

CONSENSUAL SEXUAL CONDUCT

C.K.W. v. Attorney General & Director of Public Prosecution

[2014] eKLR, Petition 6 of 2013

Kenya, High Court

COURT HOLDING

Sections 8(1) and 11(1) of the Sexual Offences Act are not discriminatory against adolescents by criminalising sexual conduct between consenting adolescents, because the intention of this law is to protect adolescents from harmful sexual conduct. Where it is alleged that a law has a discriminatory impact, but the law itself was not manifestly directed at discriminating between persons, the discriminatory impact of the law must be assessed and weighed against the rights that the law seeks to protect. In this instance, the Sexual Offences Act seeks to achieve the important societal goal of protecting children from premature sexual activity, which the court found to outweigh any alleged discriminatory impact.

Section 8 of the Sexual Offences Act does not distinguish between a boy and girl. The choice of the prosecuting authority to prosecute only the boy did not render the law discriminatory.

Summary of Facts

The petitioner, who was 16 years old at the material time, was facing a charge before the magistrate's court for the offence of defilement, for having had penetrative penile-vaginal sex with a girl the age of 16, which was contrary to Sections 8(1) and 8(4) of the Sexual Offences Act, 2006 (Sexual Offences Act). The petitioner lodged this application before the High Court of Kenya, calling on the Court to declare Sections 8(1) and 11 (1) of the Sexual Offences Act invalid to the extent that they are inconsistent with the rights of children as protected under the Constitution of Kenya. The Sexual Offences Act criminalises sex between all individuals under the age of 18, without regard to their capacity to consent.

Issues

The two grounds considered by the court for invalidity were:

(a) that Sections 8(1) and 11(1) of the Sexual Offences Act indirectly prompted disproportionate prosecution against male children in instances of consensual sexual acts between minors and thus indirectly denied male children equal protection and benefit of the law, contrary to Article 27(5) of the Constitution of Kenya; and

(b) that Sections 8(1) and 11(1) of the Sexual Offences Act were inconsistent with the rights of children under the Constitution of the Republic of Kenya to the extent that they criminalised consensual sexual conduct amongst children and in that they criminalise acts for which adults are not subjected to prosecution. The Children Act, 2001, defines "child" as a person under 18 years of age.

Court's Analysis

The Court affirmed that when a person commits an act of penetration with a child, the offence of defilement is committed, and whether or not there was consent is not an element of the offence.

The Court considered the South African case of *Teddy Bear Clinic for Abused Children & Another v. Minister of Justice and Constitutional Development and Another* [2013] ZACC 35, and highlighted that the South African Court held that the fundamental rights of children may be limited by legitimate reasons, such as to protect them from harm. The Court cited the testimony of two experts in child psychology who testified that when adolescents are left to themselves to sort out their sexuality issues, they tend to engage in risky behaviour due to poor decision-making and power imbalances within the sexual relationship. The Court's ruling was greatly influenced by this expert testimony and did not adopt the reasoning of the South African Court, which said that punishing sexual expression that is developmentally normal is degrading to the adolescent.

The Court opined that if it was the opinion of experts that adolescents should not be left to decide about sexual activity, then it was counter-productive to allow adolescents to carry on sexual activity even if such activity was deemed developmentally normal. It was on this basis that the Court went on to rule that the impugned provisions were not inconsistent with the rights of the child because they were meant to protect children from harmful sexual conduct. The limitation of the right of the adolescent to engage in consensual sex was therefore justified.

On the issue of discriminatory impact on the basis of gender, the Court ruled that Section 8 of the Sexual Offences Act did not distinguish, on its face, between a girl and a boy, and so the onus shifted to the petitioner to show, through evidence showing the broad application of Section 8 of the Sexual Offences Act, that it had a discriminatory impact on the basis of gender. The Court found that no such evidence of discriminatory impact was presented and therefore found that the law was not invalid on the basis of gender discrimination. The Court found that evidence of individual instances of gender discrimination in the application of the law, even if such evidence showed that the prosecution chose to discriminate in this particular instance, would not, in the absence of evidence showing broad discriminatory impact, render the impugned provision discriminatory.

The Court borrowed the reasoning in *The National Coalition for Gay and Lesbian Equality & another vs. The Minister of Justice & 2 others* CCT No. 11 of 1998 [1998] ZACC 15 where the Constitutional Court of South Africa laid down the factors to be considered when determining whether the alleged discriminatory provision had impacted unfairly on the complainants, including the position of the complainants in society (i.e. whether there are past patterns of disadvantage) and the nature of the provision and purpose sought to be achieved by it.

The Court decided that the petitioner had not convinced the Court that the alleged discriminatory impact of the laws exceeded the worthy or important societal goal of protecting children.

Conclusion

The petition was without merit and was dismissed.

Significance

This is an important case on the constitutional protections of children and the sexual development of children and deals with the challenging issue of to what extent the law should interfere with the constitutional rights of children and whether the constitution should protect ‘normal’ sexual conduct amongst children. The Court was asked to strike that balance between protection of the child from harmful sexual conduct and respect for the fundamental rights of children that should allow them to explore their sexuality as part of their development.

It should be appreciated that the Kenyan Court was influenced by underlying coexisting ideologies about adolescent sexuality. Past laws on defilement were not based on human rights but on prevailing social norms that girls should be ‘chaste’ when a man approached them for marriage. With the advent of Abrahamic religions in Africa, social norms around adolescent sexuality adopted the idea that sex before marriage is morally wrong because sex is only for procreation and therefore only for married people. The emergence of the human rights era placed principles of dignity, equality, and consent at the center of regulations on sex, with emphasis on protecting children.

These ideologies have influenced development of legislation on adolescent sexuality in Africa in various ways. Some countries such as Malawi have maintained the legislation adopted at colonial times and only tweaked the age of defilement from 13 to 16. Other countries such as South Africa have overhauled their legislation to align it to human rights, for instance to redefine ‘defilement’ provisions in gender-neutral terms.

Now, the question put before the Court that is of relevance to many countries is whether laws should criminalise sexual intercourse between two consenting adolescents. The Kenyan Court answered in the affirmative. Two issues could be raised with the way it arrived at its conclusion. First, the Court purported to base its argument on protecting the child from harm but a closer reading of the reasoning would reveal that this was underpinned by the prevailing attitudes in Kenyan society that it was wrong for adolescents to have sex. Though it referred to the *Teddy Bear Clinic Case*, it only did so to select lines that would support this ideology. Ultimately, it parted reasoning with the *Teddy Bear Clinic Case* and based its decision on moral grounds, though these were couched in human rights language. The Court was less interested in exploring whether criminalising consensual sex between two 16-year-olds would cause them shame and embarrassment and negatively affect their development.

Second, even if adolescents should not be left to decide matters relating to their sexuality, it could be questioned whether criminal law is the best aid for the adolescent. Would not comprehensive sexuality education be more empowering and have a more positive effect on the development of the child than criminalisation? Indeed, while comprehensive sexuality education has been shown to equip adolescents with the information and skills needed to make meaningful choices about whether and when to engage in sexual activity, many governments in the region have not provided adequate comprehensive education to adolescents, thus perpetuating their disempowerment.

Further, the Court did not really do justice to the issue of whether the defilement provision was gender-biased. Penetration in the Sexual Offences Act is defined as “partial or complete insertion of the genital organs of a person into the genital organs of another person”. It is difficult to imagine

that the sexual organs of a girl would penetrate those of a boy, so that she could be charged of this crime. The Court could have explored this definitional dilemma and determined whether it was gender-neutral. Indeed, men have suffered a pattern of disadvantage in jurisdictions where rape and defilement only pertain to women. The disadvantage is the invisibility of rape and defilement of men and boys under the law, leaving many men and boys suffering rights violations that the state does not recognise and address accordingly.

***S v. Brian M.* [surname editorially abridged]
[2015] ZWHHC 106, CRB No. B467/14
Zimbabwe: High Court**

COURT HOLDING

A sentence of 24 months' imprisonment for statutory rape was excessive considering that the perpetrator was a young boy of 17 involved in a romantic relationship with a girl of 15.

Summary of Facts

B.M was convicted under Section 70 of the Criminal Law Codification and Reform Act (Chapter 09:23) of having sexual intercourse with a person under the age of 16. B.M was 17 and the girl was 15 at the time of the alleged statutory rape(s). The two were boyfriend and girlfriend. The girl became pregnant. B.M. was charged, convicted, and sentenced to 24 months in prison, with 8 months set to be suspended if he did not violate any sex laws for 5 years, and with the remaining 16 months suspended if he performed 525 hours of community service within a 16-week period.

Issue

Whether a 24-month sentence for statutory rape is excessive for a 17-year old perpetrator who had consensual sex with a 15-year old, with whom he was in a romantic relationship.

Court's Analysis

The Court listed several reasons for determining that the sentence was excessive. First, it stated that the purpose of the law is to protect children under the age of 16 from sexually transmitted diseases, unintended pregnancies, and predatory adults. However, the prohibitions apply equally to persons aged 17 as to persons much older, even though one of the purposes of the law is to protect children from predatory adults. The Court noted that under Section 81 of the Constitution of Zimbabwe, 17-year-olds are "children." Other jurisdictions exempt youthful violators from prosecution when the violator's age is within two or three years of the victim's age. The Court noted that, according to some reports, 66% of people aged 15 to 19 engage in unprotected sex. It also noted that, in another case, juvenile sex offenders who committed the more serious crime of rape were not sentenced to imprisonment, such as in the case of *S v. M* 2009 (1) ZLR 47.