REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Coram: F.A. Ochieng J

PETITION NO. 6 OF 2013

C K W.....PETITIONER

(Petitioning through O S)

- VERSUS –

THE HONOURABLE ATTORNEY GENERAL..1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTION…....2ND RESPONDENT

JUDGMENT

1. The petitioner, ***C K W*****,** is a minor. He was 16 years old at the material time. Therefore, he did not have the requisite legal capacity to institute these (or any other) proceedings in his own name. It was for that reason that these proceedings have been brought through his lawyers.
2. The substantive relief sought by the petitioner is a declaration;

"THAT *Sections 8 (1) and II (1) of the Sexual Offences Act are invalid, to the extent that they criminalise consensual sexual relationships between adolescents".*

3. The petitioner also seeks costs of the petition, together with *"any other appropriate relief that the court deems fit".*
4. What is the genesis of this petition"
5. The petitioner, C, was charged with the offence of Defilement contrary to Section 8 (1) as read with Section 8 (4) of the Sexual Offences Act. The said charge was read and explained to the petitioner before the Chief Magistrate's Court, Eldoret, in ***CRIMINAL CASE NO. 1901 OF 2013.***
6. The particulars of the offence were that on the 26th of May 2013, at [Particulars Withheld], the petitioner intentionally and unlawfully caused his genital organ to penetrate the genital organ of ***J***, a girl aged 16 years.
7. Pursuant to the provisions of Section 8 (4) of the Sexual Offences Act, a person who defiles a child who is between the age of 16 years and 18 years, is liable to imprisonment for a term of 15 years.
8. It is the petitioner's contention that the sexual act between him and the complainant was consensual. Indeed, the petitioner emphasized that the complainant, ***J*****,** was his girlfriend.
9. The chairman of the North Rift Chapter of the Law Society of Kenya, Mr. Omboto, participated in these proceedings as an Amicus Curea.

10. He pointed out that because it is the complainant who had willingly gone to the petitioner's house, where she and the petitioner then had consensual sex, the law should not have discriminated against the petitioner. In the opinion of the Law Society of Kenya, if the 2 children were to be punished for engaging in sexual intercourse, that would be appropriate.
11. This court was told that the law was applied in a discriminatory manner, when it was only the boy who was charged.
12. On his part, the Hon. Attorney General opposed the petition. Ms. Lydia Lung'u, learned Litigation Counsel, submitted that Sections 8 and 11 of the Sexual Offences Act were not inconsistent with the Constitution.
13. Nowhere in the Constitution had consensual sex between minors been legalized, pointed out the Attorney General. Therefore, when such acts were criminalized by the Sexual Offences Act, the statute was not inconsistent with the constitution.
14. The Attorney General also pointed out that the impugned provisions of the Sexual Offences Act did not distinguish between males and females. Either gender could now be charged with the offences of defilement, unlike under the provisions of the Penal Code which had only criminalized the actions of males.
15. Meanwhile, when the petitioner complained about the invasion of his privacy, the Attorney General's response was that the prosecution had to make available the evidence, to prove the charges preferred against the petitioner. Therefore, the Attorney General believes that the requirement that the evidence be adduced to prove the offence was a legal obligation. If the discharge of that legal obligation resulted in exposing in public, the details of what was done in private, it is not unlawful.
16. After the petitioner was charged with the offence of defilement, the court granted him Bond. However, the petitioner was unable to meet the terms of the said Bond, resulting in his being held in custody.
17. Later, the petitioner asked the trial court to review the terms of the Bond, and the court obliged.
18. According to the Attorney General, the petitioner was wrong to have blamed the prosecution for his failure to attend court when the petitioner was in custody.
19. Another point that was raised by the Attorney General was that consent of the complainant cannot be an acceptable excuse for the commission of the offence. That submission is founded upon the Attorney General's contention that minors are not capable, in law, of giving consent.
20. The decision to prefer charges against the petitioner and to prosecute him, are matters which were described by the Attorney General as being within the mandate of the prosecution. Therefore, the Attorney General expressed the view that it would be wrong to find fault with the prosecution for carrying out their lawful duty.
21. Finally, the Attorney Generally submitted that the invalidation of the two statutory provisions would be repugnant to the morality of children. I was therefore urged to dismiss the petition, with costs.
22. On his part, the Director of Public Prosecutions first made the point that the Rights and Fundamental freedoms contained in the Bill of Rights, which is an integral part of the Constitution of the Republic of Kenya, were not all absolute. It was only the rights and fundamental freedoms cited in Article 25 of the Constitution which could not be limited in any way.
23. As the rights which the petitioner was fighting for did not fall within Article 25, the Director of Public Prosecution submitted that the said rights and freedoms could be lawfully limited.
24. The failure by the petitioner to resume learning at his former school was described as not attributable to the Director of Public prosecution. Having been granted Bond or Bail, the petitioner was described as a person who was not obliged to remain in custody.
25. But even if he had remained in prison, the Director of Public Prosecution pointed out that nowadays, there are informal learning centres within our prisons. In effect, the petitioner could have continued his education even if he had remained behind bars.

26. An interesting aspect of the submissions filed by Mr. Z.G. Omwega, learned Deputy Director of Public Prosecutions was that;

"…… the prosecution had to act on the complaint that was made by the complainant. The case would have taken another turn if the petitioner would have also made a complaint, which was not the scenario in the instant case".

27. In any event, the Director of Public Prosecution emphasized that the decision to prosecute the petitioner was necessary to ensure that the welfare of children was well taken care of.
28. Mr. Omwega observed that the petitioner, is a minor, who should therefore have been concentrating on his education. That was said to be in line with Section 4 (3) (c) of the Children Act.
29. Therefore, the Director of Public Prosecution asked me to dismiss the petition, so as not to open a Pandora's Box, whose contents will be incapable of being contained by the Kenyan Society.
30. Just what is the Pandora's Box, which the Director of Public Prosecutions does not wish us to have a glimpse of"
31. But perhaps I should start by saying that the claims put forward by the petitioner should not be likened to a Pandora's Box, which could spring surprises when it is opened. I say so because the declaration sought by the petitioner has already been laid bare, for all to see. There are no hidden surprises.
32. Having set out the responses put forward by the Respondents, as well as the views expressed by the Law Society of Kenya, I now will set out the case of the petitioner. I have deliberately chosen to first set out the responses, so that as the petitioner's arguments are being brought out, the court can immediately proceed to analyze the respective positions and thus come out with the determinations on specific issues.
33. The petitioner has come before this court with the intention of;

"Challenging the constitutional validity of the offences created in Section 8 (1) and Section 11 (1) of the Sexual Offences Act, to the extent that they are inconsistent with the rights of children under the constitution".

34. That summary, as set out by Mr. Oscar Sang, the learned advocate for the petitioner, correctly spells out the issue for determination. In effect, this court is being called upon to determine whether or not Sections 8 (1) and 11 (1) of the Sexual Offences Act were inconsistent with the Constitution of the Republic of Kenya.
35. Section 8 (1) of the Sexual Offences Act reads as follows;

"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement".

36. And Section 11 (1) of the Sexual Offences Act provides as follows;

"Any person who commits an indecent act with a child is guilty of the offences of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years".

37. The reason why the petitioner has asked this court to declare those two statutory provisions unconstitutional was that the impugned sexual activity between him and the complainant was consensual.
38. It was because of that fact that the petitioner submitted that it was wrong to criminalize

consensual sexual acts between minors.

39. The petitioner made it clear that he did not seek to challenge the constitutional validity of Sections 8 (1) and 11 (1) of the Sexual Offences Act in so far as those provisions criminalize adults who engaged in acts of sexual penetration or of indecent acts with children.
40. The petitioner also made it crystal clear that he was not challenging the constitutional validity of those statutory provisions, to the extent that they criminalize children who engaged in acts of sexual penetration or of indecent acts with other children, in a way that was non-consensual, forceful, violent or exploitative.
41. The parameters of the petition have thus been clearly delineated. It deals only with the consensual sexual activity between minors.
42. The first point canvassed by the petitioner was that the 2 statutory provisions, in practice, promoted disproportionate prosecution of the male child in incidences of consensual sexual acts between minors, even when it was clear that the female child was a willing participant in the sexual acts proscribed by Sections 8 (1) and 11 (1) of the Sexual Offences Act.
43. If that be the position, the petitioner submitted that it constituted the violation of the rights of the male child, to equal protection and benefit of the law, because it constituted indirect discrimination against the male child, contrary to Article 27 (5) of the Constitution.
44. The second point that was canvassed by the petitioner was that the Sexual Offences Act discriminated against minors on the grounds of their age. That submission is borne out of the contention that for similar activities, the adults were not subjected to criminal prosecution.
45. The effect of preferring charges against a minor who had engaged in consensual sexual activity was said to be the stigmazation and degradation of the minor, which arose when he was called a “Defiler”. Thereafter, the minor was exposed to emotional stress, in the form of shame, embarrassment, anger, regret and estrangement from his peers.
46. I understand the petitioner to be saying that because consensual sexual activity was respectable, it was wrong to make him feel so traumatized, through the criminalization of that activity.
47. Another negative consequence was said to impact upon the complainant who was questioned by the police officers who were investigating the sexual offence.
48. Pausing at that point for a moment, I note that the petitioner appears to be saying that both he and the complainant were impacted negatively, by the investigations into the incident which gave rise to the criminal charges. That implies that it was not only the petitioner who was affected negatively by the process of investigations.
49. Secondly, the petitioner is confirming his knowledge of the fact that the police officers conducted investigations prior to the decision to prefer charges against him. If the said investigations revealed an offence, the police were obliged to arraign the suspect in court.
50. If the police had evidence which they deemed sufficient to mount a successful prosecution, leading to a conviction, it would have been an abdication of duty if they had chosen not to charge the petitioner.
51. The petitioner has not placed before this court any material pertaining to other incidents wherein there had been consensual sexual activities between minors. Therefore, to the extent that the petition was making generalized statements, calculated to persuade the court about *“incidences of consensual sexual acts between minors”,* this court holds the view that there was no factual foundation upon which to make a generalized finding, touching on the male child, in general.
52. However, that observation does not nor was it intended to diminish the possible overall impact that the pronouncement in the petition would have in relation to other minors.
53. The petitioner’s first legal authority was ***TEDDY BEAR CLINIC FOR ABUSED CHIDLREN & ANOTHER VS. MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT AND ANOTHER (CCT 12/13) [2013] ZACC 35,*** in which the court held thus;

“It cannot be doubted that the criminalization of consensual sexual conduct is a form of stigmatization

which is degrading and invasive. In the circumstances of this case, the human dignity of the adolescents targeted by the impugned provisions is clearly infringed. If one's consensual sexual choices are not respected by society but are criminalized, one's innate sense of self-worth will inevitably be diminished…"

54. It is important to note that the issue before that South African Court was Section 15 of that country's Sexual Offences Act. The said section criminalized consensual sexual penetration with a child.
55. Broadly, the offence committed when there was consensual sexual activity was described as Statutory Sexual Assault or Statutory Rape.
56. The learned Judges in the South African case observed that;

"….If a prosecution is instituted for a charge of Statutory Rape, both the children involved must be prosecuted; put differently, if two adolescents engage in sexual penetration with one another, each will be guilty of having statutorily raped the other".

57. In Kenya, there is no express or implied requirement that when two children are involved in sexual penetration with each other, both of them should be charged with the offence of defilement.
58. However, there is no legal bar to the prosecution preferring criminal charges against both the children. In effect, if the prosecution had reasonable cause to charge both minors, they could do so.
59. Based on the facts of this case, as alluded to by the learned Director of Public Prosecution, the petitioner did not lodge any complaint against the girl with whom they had had consensual sexual activity. Therefore, that is the reason that has been proffered for not having also brought charges against the girl.
60. Whilst that may or may not be the reason which consciously led the prosecution to decide to only charge the petitioner, I still think that it cannot be a complete answer. My said thoughts are based on the fact that if two minors were genuinely, freely and consciously engaging in consensual sexual activity, it would be unlikely that either of them would thereafter lodge a complaint against the other, in respect to an act that they had consented to.
61. A complaint against the other person connotes some element of coercion or deceit employed by the party complained against. In those circumstances, the activity would not have been wholly consensual.
62. But then again, even when the minor did not complain against the other person, it does not negate the offence of defilement.
63. When a person commits an act which causes penetration with a child, he has already committed the offence termed as Defilement. The absence or otherwise of consent from the child is not a factor. Similarly, the fact that the victim has or has not lodged a complaint is not a factor in determining whether or not the offence had been committed.
64. However, the absence of a complaint, whether it be by the victim or any other persons, could make it difficult for action to be taken against the offender, considering that sexual offences (by their very nature) were ordinarily committed in private.
65. In **KHUMALO VS. HOLOMISA [2002] ZACC 12**, at paragraph 28, the court observed that;

"Privacy fosters human dignity insofar as it is premised on, and protects, an individual's entitlement to a sphere of private intimacy and autonomy".

66. Therefore, that court expressed the view that the invasion of relationships between partners was a strong indication of a violation of a deeply personal realm of their lives.

67. In my considered opinion that pronouncement cannot be unqualified, as suggested by the learned Judge. My said opinion is informed by the fact that the democratically elected leaders of the people of Kenya have passed legislation which criminalizes certain activities, regardless of whether such activities were carried out in private or in public.
68. Defilement is one such activity which has been outlawed. And the purpose for doing so was to provide protection for the children in Kenya.
69. Even if a person has consensual sexual activity with a minor, in which there was penetration, such a conduct cannot escape censure simply because it had been intimately undertaken in privacy.
70. The petitioner has made the following bold pronouncement;

"78. While the petitioner is persuaded that consensual sexual activity between adolescents should not be condoned or regarded as the acceptable norm, he believes that a more effective intervention than the criminalization of consensual sexual acts is likely to be secured if the response was changed from a criminal one to a more child friendly response".

71. I have described that pronouncement as bold because it makes it clear that the petitioner appreciates and accepts the fact that consensual sexual activity between adolescents should not be condoned. He says that sexual activity between adolescents, even if they should be consensual, should not be regarded as the acceptable norm.
72. If we were to paraphrase that pronouncement, we would simply say that even when adolescents engaged in consensual sexual activity that would still be wrong.
73. It then becomes clear that the petitioner's main complaint, as I understand it from the above-quoted pronouncement, was the fact that by criminalizing consensual sex between adolescents, the Kenyan society had responded to those wrongful actions in a manner which was not child friendly.
74. In the case of ***TEDDY BEAR CLINIC FOR ABUSED CHILDREN & ANOTHER VS. MINISTER OF JUSTICE AND CONSTITUIONAL DEVELOPMENT AND ANOTHER (CCT 12/13) [2013] ZACC 35,*** Khampepe J. said;

"Of course, there may be legitimate reasons for limiting a child's fundamental rights in particular circumstances, due to the stage of his or her development, and in order to protect him or her".

75. In determining that case, the court gave due consideration to an expert report compiled by the late Professor Alan Flisher, a child psychiatrist at the University of Cape Town and Ms. Anik Gevers, a clinical psychologist who specialized in child mental health at the University of Cape Town.
76. The court described the said evidence as constituting uncontradicted expert evidence, which must inform the determination of the court.

77. One of the conclusions made by the two experts was in the following words;

"When adolescents are left to sort through sexuality issues and choices among themselves, they tend to engage in more risky behaviours for a variety of reasons, including poor decision-making skills and power imbalances in a relationship".

78. The learned Judge went on to observe that;

"Parliament has clearly determined that a particular group of children-adolescents – are vulnerable and merit special protection from sexual predation, by both adults and other children".

79. Parliament went on to criminalize a wide range of consensual sexual conduct between children in South Africa.

80. According to Khampepe J.,

"There can also be no doubt that the existence of a statutory provision that punishes forms of sexual expression that are developmentally normal, degrades and inflicts a state of disgrace on adolescents".

81. With all due respect to the learned Judge, I find myself unable to agree with that reasoning. I say so because, it is already accepted that during their developmental stage, adolescents require guidance and protection, because if left to their own devices, they tend to engage in more risky behaviour, as the experts from South Africa said.
82. Therefore, it would be counter-productive to then say that adolescents should be allowed to carry on with certain forms of sexual expression which were deemed to be developmentally normal.
83. That which is said to be wrong cannot be, simultaneously, considered as being developmentally normal. The converse is equally true; that that which is deemed to be developmentally normal ought not to be considered wrong.
84. Even Khampepe J. appears to have come back to that position when he said;

"I accept that the purposes of discouraging adolescents from prematurely engaging in consensual sexual conduct which may harm their development, and from engaging in sexual conduct in a manner that increases the likelihood of the risks associated with sexual conduct materializing, are legitimate and important".

85. Finally, that court went on to find that it was only the criminalization of children between 12 and 16 years, that was invalid because that category of children ought not to be punished for committing criminal offences when the society says that they do not have the capacity to make choices about their sexual activity.

86. Although I do not share a portion of that reasoning, I note that Khampepe J. went on to hold that;

"…16 and 17 year olds may be criminalized for engaging in consensual sexual conduct with adolescents".

87. Thus, even in the very case that the petitioner relied upon to support his case, the Court expressed the view that adolescents within his age-group may be criminalized.
88. In Kenya, the law does not distinguish between the girl and the boy in Section 8 of the Sexual Offences Act. In effect, the law, as enacted does not discriminate.
89. The petitioner said that he was charged because he was a boy, whilst the girl was let scott free.
90. The Director of Public Prosecution said that the decision to prefer the charge against the petitioner was not based on his gender.

91. It will therefore be a matter of evidence, which is yet to be led, to enable the court establish the reasons why the petitioner was charged with defilement whilst his willing female partner was not charged.
92. But even if it is ultimately proved that the petitioner was charged, largely, because he is a boy (as opposed to being a girl), that would not render the statutory provisions discriminatory.
93. The discriminatory application of a law, if it is established, is wrong. But such a conduct by the person who exercises it does not render the law itself to be discriminatory.
94. I also find that the law is not discriminatory against adolescents by criminalizing their sexual

conduct even when such conduct was consensual, whilst allowing adults to engage in consensual sexual conduct.

95. The law protects adolescents from the harmful sexual conduct whether such conduct was directed at them by adults or by other adolescents. To the extent that the law is geared towards the protection of the child, it does not discriminate against the perpetrator.
96. To borrow the words of Ackermann J. in the case of **THE NATIONAL COALITION FOR GAY AND LESBIAN EQUALITY & ANOTHER VS. THE MINISTER OF JUSTICE & 2 OTHERS CCT NO. 11 OF 1998 [1998] ZACC 15,** there are factors to be considered when determining whether the alleged discriminatory provision had impacted unfairly on the complainants.

"Those would include:

a. *the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, whether the discrimination in the case under consideration is on a specified ground or not;*
b. *the nature of the provision or power and the purpose sought to be achieved by it. If its purpose is manifestly not directed, in the first instance, at impairing the complainants in the manner indicated above, but is aimed at achieving a worthy or important societal goal, such as for example, the furthering of equality for all, this purpose may, depending on the facts of the particular case, have a significant bearing on the question whether the complainants have in fact suffered the impairment in question".*

97. In this case, I find that the purpose of Sections 8 (1) and 11 (1) of the Sexual Offences Act was not manifestly directed at impairing the rights of the petitioner. The petitioner has not led any evidence to demonstrate past patterns of disadvantage.
98. If anything, I do find that the provisions of law which are in issue were aimed at achieving a worthy or important societal goal of protecting children from engaging in premature sexual conduct.
99. Children are particularly vulnerable, and they therefore require legal protection. The law which seeks to offer them such protection as they need is not unconstitutional.
100. As regards the fact that the petitioner;

i. was initially unable to meet the terms of the Bond; or
ii. was unable to proceed with his education because he was in custody, whilst the complainant was going on with school; or
iii. was exposed to investigation by police officers; cannot render Sections 8 (1) and II (1) of the Sexual Offences Act unconstitutional.

101. In the result, I find that the petition lacks merit. It is therefore dismissed.

102. However, before concluding this Ruling, I do express my Sincere gratitude to the petitioner for taking the bold step of tackling an issue which would ordinarily have remained unspoken.

103. Although he was unsuccessful, I find that he has brought to the fore, the need to consider whether or not there are other measures which were more appropriate and desirable, for dealing with children, without having to resort to criminal proceedings.

104. To this end, I send out a challenge to professionals in matters of children psychology and in the overall wellness of children to conduct appropriate studies in Kenya, with a view to ascertaining if there were mechanisms and procedures which could be put in place, to offer protection to children whilst

simultaneously being proportionate to both the circumstances of the child and the offence.

105. In matters of sexual conduct, the Kenyan child needs and deserves protection of the law. As we all work together in trying to achieve the most optimum systems of providing them with protection in a sensitive manner, we will be striving to live up to the provisions of Article 40 of the United Nations Convention on the Rights of the Child.

106. Finally, I order that each party will bear his own costs in this petition.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 25th day of July 2014.

FRED A. OCHIENG

JUDGE

Judgment read in open court in the presence of

Miss Oduol for the 2nd Respondent.

Mr. Miyienda for Sang for the Petitioner.

Mr. Miyienda for Omboto for LSK

Miss Oduol for Omboto for 1st Respondent.