**Odhiambo v Republic (Criminal Appeal 85 of 2016)**
**[2022] KECA 1082 (KLR) (7 October 2022) (Judgment)**

Neutral citation: [2022] KECA 1082 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT KISUMU**

**CRIMINAL APPEAL 85 OF 2016**

**PO KIAGE, M NGUGI & F TUIYOTT, JJA**

**OCTOBER 7, 2022**

**BETWEEN**

**KENNEDY ODHIAMBO ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(An appeal from the judgment of the High Court of Kenya at Migori (Majanja, J.) dated 11th December, 2014 in HCCRA No. 86 of 2014)***

## JUDGMENT

1. This appeal shines the spotlight once more on the obvious blind spots that mar and call into question the justice of certain aspects of the criminal justice system especially as regards the implementation of the *Sexual Offences Act* No. 4 of 2006. (SOA).

2. The appellant, Kennedy Odhiambo Okeyo alias Matiba, will this month have spent a long decade in custody. He was apprehended on 21st October 2012 and arraigned before the Senior Principal Magistrates' Court in Migori two days later on a charge of defilement contrary to Section 8(1)(4) of the SOA. The particulars of the offence were that between June and October of 2012, at Muhuru Bay Township within Migori county, he intentionally caused his penis to penetrate the vagina of EA, a juvenile girl aged 17 years.

3. He faced a second court of sexual exploitation of a child contrary to section 15 of the *Children Act*, 2001 in that at the same time and place cited in the first count, he cohabited with the said EA, a child under the age of 18 years.

4. The appellant denied both counts and a trial ensued in which the prosecution called some six witnesses in support of its case. The complaint, EA, was the first witness and her testimony as recorded is quite intriguing.

5. First, in what the learned Majanja, J. in his judgment on first appeal called an "unnecessary" exercise, the trial magistrate decided to conduct a voir dire examination of the complainant "because she appeared to be below 18 years old." This was a misapprehension of the law, as voir dire is required only when the proposed witness is a child of tender years so as to establish the competence of the witness' to testify intelligibly and to establish whether she understands the nature of an oath and the obligation to tell the truth. A child of tender years is, in the absence of special circumstances, one of an age or apparent age of 14 years and below. See Section 19 of the *Oaths and Statutory Declarations Act*, Cap 15, Laws of Kenya as interpreted in, among others *Kibageny Arap Kolil Vs. Republic* 1959 EA 92 and *Baya Vs. Republic* [2000] KLR 376.

6. During that *voir dire*, the complainant indicated that she was a class eight pupil at [Particulars Withheld] Primary School, and that she was 18 years old. The magistrate concluded that she was a competent witness to testify under oath.

6. In her ensuing testimony, the complainant stated that she was 17 years old and that she had been to the appellant's house in Muhuru area 'as his wife' She went on to state thus;

> " I had not alerted my parents that I had married myself off to the accused. I and accused had been lovers for about six months in the past. We used to sleep on the same bed together. We used to engage in sexual intercourse. I am now pregnant and expecting his child." (Our Emphasis)

7. When cross examined by the appellant, she stated that her father wanted her to proceed with her schooling first but was categorical that she was not being forced to engage in sex.

8. The complainant's class teacher NK (PW2) testified that the complainant's father came to report to him that she used to "sneak out at night during weekends." PW2 stated that when school was on, the complainant "used to operate from the accused's [appellants'] house." A search for her was conducted and later, according to the witness, "the love birds" were arrested.

9. Among those who effected the arrest was Otieno Barack Okoth (PW4) who was the chairman of the local motor bike association to which the appellant belonged. He testified that when he and others went to the appellant's house on receiving a report that the appellant was cohabiting with a pupil, they found the girl preparing tea. She confirmed and pointed out the accused as "her husband." The accused claimed the girl was "his wife." In cross examination he repeated that the girl confirmed she was cohabiting with the appellant "as husband and wife."

10. A medical examination of the complainant was done by a clinical officer at Muhuru Health Centre. She told him that she had "eloped with someone known to her," and the examination revealed that she was about 4 months pregnant.

11. The appellant was, on the basis of that evidence, placed on his defence. He gave sworn testimony denying the charge but the trial magistrate found the offence of defilement proved beyond reasonable doubt as the complainant proved to be 17 years old and "is thus incapable of consenting to sexual intercourse." The trial court convicted the appellant and proceeded to impose a sentence of 15 years imprisonment as a mandatory minimum but acquitted the appellant on the second charge.

12. Aggrieved by the conviction and sentence, the appellant appealed to the High Court at Migori. The appeal was heard by Majanja, J. who, by a judgment dated December 11, 2014 dismissed it and affirmed both conviction and sentence, noting that the latter was the minimum provided under the SOA.

13. Still aggrieved, the appellant preferred an appeal to this Court raising these four grounds of complainant in his self-crafted memorandum of appeal filed on January 16, 2020;

    1. That both the trial and first appellate courts failed to consider that the victim misled the appellant into believing that she was an adult.

    2. That both the trial and first appellate courts failed to observe that the sentence imposed was unconstitutional owing to its mandatory nature.

    3. That both the trial and first appellate courts failed to observe that the sentence imposed lacked legal basis.

    4. That both the trial and first appellate courts failed to observe that the sentence imposed was in breach of Article 50(2)(p) of *the Constitution*.

14. At the hearing of the appeal, however, the appellant did not urge those grounds, which he abandoned, choosing to address us on sentence only. It is telling, however, that in his written submissions, again self-crafted, the appellant first contended as follows;

> "It is my humble submission that the complainant deceived the appellant that she was an adult. She stated in her evidence that she did not inform her parents that she had been married by the accused (see pg 8 line 12). She confirmed her consent to the relationship. (see pg 9 line 2-3). It is my submission that the victim acted like an adult and her actions including consent to marriage was not consistent with that of a child."

15. We think, with respect, that from the totality of the record, that submission would not have been an idle one had the appellant not abandoned his challenge to conviction, and significantly, had the issue been raised properly before the trial court. We think that had the appellant had the advantage of legal representation, this is definitely a matter that would have been capable of being addressed frontally with the appellant being able to show the manner in which he was deceived, as belatedly contended, into reasonably believing that the complainant was over the age of 18. Such a scenario is a statutory defence contemplated by section 8(5) and (6) of the SOA. However, it bears repeating that a lay person may be ill-equipped to understand and address the nuanced elements of the said defence, hence the absolute necessity of legal representation in the absence of which it seems to us the potential for injustice is high, and intolerably so. It may indeed be time to critically examine the justice of suspects charged with offences attracting some of the highest penalties in our penal statutes undertaking their defences without legal representation because they cannot afford it.

16. Article 50(2) (j) of *the Constitution* facially makes the right to legal representation at State expense one that applies only "if substantial injustice would otherwise result," and it seems rather plain that the class of offences we are dealing with, and the potential penalties, many of them mandatory minimum sentences, do portend the substantial injustice contemplated by *the Constitution*.

17. Turning now to the single question of sentence, we address it only as regards its legality since, in a second appeal, our jurisdiction is circumscribed by Section 361 of the Criminal Procedure Code and confined to matters of law only, with severity of sentence statutorily stated to be a question of fact. We therefore proceed from the appellant's reliance on the pronouncement of the Supreme Court in the often-cited case of *Francis Karioko Muruatetu & Anor Vs. Republic* [2017] eKLR to the effect that sentencing is a judicial function which enables the courts to exercise discretion, on principle, in an individualized case-by-case basis with a view to imposing appropriate and just sentences.

18. Bearing in mind the said decision and the sequel thereto in which the Supreme Court gave certain directions, as well as subsequent decisions of both the High Court (for example *Philip Mueke Maingi & 5 Others Vs. Director of Public Prosecutions & Anorther* (petition No. E017 of 2021) [2022]keelc 296 (KLR) and *Edwin Wachira & 9 Others Vs. Republic* Mombasa Petition No's 97,88,90 and 57 of 2021 (Consolidated (Unreported)). and this Court in the issue of mandatory minimum sentences, and having in view the Sentencing Policy Guidelines, we are persuaded that in the circumstances of this case, as we have set them out earlier in this judgment, the mandatory minimum sentence of 15 years imposed on the appellant on the basis only, repeated by the learned Judge, that it was the minimum that the trial court could impose, calls for our interference. There is not a single aggravating factor disclosed while the totality of the evidence persuades leniency.

19. When we consider, further, the appellant's total time in custody as he was apparently unable to raise the Kshs.200,000 bail imposed by the trial court on 23rd October, 20212 or the Kshs.100,000 imposed on 29th January, 2013 following an application for review, we think that the justice of this case is best served by reducing the appellant's term sentence to the period already served.

20. In the result, the appeal is allowed on sentence and the appellant shall be set at liberty forthwith unless otherwise lawfully held.

**DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**