EWS v Republic (Criminal Appeal 314 of 2018)
[2019] KECA 674 (KLR) (6 June 2019) (Judgment)

Evans Wanjala Siibi v Republic [2019] eKLR

Neutral citation: [2019] KECA 674 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 314 OF 2018

MSA MAKHANDIA, PO KIAGE & JO ODEK, JJA

JUNE 6, 2019

BETWEEN

EWS ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma (Ali Aroni, J.) dated 9th June, 2013 in HC.CR.A. No. 68 of 2012)

Trial courts must be more vigilant to ensure that young persons in conflict with the law were accorded the full protection of the law

The appeal was against the conviction and sentence of the appellant to 20 years imprisonment for the offence of defilement. The appellant was a child at the time he allegedly committed the offence. The court found that the unfair consequences of a skewed application of the Sexual Offences Act predominantly against the male adolescent was apparent and it did not conduce the conceptions of justice and fairness. The court highlighted the safeguards which a child in conflict with the law was entitled to. The court noted that the appellant's trial took a year and that period did not satisfy the statutory requirement to have the matter determined without delay. The court also stated that trial courts must be more vigilant to ensure that young persons in conflict with the law were accorded the full protection afforded by the law.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms - children's rights – rights of children in conflict with the law - safeguards which children in conflict with the law were entitled to - whether the period of a year to determine a case involving a child in conflict with the law satisfied the statutory requirement to have the matter determined without delay – whether the differential treatment of male and female children in sexual offences cases was discriminatory and against the principles of justice, fairness, and equality before the law - Constitution of Kenya, article 53; Children Act (cap 141), section 86.*

Criminal Procedure *– retrial – circumstances in which a court could order for a retrial - whether a retrial could be ordered where a conviction was vitiated by a mistake of a trial court for which the prosecution was not to blame.*

Brief facts

The appellant was charged, tried and convicted by the trial court for the offence of defilement of a girl aged 15 years contrary to section 8(1)(3) of the Sexual Offences Act. The appellant was sentenced to 20 years imprisonment. He appealed to the High Court which dismissed his appeal prompting the instant appeal. The appellant claimed that the courts below violated his rights and thus the proceedings were null and void. The appellant contended that he was 17 years old when he was alleged to have committed the offence and had requested at the trial court to be taken for age assessment, but the court declined.

Issues

i. Whether the differential treatment of male and female children in sexual offences cases was discriminatory and against the principles of justice, fairness, and equality before the law.
ii. What were the safeguards which a child in conflict with the law was entitled to?
iii. Whether the period of a year that a court took to determine a case involving a child in conflict with the law satisfied the statutory requirement to have the matter determined without delay.
iv. Whether a retrial could be ordered where a conviction was vitiated by a mistake of a trial court for which the prosecution was not to blame.

Held

1. Had the two courts below adopted a more fair-minded and-even-handed approach to the case, they would at the very least have sought to establish the appellant's age. Instead, there was a rush to punish him in a zealous deployment of the Sexual Offences Act for the supposed protection of the complainant.
2. The unfair consequences of a skewed application of the Sexual Offences Act predominantly against the male adolescent was quite apparent: two youths caught engaging in sex received diametrically opposite treatment. The girl was branded a victim and guided to turn against her youthful paramour while the boy was branded the villain, hauled before the courts and visited with a lengthy jail term. It did not conduce to good sense, policy and the conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warranted the term.
3. Where, as in the instant case, the person accused of a criminal offence was a minor, the law was cognizant of the attendant vulnerability of his position and put in place measures to ameliorate the same and thus avoided injustice. That was in keeping with the Constitution's own peremptory requirement at article 53(2) that in every matter concerning a child, the best interest of the child shall be of paramount importance.
4. By reason of section 186 of the Children Act, a child who was accused of having infringed any law had various other safeguards additional to the rights available to other suspects or accused persons. Those safeguards were quite elaborate but for purposes of the case the court quoted a few, which were that he shall;
    1. be informed promptly and directly of the charges against him;
    2. if he was unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;
    3. have the matter determined without delay;
    4. have his privacy fully respected at all the proceedings.
5. The Constitution provided in article 53(1) that every child had the right not to be detained, except as a measure of last resort, and when detained, to be held for the shortest appropriate period of time; and separate from adults and in conditions that took account of the child's sex and age.

6. The trial court was quite indifferent to the appellant's quite apparent childhood, as both under the Constitution and the Children Act, anybody under the age of 18 years was a child. From the record, no inquiry of any sort was made into the matter and the instant court resolved the matter in favour of the appellant. The appellant's trial took one year, the period of one year did not satisfy the statutory requirement to have the matter determined without delay. There was nothing on record to show that any attempt was made to fast track the hearing.
7. The court in *Kazungu Kisiwa Mkunzo & Anor v Republic* [2006] eKLR struck down timelines for the completion of trials involving children that had been included in the Child Offences Rules in the 5th Schedule of the Children Act. That was before the promulgation of the Constitution and it was debatable what a decision on the issue would be today. It was doubtful that the trial was concluded with the intended expedition.
8. There was no indication that the appellant was asked whether he could afford a lawyer. He had to defend himself against a charge carrying a lengthy jail term in case of conviction. That was such a fundamental omission that went to the very core of the fairness of the appellant's trial, and vitiated it. The ensuing conviction and sentence were thus null and void for violation of the appellant's right to a fair trial which, by virtue of article 25(c) of the Constitution, was non-derogable and not subject to limitation.
9. Trial courts must be more vigilant to ensure that young persons in conflict with the law were accorded the full protection afforded by various constitutional and statutory guarantees and safeguards that existed in Kenya's laws.
10. A retrial should only be ordered where the interests of justice required it and would not cause prejudice or injustice to the accused person. Where a conviction was vitiated by a mistake of the trial court for which the prosecution was not to blame it did not follow that a retrial should be ordered. The decision on retrial or otherwise depended on the facts of each case. In the instant case the appellant was no longer a child and would therefore not be entitled, in a new trial, to the extra guarantees he should have had within the stricken trial. Further, he had been in prison custody for over seven years since he was convicted and sentenced. Given the facts of the case, it would not serve the ends of justice to have him retried.

Appeal allowed.

Orders

i. *Conviction quashed and sentence set aside.*
ii. *An order was issued that the appellant be set at liberty unless otherwise lawfully held.*

Citations

Cases

Kenya

Kazungu Kasiwa Mkunzo v Republic Criminal Appeal 239 of 2004; [2006] KECA 381 (KLR) - (Explained)

South Africa

Michell Joyce Raduvha v Minister of Safety and Security [2016] ZACC 24; 2016 (10) BCLR 1326 ; 2016 (2) SACR 540 - (Followed)

Regional Court

1. *Ahmed Sumar v Republic* [1964] EA 481 - (Followed)
2. *Pascal Clement Braganza v Republic* [1957] EA 152 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya articles 53(1)(2); 25(c)- (Interpreted)
2. Children Act (cap 141) section 186 - (Interpreted)

3. Children Offences Rules (cap 141 Sub leg) Schedule 5- (Cited) In general
4. Sexual Offences Act (cap 63A) sections 8(1)(3); 36 - (Interpreted)

Advocates

Ms. R. N. Karanja Prosecution Counsel

JUDGMENT

1. The appellant, EWS, was charged, tried and convicted before the Principal Magistrate's Court at Webuye for the offence of defilement contrary to section 8(1)(3) of the *Sexual Offences Act* in that on diverse dates between August, 2010 and April, 2011 in Bungoma East District, within Bungoma County, he unlawfully and intentionally caused his penis to penetrate into the vagina on SMS who was aged 15 years. He was sentenced to 20 years imprisonment following the conviction.

2. His first appeal to the High Court at Bungoma was dismissed by Ali-Aroni, J. on June 9, 2015prompting the current appeal. His self-crafted memorandum of appeal complains that;The trial and first appellate courts violated his rights and the proceedings were therefore null and void.Both courts did not analyze the evidence of the investigating officer.The medical evidence was not in accordance with the provisions of section 36 of the *Sexual Offences Act*.The sentence was harsh and excessive and he might die in prison custody.

3. The appellant also filed written submissions speaking to those grounds of appeal which he relied on at the hearing of the appeal. In answer to our enquiry, the appellant informed us that he was born in 1993, which means that he was 17 years old when he is alleged to have committed the offence. He added that he did indicate to the trial court that he was a minor at the time and that he requested that he be taken for age assessment, but the court would hear none of it.

4. For the Republic, Ms RN Karanja, the Learned Prosecution Counsel, accepted that the appellant was indeed 17 years old as at the time the offence was allegedly committed and she had no contrary information. She went on to state that on that score she would concede the appeal as the trial may indeed have violated the appellant's rights.

5. What emerges from our perusal of the record is that the complainant in her evidence in chief testified that on a date she does not mention, she was invited by the appellant, a herds boy in the neighbourhood, to his house. He picked her water container and went with it. When she went to collect it, he locked the door, pulled her to the bed, removed her panty and had sex with her. She said she felt pain as it was her first time. She was in that house from 10.00 AM until 5.00 PM when her mother came and found her there. When the mother came, the appellant jumped out of the house through the window.

6. On being cross-examined by the appellant, the complainant stated that the two had engaged in sex previously "about three times before we were found."

7. The complainant's mother (PW2), testified that on the material day, which she stated to have been April 15, 2011, she got home at about 3pm and learnt that the complainant had gone to fetch water at the house of a neighbour called Festus an hour previously, but had not returned. She went after her and on getting to the gate called out her name. The complainant answered from a kitchen. PW2 pushed at the door and found it locked. She knocked and the complainant opened for her while the appellant jumped out through the window. PW2 stated that she found the complainant naked. PW2 notified the appellant's employer before she and her husband took the complainant to hospital.

8. At the hospital the complainant was examined and found to have a whitish discharge from her vagina and her hymen was perforated leading the Clinical Officer (PW3) to conclude that she had been defiled. She was also pregnant and she divulged that she had engaged in sex with the same person in the kitchen of his place of work on no fewer than five previous occasions between August, 2010 and April, 2011.

9. PW3 testified further that the complainant's age had been assessed at 15 years by a Dr Muchesa, a dentist at Webuye District Hospital. In cross examination she stated that the complainant was found to be pregnant and that "If she is not pregnant now she may have aborted."

10. The appellant's unsworn statement of defence was that he was framed on April 15, 2011, and that the complainant had never given birth.

11. This case presents yet another instance where the youthful indiscretions of adolescents visit upon the boy grave penalties within the country's criminal justice system. Without going into an analysis of the evidence and pronouncing on the credibility of the complainant, it is quite apparent that the sexual intercourse between the complainant and the appellant, both teenagers, had been ongoing for over eight months before they were busted by the complainant's mother. By all indications the complainant voluntarily and repeatedly went to the kitchen rendezvous where their youthful passions boiled. In fact, those trysts would have gone on quite indefinitely but for PW3 happening on them on the fateful day. In fact the complainant, referring to that interruption, says they were "found" by her mother.

12. It was the appellant's contention that he was not accorded a fair hearing because he sought to be age-assessed but the trial court ignored him. The record in fact does not capture the request. There is, however, nothing to contradict the appellant's claims as to his age. We asked him whether at his current age of 26 years, by his reckoning, he held a national identity card, and his answer was that he did not, as he was arrested and sent to prison before attaining the age of majority and taking a national identity card.

13. We think, with respect, that had the two courts below adopted a more fair-minded and-even-handed approach to the case, they would at the very least have sought to establish the appellant's age. Instead, what emerges is a rush to punish him in a zealous deployment of the *Sexual Offences Act* for the supposed protection of the complainant. Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent: two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term.

14. Where, as here, the person accused of a criminal offence is a minor, the law is cognizant of the attendant vulnerability of his position and puts in place measures to ameliorate the same and thus avoid injustice. This is in keeping with the *Constitution*'s own peremptory requirement at article 53(2) that in every matter concerning a child, the best interest of the child shall be of paramount importance.

15. Indeed, by reason of section 186 of the *Children Act*, a child who is accused of having infringed any law has various other safeguards additional to the rights available to other suspects or accused persons. Those safeguards are quite elaborate but for purposes of this case we shall quote but a few, which are that he shall;

    (a) be informed promptly and directly of the charges against him

(b) if he is unable to obtain legal assistance, be provided by the Government with assistance in the preparation and presentation of his defence;

(c) have the matter determined without delay

...

(g) have his privacy fully respected at all the proceedings.

16. The *Constitution* itself also provides in article 53(1) that every child has the right –

...

(f) not to be detained, except as a measure of last resort, and when detained, to be held-

(i) for the shortest appropriate period of time; and

(ii) separate from adults and in conditions that take account of the child's sex and age."

17. As we have already indicated, the trial court was quite indifferent to the appellant's quite apparent childhood, as both under the *Constitution* and the *Children Act*, anybody under the age of 18 years is a child. It is clear from the record that no inquiry of any sort was made into the matter and we, on our par, have no difficulty resolving the matter in favour of the appellant. It is also clear that his trial took a year from his arraignment on April 27, 2011, to the judgment that was delivered on 2nd April, of the following year. We doubt that the period of a year satisfies the statutory requirement "to have the matter determined without delay." There is nothing on record to show that any attempt was made to fast track the hearing. We are aware that this court in *Kazungu Kisiwa Mkunzo & anor v Republic* [2006] eKLR struck down timelines for the completion of trials involving children that had been included in the *Child Offences Rules* in the 5th Schedule of the *Children Act*. That was before the promulgation of the 2010 Constitution and it is debatable what a decision on the issue would be today. That issue is not before us though, and it is enough for us to say that it is doubtful that the trial was concluded with the intended expedition.

18. More concerning is the fact that the appellant was not provided with legal assistance at Government expense. There is no indication even that he was asked whether he could afford a lawyer. He had to defend himself against a charge carrying a lengthy jail term in case of conviction. We think, with respect, that this was such a fundamental omission it went to the very core of the fairness of the appellant's trial, and vitiated it. The ensuing conviction and sentence were thus null and void for violation of the appellant's right to a fair trial which, by virtue of article 25(c) of the *Constitution*, is non-derogable and not subject to limitation.

19. It bears repeating that trial courts must be more vigilant to ensure that young persons in conflict with the law are accorded the full protection afforded by various constitutional and statutory guarantees and safeguards that exist in our laws. It is time we were more deliberately solicitous of the best interest of children. We do so, not so much out of some mushy-mushy sentimentality, but out of an acute recognition of the special space that children occupy and as a constitutional and statutory command. It is a command to observe the best interest of all children be they male or female.

20. We think that the comparative decision of the Constitutional Court of South Africa in *Michell Joyce Raduvha v Minister of Safety and Security* CCT 151/15 speaks to our circumstances as well, and we would respectfully agree with Bosielo AJ's reasoning for that unanimous court;

59. Does the fact that section 28(2) demands that the best interests of children be accorded paramount importance mean that children's rights trump all other rights? Certainly not. All that the *Constitution* requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them. the *Constitution* demands that our criminal justice system should be child-sensitive.

60. Reflecting on how pre-1994 justice system treated children, Pnnan AJA remarked poignantly in Brandt:

> Historically, the South African justice system has never had a separate, self-contained and compartmentalized system for dealing with child offenders. Our justice system has generally treated child offenders as smaller versions of adult offenders. In S v Williams and others 1995 (3) SA 632 (CC) paragraph 74 the Constitutional Court in abolishing whipping sounded 'a timely challenge to the State to ensure the provision and execution of an effective juvenile justice system.'

66. Contrary to the position pre-1994, our constitutional dispensation has ushered in a new era – an era where the best interests of a child must be accorded paramount importance in all matters affecting the child – an era where we, as society, are committed to raising, developing and nurturing our children in an environment that conduces to their well-being. This resolve was captured admirably by Khampeppe J in Teddy Bear Clinic:

> Children are precious members of our society and any law that affects them must have due regard to their vulnerability and their need for guidance. We have a duty to ensure that they receive the support and assistance that are necessary for their positive growth and development. Indeed, this Court has recognized that children merit special protection through legislation that guards and enforces their rights and liberties. We must be careful, however, to ensure that, in attempting to guide and protect children, our interventions do not expose them to harsh circumstances which can only have adverse effects on their development.'" (Our emphasis)

21. The 2010 *Constitution* is to Kenya the watershed, the defining and epoch-making event that the 1994 Constitution is to South Africa.

22. Having come to conclusion that the appellant's trial was a nullity, should we order a retrial? We recall that a retrial should only be ordered where the interests of justice require it and would not cause prejudice or injustice to the accused person. See *Pascal Clement Braganza v Republic* [1957] EA 152. Indeed, the predecessor of this Court in *Ahmed Sumar v Republic* [1964] EA 481 at 483 stated that where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame it does not follow that a retrial should be ordered.

23. The decision on retrial or otherwise depends on the facts of each case. In the present case the appellant is now obviously no longer a child and would therefore not be entitled, in a new trial, to the extra guarantees he should have had within the stricken trial. Further, he has been in prison custody for over 7 years since he was convicted and sentenced. We do not see how, given the facts of the case as we set them out earlier in this judgment, it would be a service to justice to have him retried.

24. In the result, we allow the appeal, quash the conviction, set aside the sentence and order that the appellant be set at liberty forthwith, unless otherwise lawfully held.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF JUNE, 2019.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR