Susa v Republic (Criminal Appeal 193 of 2017)
[2023] KECA 1413 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1413 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 193 OF 2017

PO KIAGE, M NGUGI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

DANIEL AKWEZA SUSA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kakamega (J. Njagi, J.) dated 19th October, 2017 in HCCRA No. 179 of 2014)

JUDGMENT

1. The appellant, Daniel Akweza Susa, was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006 (SOA). The particulars of the charge were that on the 19th day of July 2013 in Budaywa sub-location, within Vihiga County, he intentionally and unlawfully caused his penis to penetrate the vagina of JMM, a girl aged 7½ years (minor).

2. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11(1) of the SOA.

3. The appellant pleaded not guilty to the charge and the matter proceeded to full trial with the prosecution calling 6 witnesses. Placed on his defence, the appellant gave sworn testimony denying the charges.

4. After evaluating the evidence tendered before court, the trial magistrate (J. K. Ng'arng'ar) found the appellant guilty as charged and sentenced him to life imprisonment as provided by law.

5. Aggrieved by the conviction and sentence, the appellant petitioned the High Court at Kakamega. On 19th October 2017, the learned judge (J. Njagi) delivered a judgment dismissing the appeal in its entirety.

6. Still aggrieved, the appellant preferred the instant appeal, initially raising 7 grounds. At the hearing of the appeal, however, he abandoned those grounds, choosing to address us on sentence only. The appellant beseeched us to commit him to a sentence that gives him hope that one day he will be released from prison.

7. We address the question of sentence only as regards its legality since, in a second appeal, our jurisdiction is circumscribed by Section 361(1) of the *Criminal Procedure Code* and confined to matters of law only, with severity of sentence statutorily stated to be a question of fact.

8. The appellant urged us to consider the sentence meted out and release him. While expressing remorse, he implored us to take into account the time he had served in jail and the fact that he was a first offender.

9. For the respondent, Mr. Okango, the learned Senior Principal Prosecution Counsel submitted that the sentence that was imposed should be upheld because the offence that was committed by the appellant was grave, going by the testimony of the clinical officer (PW5). The evidence of PW5 was to the effect that a detailed examination of the minor revealed that the hymen was torn and there was reddening. On the inner part of her vagina there was also a tear. PW5 found that there was forceful internal penetration of the minor. Counsel urged that if the Court felt it proper to interfere with the sentence, then a term sentence of 30 years' imprisonment should be imposed.

10. It is crystal clear from jurisprudence which is fast setting pace, starting with the Supreme Court decision in *Francis Karioko Muruatetu & Anor vs. Republic* [2017] eKLR, that sentencing is a judicial function which enables the courts to exercise discretion, and determine the appropriate sentence to impose.

11. Bearing in mind the said decision and the sequel thereto in which the Supreme Court gave certain directions, the High Court and this Court have pronounced themselves on the unconstitutionality of mandatory minimum sentences in the SOA in several cases including, *Maingi & 5 Others vs. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and *Joshua Gichuki vs. Republic*, Criminal Appeal No. 84 of 2015 (Unreported). In the circumstances, and in view of the Sentencing Policy Guidelines, we are inclined to interfere with the sentence imposed by the Principal Magistrate's Court and upheld by the High Court. We do so considering both the aggravating factors and the appellant's mitigation and the fact that the two courts below were bereft of the discretion to consider both the mandatory sentence prescribed by statute.

12. In the result, this appeal partly succeeds to the extent that, we set aside the life sentence and substitute therefor a term of twenty- five (25) years imprisonment to run from the date the appellant was first sentenced.

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

P.O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR