Fredrick v Republic (Criminal Appeal E016 of 2022)
[2024] KEHC 2857 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2857 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E016 OF 2022

SC CHIRCHIR, J

MARCH 20, 2024

BETWEEN

HENRY SHIKULE FREDRICK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentencing in respect to the Judgment delivered on delivered on 11{{^th}} day of November 2009 by Hon. G.O Oyugi (RM) at SRM court at Butere)

JUDGMENT

1. The Appellant Henry Shikule Fredrick was charged with two counts before the chief Magistare's court at Butere. On the 1st count he was charged with abducting with intent to confine contrary to section 259 of the *penal code*. The particulars were that on the 11th day of October 2009 in Khwisero District within western province with intent to cause M K to be secretly and wrongfully confine abducted the said M K.
2. On the Count 2, he was charged with defilement contrary to section 8 (1) as read with section 8 (3) of the *sexual offences Act* No. 3 of 2006.(The Act)
3. The particulars being that on diverse dates 11th-18th October 2009 in Khwisero District within western province intentionally caused his penis to penetrate the vagina of M K a child aged 14 years.
4. He faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *sexual offences Act* No. 3 of 2006.
5. The particulars of the offence were that diverse dates 11th-18th October 2009 in Khwisero District within western province intentionally touched the vagina of MK a child aged 14 years with his penis.

6. The appellant pleaded guilty to both counts , and he was convicted on his own plea . He was sentenced to 15 years in respect to count 1 and 30 years in count 2 and the sentences were ordered to run concurrently.

7. Aggrieved by the outcome , he filed this Appeal and set out the key grounds as :

    a. That the appellant was handed a harsh sentence not warranted by the evidence on record.

    b. That he was not recognized by any witness during the identification parade

    The appellant prayed that the conviction to be quashed and the sentence set aside and the appellant be re-tried.

8. On 7th August 2023, the appellant filed a supplementary ground in which he added that : the learned trial magistrate erred in law and fact by convicting the appellant on harsh and unproportioned sentences

9. However , a perusal of the Appellant's submission shows that he has confined his Appeal to the issue of sentencing only.

Appellant's submission.

10. It was the appellant's submission that the sentence meted to him by the trial court was too harsh and excessive. He relied on the case of *S vs. Scott Crossley* 2008 (1) SACR 223 Para 35.

11. He stated that despite him pleading guilty, the trial court did not take this into account.

12. He also questioned whether the minimum mandatory sentences imposed was in tandem with the international convention on civil and political rights of 1966 which was ratified to which Kenya is a signatory by virtue of Article 2 (6) of the *constitution*.

13. On the issue of mandatory sentences he relied in the court of appeal case in *Dismas Wafula Kilwake vs. Republic* (2019). EKLR. He relied in the court of appeal case of *Eliud Waweru Wambui vs. Republic* (2019) eKLR on the amendment of the legislation on sexual offences.

14. He points out that the trend in the courts show a diversion away from the mandatory sentences. He cites for instance *G.M vs. Republic* (2017) Meru High court Criminal caseno.73 of 2010 and peter matheri Macharia vs. Republic criminal No. 24 of 2017 High court in Naivasha where the courts in both cases reduced life imprisonment to a lesser sentences.

15. He stated that despite the fact that he pleaded guilty to the first count of abduction with the intent to confine, he was sentences to 15 years imprisonment whereas under section 259 the offence attracted an imprisonment of 7 years .

16. He prayed that the appellant be allowed and that he be awarded a sentence that is proportionate to the offence.

Determination

17. There are 2 issues for determination on this matter:-

    a. Whether the sentence was based in law and if in the affirmative whether it was excessive in any event.

b. Whether the sentence of 15 years for the first count was lawful and whether it should be revised

Whether the 15 year sentence on the first count was lawful

18. Section 259 0f the *penal code* under which the Appellant was charged as a 1st count provides as follows: Any person who kidnaps or abducts a person with intent to cause that person to be secretly and wrongfully confined is guilty of a felony and is liable to imprisonment for seven years. When the statute says " shall be liable" it means the sentence stated herein is the maximum sentence and the court has the discretion to impose a lesser sentence (see *Opoya vs Uganda* (1967) EA 752 cited with approval in the case of *NOO vs Republic* (2019) e KLR) . In other words the trial court could only impose a sentence of up to 7 .

The sentence of 15 years was therefore illegal and the same is hereby set aside

19. In respect to the second count Section 8(3) of *the Act* provides as follows: 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."

The Act sets a minimum mandatory sentence of not less than 20 years. The Appellant herein was sentenced to 30 years. The sentence was therefore based in law.

20. Was it still excessive? *The Act* provides for minimum sentences and therefore the discretion of the trial court was limited to a minimum of 20 years. In effect she could give met out any term sentence in excess of 20 years but nothing less.

21. Am alive to the ongoing debate within the courts of the constitutionality of minimum mandatory sentences provided under the *sexual offences Act*. This debate is yet to be settled. What has been settled is the mandatory sentence under section 204 of the *penal code*. Through F*rancis Muruatetu & Ano vs R* (2017) e KLR the supreme court declared that section unconstitutional. In what has come to be referred to as *Muruatetu II*, that is, *Francis Muruatetu & others vs R*- (2021) e KLR the supreme court went further to clarify that their finding was limited to section 204 of the penal code only.

22. Am of the view that unless and until the supreme court gives further directions on the *sexual offences Act* then this court is bound by the directions given by the o supreme court in *Muruatetu II*. To that extent the sentence meted out by the magistrate was lawful.

23. However in respect to the first count, , the Accused asked for leniency. He had also pleaded guilty at the earliest. The court also seems to have factored in the fact that the accused had detained the complainant for 7 days. The period of detention, should have been a consideration under count I1 to which the sentence had already been passed.

24. It is trite law that sentencing is an act of discretion by the trial court and the Appellate court should not interfere unless the trial court failed to consider certain factors or took into account irrelevant ones. In the Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR stated as follows:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not

sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

25. Am of the view that the sentence was too excessive in view of the mitigating factors and I therefore set it aside.

26. I have considered the Appellant's mitigation in both counts. On the first count he sought for leniency and pleaded guilty as soon as he was arraigned in court, and he was a first offender. I consider a sentence of 5 years more appropriate.

27. On the 2nd count , while I have stated that the court seemed to have failed to take into account the fact that the Appellant had pleaded guilty at the earliest, and considered the period of detention which ought not to have Am equally mindful that the sentence provided is the minimum. I will therefore set aside the sentence of 30 years and substitute it with 20 years.

28. In conclusion I order as follows:

    a). The sentence of 7 years on count 1 is hereby set aside and substituted with 5 years.

    b). The sentence of 30 years in count II is hereby set aside and substituted with 20 years.

    c) The sentences will run concurrently and will take effect from the date of conviction at the trial court.

DATED SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH TH DAY OF MARCH 2024.

S.CHIRCHIR

JUDGE.

In the presence of :

Godwin- Court Assistant

No appearance by the parties