Wanzala v Republic (Criminal Appeal 10 of 2019)
[2023] KECA 1458 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1458 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 10 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

GRIVIN WANZALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J) delivered on 5th October, 2017 in HCCRA No. 112 of 2013)

JUDGMENT

1. The appellant, Grivin Wanzala, was charged before the Senior Principal Magistrate's Court at Webuye with the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars were that on 24th June, 2012 in Bungoma East District within Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JN, a child aged 14 years.

2. The trial court, upon considering the evidence adduced by the prosecution as well as defence witnesses, reached the conclusion that the charge of defilement had been proved beyond reasonable doubt. Consequently, the appellant was convicted and sentenced to 20 years imprisonment. His appeal to the High Court (Ali-Aroni, J.) was unsuccessful, hence this second appeal.

3. At the hearing of this appeal, the appellant abandoned his appeal against conviction, and instead opted to proceed with the appeal on sentence only.

4. In his written submissions, the appellant contended that the mandatory 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. He argued that the sentence of 20 years imprisonment

imposed against him by the trial court and upheld by the 1st appellate court was not commensurate with the circumstances of his case. He urged that the sentence be reviewed to a less severe sentence.

5. In reply, the respondent, who was represented by Ms. Mwaniki of the Office of the Director of Public Prosecutions (DPP), submitted that the law provides that any person found guilty under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, is liable upon conviction to imprisonment for a term of not less than 20 years. That an age assessment conducted on the complainant showed that she was approximately 15 years therefore falling under Section 8(3) of the *Sexual Offences Act*, and the sentence imposed was proper.

6. The respondent pointed out that the appellant stated in the trial court in his mitigation that he was born in 1992 and was supposedly 20 years old at the time of the commission of the offence, while at his first appeal, he informed the court that he was a minor by the time he was arrested but failed to provide any supporting evidence.

7. Having considered the record of appeal and the parties' respective submissions, the core issue for determination is whether the Court should interfere with the sentence that was imposed on the appellant.

8. This being a second appeal we are limited under Section 361 of the *Criminal Procedure Code* to considering matters of law only. Under that section, severity of sentence is a matter of fact and is not open to this Court for consideration unless a matter of law arises therefrom.

9. The Appellant was sentenced to serve 20 years imprisonment under Section 8 (3) of the *Sexual Offences Act*. The record of appeal shows that the appellant had an opportunity to offer his mitigating circumstances and that in sentencing the appellant to 20 years imprisonment the trial court indicated that it had considered the mitigation.

10. The first appellate court in dismissing the appellant's appeal did not make any reference to his mitigation nor did he consider whether the sentence imposed was appropriate.

11. The appellant's appeal was dismissed on 5th October, 2017, and there is reason to believe 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*.

12. The emerging jurisprudence is that the statutorily mandated minimum sentences in the *Sexual Offences Act* are unconstitutional. In *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. This was so held in a constitutional petition by the High Court in *Maingi & 5 others -vs- Director of Public Prosecutions & Another* (Petition E107 of 2021) [2022] KEHC 1318 (KLR). That decision has been cited with approval by this Court in *Joshua Gichuki Mwangi -vs- 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 himself, we hereby set aside that sentence."

13. In *Dismas Wafula Kilwake -vs- Republic* [2019] eKLR), this Court noted that in appropriate cases the Court should freely exercise its discretion in sentencing including imposing the prescribed sentences where appropriate.

14. While sentencing the appellant, the trial magistrate stated that she had considered the mitigation but nevertheless sentenced the appellant to the minimum mandatory sentence of 20 years' imprisonment. The trial magistrate did not provide any justification for this. It is apparent to us that the trial court did not exercise its discretion by considering the circumstances before it.

15. This was a case in which the complainant, a 14-year-old girl went with the appellant to his house and had sex with him for several hours, and later when the complainant's brother accosted them, the complainant who had alleged that she had been forced into sex by the appellant, took off with the appellant and went and slept with him again in his grandmother's house.

16. The circumstances show that this was a boy-girlfriend relationship. Although the appellant's age was not ascertained, it is evident that he was a young man whose hormones were playing havoc. The magistrate simply felt obligated to impose the minimum mandatory sentence. The learned Judge compounded the situation by failing to address nor consider the appropriateness and severity of the sentence.

17. In light of the circumstances in which the offence was committed, the trial court ought to have exercised its discretion in imposing a sentence other than the mandatory minimum. We appreciate that the appellant bears the heavier burden because the complainant was a minor and her consent was inconsequential. Nevertheless, the sentence imposed should have been one that rehabilitated the appellant by helping him to appreciate the serious consequences of what he had done without necessarily completely destroying his life.

18. For the above reasons, we allow the appeal against sentence and set aside the sentence of imprisonment of 20 years and substitute thereto a term of 10 years' imprisonment which shall be effective from 9th September, 2013 the date of his conviction.

Those shall be the orders of the Court.

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