Republic v Koech (Criminal Appeal E026 of 2021)
[2023] KEHC 21180 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEHC 21180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E026 OF 2021

HM NYAGA, J

JULY 27, 2023

BETWEEN

REPUBLIC ..... APPELLANT

AND

ERIC KIPLAGAT KOECH ..... RESPONDENT

(Being an appeal from the Sentence dated 26th August,2021 by Hon E. Kelly, Senior Resident Magistrate at Nakuru Criminal S.0 No. 73 of 2020)

JUDGMENT

1. The Appeal herein is against sentence only.

2. The Respondent Eric Kiplagat Koech was charged with defilement contrary to Section 8(1) (3) of the *Sexual Offences Act*. The particulars were the Respondent on 18th day of May,2020 in Rongai Sub County within Nakuru County, unlawfully and intentionally committed an act by inserting male genital organ namely penis to a female genital organ vagina of FJ, a child aged 15 years' old which caused penetration.

3. He faced an alternative count of indecent Act contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006. And further, that the Respondent on the same date, place and time as above unlawfully and intentionally committed an indecent act by touching the female genital organ namely vagina of FJ a child aged 15 years with his genital organ namely penis.

4. He was tried, found guilty and convicted for the alternative charge offence of indecent act and sentenced to serve three (3) years imprisonment.

5. The Appellant was aggrieved by the said sentence and filed the instant appeal raising the following grounds: -

    1. That the Learned Trial Magistrate erred in law and fact in sentencing the Respondent to three (3) years imprisonment contrary to Section 11(1) of the *Sexual Offences Act* No.3 of 2006 which provides for a mandatory minimum sentence of ten (10) years imprisonment.

    2. That the decision of the Learned Trial Magistrate together with the consequential orders are bad in Law and should not be allowed to stand.

6. The Appeal was canvassed via written submissions.

Appellant's Submissions

7. According to the Appellant the sentence of 3 years imposed against the Respondent by the trial court was too lenient.

8. It urged this court to invoke Section 354(3)(b) of the *Criminal Procedure Code* and enhance the said sentence.

9. In support of its submissions, the Appellant referred this court to the case of *Shadrack Kipkoech v Republic* [2021] eKLR.

Respondent's Submissions

10. The Respondent urged the Court to uphold the sentence imposed by the trial court. In support of his submissions, he relied on: -Judiciary *Sentencing Policy Guidelines*;*Dahir Hussein v Republic* [2015] eKLR;*S v. Jansen* 1999 (2) SACR 368 (C) at 373 (g)-(h);*Wanjema v. Republic* (1971) EA 493*S v. Malgas* 2001 (1) SACR*Mokela v. The State* (135/11) [2011] ZASCA 166

Analysis & Determination

11. Having considered the proceedings before the Lower court, the grounds of Appeal and the parties' submissions plus the authorities cited, it is my considered view that the only issue that arises for determination is whether the sentence imposed by the trial court was manifestly lenient.

12. The principles guiding interference with sentencing by the appellate Court were properly, set out in *S vs Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

13. Similarly, in *Mokela v The State (1*35/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

14. The Court of Appeal in the case of *Ogolla s/o Owuor vs Republic*, [1954] EACA 270, pronounced itself on this issue as follows: -

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

15. In the case of *Shadrack Kipkoech Kogo v R*.(*supra*) the Court of Appeal stated as follows: -

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka v R. (1989 KLR 306)"

16. The same Court in *Bernard Kimani Gacheru v Republic* [2002] eKLR restated that:

> " 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 states is shown to exist."

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18. J. Ngugi, J in *Benson Ochieng & Another vs Republic* [2018] eKLR categorized the set of factors to be considered in sentencing. He stated that;

> "Re-phrasing the *Sentencing Guidelines*, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years' imprisonment). These are the following:
>
> a. Circumstances Surrounding the Commission of the Offence: The factors here include:
>
> i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.
>
> ii. Was the offender armed with a gun?
>
> iii. Was the gun an assault weapon such as AK47?
>
> iv. Did the offender use excessive, flagrant or gratuitous force?
>
> v. Was the offender part of an organized gang?
>
> vi. Were there multiple victims?
>
> vii. Did the offender repeatedly assault or attack the same victim?
>
> b. Circumstances Surrounding the Offender: The factors here include the following:
>
> i. The criminal history of the offender: being a first offender is a mitigating factor;
>
> ii. The remorse of the Applicant as expressed at the time of conviction;
>
> iii. The remorse of the Applicant presently;
>
> iv. Demonstrable evidence that the Applicant has reformed while in prison;
>
> v. Demonstrable capacity for rehabilitation;
>
> vi. Potential for re-integration with the community;
>
> vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.
>
> c. Circumstances Surrounding the Victim: The factors to be considered here include:
>
> i. The impact of the offence on the victims (if known or knowable);
>
> ii. Whether the victim got injured, and if so the extent of the injury;
>
> iii. Whether there were serious psychological effects on the victim;
>
> iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there has been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

19. In this case the appellant was convicted under section 11(1) of the *Sexual Offences Act*. The said section provides that:

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

20. Now, there has been a lot of recent litigation over the so called mandatory sentences and those that provide for a minimum sentence.

21. The issue of mandatory sentences was addressed in *Francis Karioko Muruatetu & others v Republic* [2017] eKLR (Muruatetu 1) where the Supreme Court held that the mandatory death sentence prescribed for the offence of Murder by section 204 of the *Penal Code* was unconstitutional. The Court took the view that:

> " Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the *Constitution*; an absolute right."

22. Subsequent to the above decision, a lot of emerging jurisprudence has come to the fore on the question of these so called mandatory sentences in other offences other than murder.

23. For instance, in *Jared Koita Injiri vs Republic* [2019] eKLR the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) (2) of the *Sexual Offences Act*. The Court of Appeal opined that;-

> " if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

The court further stated:

> " The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

> Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic* (*supra*), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

24. The Court of Appeal in *Dismas Wafula Kilwake vs R* [2018] eKLR, held that the mandatory minimum sentence under Section 8 of the *Sexual Offences Act* is unconstitutional as it denies the court discretion in sentencing.

25. Odunga J (as he then was), in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) held as follows;

> "Taking cue from the decision in Francis Karioko Muruatetu directed that those who were convicted of sexual offences and whose sentences were passed on the basis that the trial Courts had no discretion but to impose the said mandatory minimum sentence are at liberty to petition the High Court for orders of resentencing in appropriate cases."

26. In the case of *Fappyton Mutuku Ngui v Republic* [2019] eKLR the court directed the trial court to rehear the Applicant's sentence on grounds that following the decision in the *Muruatetu* case several decisions have been made by various courts wherein minimum sentences imposed have been tampered with as a result.

27. The court in *Hashon Bundi Gitonga vs Republic* [2020] eKLR held that minimum sentence portends real possibility of a harsher or excessive sentence being imposed on an individual who would after mitigation be entitled to a lesser sentence. That therein lays prejudice.

28. In *Samuel Achieng Alego v Republic* [2018] eKLR the court stated as follows;

> "It is therefore clear that section 8(2) on the face of it prescribes a mandatory sentence as opposed to a maximum one In my view under the current constitutional dispensation, mandatory minimum sentences ought to be looked at in light of Article 27 of the *Constitution* as read with clause 7 of the Transitional and Consequential Provisions which provide as follows: All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
>
> Such sentences, in my view, do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances as the Court is deprived of the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates..."

29. From the foregoing, it is indeed correct to state that by prescribing mandatory sentences, the *Sexual Offences Act* takes away a court's discretion to impose a sentence it considers appropriate in any given circumstances.

30. In the instant case, the trial magistrate did not give reasons for her decision to give the sentence, which was relatively lenient.

31. I am of the view that it is important for a trial court, when departing from these so called minimum or mandatory sentences, gives reasons on the record, so that an appellate court is not left to make presumptions as to why it reached the decision.

32. I have considered circumstances of this case as shown by the court record. The evidence by the victim was that the respondent actually had sexual intercourse with her. The trial magistrate found that there was no evidence of penetration as the injury was on the outer genitalia.

33. There is no appeal against the conviction for the alternative count so I will not delve into the issue in details, save to point out that penetration in law, under section 2 of the *Sexual Offences Act*, would be proven even if there was only partial insertion of the appellant's genital organ into the victim's genital organ.

    1. In *Mark Oiruri Mose v R* [2013] eKLR the Court of Appeal stated thus:

> " Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ"

35. Further, the same court, differently constituted, in the case of *Erick Onyango Ondeng v Republic* [2014] eKLR in this respect noted: -

> " In sexual offences, the slightest penetration of a female sex organ by a male sex organ is sufficient to constitute the offence. It is not necessary that the hymen be ruptured. "

36. Clearly the trial magistrate fell into error when she found that there was no penetration to constitute the offence of defilement. As I have stated there was no appeal against that decision so the conviction for the offence of indecent act with a child remains.

37. The counsel for the respondent argued that the evidence that was tendered was not sufficient to convict the respondent in the first place and therefore the sentence imposed was unlawful.

38. There was no cross appeal made by the respondent and therefore it is not proper for the court to delve into the issue of conviction. The court was only invited to look at the sentence imposed by the trial court.

39. It is my opinion that given the entire circumstances of that material day I think that the sentence meted out was manifestly lenient/low.

40. I note from the pre- sentence report, the victim was 15 years old. She was really affected by the act committed to her. Pw1 told the court that after the incident, she was trembling and couldn't speak. PW3 and PW5 testified that the victim was scared.

41. The Respondent, despite being found guilty still denied committing the offence. He was said to be a young man of about 21 years old and he was a first time offender. He is also said to be a partial orphan. It was noted further that the accused used to relate well with the community members. The mother of the victim and Respondent's community were amenable to resolve the matter, whatever that meant. The victim also continued with her education.

42. The trial magistrate considered the Respondent's pre- sentence report and his mitigation before imposing the sentence it deemed appropriate.

43. While I agree that the trial court retained the discretion in sentencing, as I have stated, I think that the circumstances called for a higher sentence. There are ample authorities where the appellate court has revised a sentence upwards.

44. For instance, in *Republic v Nicholas Wambogo* [2022] eKLR the appellant had been sentenced to three (3) years imprisonment for defiling a 14 year old girl. The State appealed against the sentence and the High Court revised the sentence upwards to 15 years imprisonment.

45. I am therefore inclined to interfere with the sentence meted against the appellant and substitute it with a higher sentence.

46. In the premises, I allow the appeal and set aside the sentence meted out and sentence the respondent to seven (7) years imprisonment, to commence from the time he was committed to prison. He will therefore serve an additional four (4) years.

47. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS DAY OF 27TH DAY OF JULY, 2023.

HESTON M. NYAGA

JUDGE

In the presence of;

Murunga for state

C/A Jeniffer

Respondent present virtually from Sotik Prison