Simiyu v Republic (Criminal Appeal E061 of 2022)
[2024] KEHC 7149 (KLR) (29 May 2024) (Judgment)

Neutral citation: [2024] KEHC 7149 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E061 OF 2022

REA OUGO, J

MAY 29, 2024

BETWEEN

GRIVIN SIMIYU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence of Hon. A. Odawo (SRM) delivered on 14/6/2022 arising from Bungoma CMCSOC No 052 of 2021)

JUDGMENT

1. The appellant, GRIVIN SIMIYU, was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act*. The particulars of the offence were that on diverse dates between 24th May 2021 and 2nd July 2021 at [Particulars Withheld] Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SWK a child aged 15 years. He also faced an alternative charge of committing an indecent act to a child contrary to section 11 (1) of the *Sexual Offences Act*.

2. The prosecution called 4 witnesses while the appellant gave unsworn testimony and called 2 witnesses. At the close of the defence hearing, the trial magistrate in his judgment found that the prosecution had established its case beyond reasonable doubt and convicted the appellant of the offence of defilement. The appellant was sentenced to serve 20 years imprisonment.

3. The appellant in his petition of appeal filed before this court on 22nd June 2022 appealed against the sentence and conviction on the following grounds:

    1. That the trial magistrate grossly erred both in law and facts to convict the appellant on contradicting, inconsistent and uncorroborated evidence which meant that the witnesses were not credible.

2. That the learned magistrate didn't observed Article 50 (2) (c) of *the Constitution* of Kenya 2010 that the appellant wasn't given enough time when he asked the Hon. Court 2 for retrial.

3. That the high court contravened Article 50 (2) (m) which lead to the appellant not to understand what was taking place in court.

4. That the trial court never observed Article 157 (6) (a) and that is why the charge sheet in this matter is defective.

4. On 7th March 2024, the appellant filed amended grounds of appeal on sentence only. He is dissatisfied with the trial magistrate's ruling on the sentence as it failed to consider the jurisprudence on the sentence. The imposed minimum sentence was without consideration of the appellant's mitigation.

5. The appellant's submissions were on the issue of sentence only. He submits that he was a first offender and constitutionally entitled to the benefit of the law including section 216, 329 and 333 (2) of the Criminal Procedure Code. He cited the case of Evans Wanyonyi v Republic and Fatuma Sassan Solo v Republic where the court held that sentencing is a matter of the discretion of the trial court. The appellant also urged the court to consider that at the time of the offence, he was only 18 years old and ignorant. The appellant seeks a lesser sentence.

6. The respondents opposed the appeal and, in their submissions, they discussed the ingredients which must be proved in the case of an offence of defilement. On the sentence imposed, it was submitted that the appellant was properly sentenced as per the provisions of section 8 (2) of the *Sexual Offences Act*. He was given the minimum mandatory sentence hence cannot complain that the sentence was in excess. They submit that the appeal lacks merit.

Analysis And Determination

7. The sole issue before the court is on sentence and for the court to interfere with the sentence herein, bearing in mind that sentencing is a matter of discretion by the court, this Court will be guided by the Court of Appeal decision in Bernard Kimani Gacheru V Republic [2002] eKLR thus:

> " 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."

8. The appellant submits that he was only 18 years old at the time of the offence. According to the circumstance of this case, the victim who was 15 years testified that she still loved the appellant. Age is an important factor that must be considered during sentencing. The appellant in his submissions relied on the case of Yawa Nyale vs Republic [2018] eKLR where it expressed itself as hereunder:

> " It is now clear that certain provisions of the *Sexual Offences Act*, are a cause of concern in this country. The effect of the harsh minimum sentences imposed under the said Act on young people in this country is a serious cause of concern. Our jails are overflowing with young people convicted courtesy of the provisions of the said Act. While I appreciate that sexual

offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought to be taken into account in order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question."

9. The Court of Appeal in Evans Wanjala Siibi vs Republic [2019] eKLR:

> " 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."

10. The appellant in this case was 18 years old. Section 8(3) of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child between the ages of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years. However, the court is not bound to prescribe the mandatory sentence imposed under section 8 if the circumstances do not warrant it. In Dismas Wafula Kilwake Vs. Republic [2019] eKLR the court held as follows:

> " Being so persuaded, we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

11. In this case, the appellant was a first offender and 18 years of age. In his mitigation, he told the court that his parents were deceased and he lived with his grandfather. He was remorseful and sought a lenient sentence.

12. Having considered the nature and the circumstances of the offence as well as the appellant's mitigation, I find that the appeal is merited.I, therefore, allow the appeal, and the sentence of 20 years imprisonment imposed by the trial court is hereby set aside. In lieu thereof, I sentence the appellant to six (6) years' imprisonment from the date of sentence. Right of Appeal explained.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 29TH DAY OF MAY 2024

R.E. OUGO

JUDGE

In the presence of:

Grivin Simiyu / Appellant in person

Miss Matere -For the Respondent

Wilkister/ Diana -C/A