribed minimum..."

15. Indeed, in appropriate cases the Court should freely exercise its discretion in sentencing including imposing the prescribed sentences where appropriate. See *Dismas Wafula Kilwake v Republic* [2019] eKLR). In meting out the sentence, as pointed out earlier, the trial court made reference to an unfavourable social inquiry report, which unfortunately does not form part of the record of appeal, nor are the contents disclosed in that observation; and even with that observation, it was the minimum mandatory sentence that was visited upon the appellant. It thus becomes apparent to us that the trial court did not exercise its discretion.

16. At the plenary hearing, the appellant expressed remorse; drawing to our attention that he has been in prison for 9 years and just has 5 months left to complete the term. In view of the foregoing, the trial court ought to have exercised its discretion in imposing a sentence other than the mandatory minimum. We are by no means downplaying the duty pointed out by the respondent that the appellant bears

the heavier burden because the complainant was a minor, and her consent was inconsequential. We, however, are alive to the sentencing objectives, which provide that the sentenced imposed should be one that rehabilitates even as it punishes and deters.

17. Consequently, we allow the appeal against sentence and set aside the sentence of imprisonment of 15 years and substitute thereto a term of 14 years' imprisonment which shall be computed from 30th April, 2014 and which translates to the time served.

DATED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF NOVEMBER, 2023.

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.