Wanyama v Republic (Criminal Appeal 93 of 2018)
[2023] KEHC 21447 (KLR) (15 August 2023) (Judgment)

Neutral citation: [2023] KEHC 21447 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL 93 OF 2018

REA OUGO, J

AUGUST 15, 2023

BETWEEN

DAVID SIMIYU WANYAMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence in a judgment dated 24th March 2017 in Chief Magistrate's Court at Bungoma by Hon. E.N Mwenda (SRM)

JUDGMENT

1. The Appellant herein was charged with two counts of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the two counts were as follows:

   Count I: On the 19th day of November, 2015 within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of NNM a child aged 14 years.

   Count II: On diverse dates between November 20, 2015 and January 3, 2016 within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of NNM a child aged 14 years

3. He also faced two alternative charges of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

4. In a nutshell, the prosecution's case was that on the 19th of November 2015, the complainant NNM accompanied the appellant to his residence in [Particulars Withheld]. Subsequently, they relocated to [Particulars Withheld], where she resided with the appellant until the 5th of January 2016.

5. The trial magistrate convicted the appellant on both counts and sentenced him to 30 years imprisonment. The appellant dissatisfied with the decision of the subordinate court filed his petition of appeal before this court on September 20, 2019. He later abandoned the grounds of appeal on the face of his petition of appeal and filed amended grounds of appeal on January 26, 2023. The appellant's appeal is only on the sentence meted by the trial magistrate. The appellant raises the following grounds:

    1. That, the mandatory nature of the sentence under section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 of 2006 is unconstitutional hence not warranted on plea.

    2. That, the sentence of the appellant ought to be computed from the time of his arrest pursuant to the provisions in section 333(2) of the *Criminal Procedure Code*.

6. The appeal was canvased by way of written submissions and both parties filed their respective submissions. The appellant in his submissions filed on January 26, 2023 submits that the record reflects that he was a first offender. He also claims that the complainant's age was not ascertained. He submits that the mandatory nature of the sentence takes away the trial court's discretion and it is then forced to impose sentences which are predetermined by the legislature contrary to the doctrine of separation of powers. He cited the case of *Philip Mueke Maingi & 5 others* in Petition No E017 of 2021. The appellant also faulted the trial court for failing to comply with section 333 (2) of the Criminal Procedure Code and therefore imposed a harsh sentence.

7. The respondent in their submissions argue that there was sufficient evidence establishing that the complainant was 14 years old. The appellant exploited her and they urged the court not to interfere with the discretion of the trial court. The minimum sentence for the offence as per the *Act* is 20 years. The complainant dropped out of school and could not deliver in the normal manner. Her life has forever changed. In light of the aggravating circumstances, they support the trial court's sentence of 30 years and further submits that the trial court exercised its discretion judiciously.

Analysi And Determination

8. I have considered the amended petition of appeal and the rival submissions by parties and the only issue raised by the appellant is on sentence. The Court of Appeal in the case *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."

9. The appellant in his submissions has maintained that the sentence meted by the trial court was harsh. The appellant relied on the case of *Maingi & 5 others v Director of Public Prosecutions & another*

(Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) where Odunga J. (as he then was) held that:

> "My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the *prima facie* mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.
>
> 112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as *prima facie* mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed."

10. In the case of Chigongo Dzuye v Republic, Criminal Appeal No 31 of 2022, the Court of Appeal sitting at Malindi held as follows:

> "37. In the Joshua Gichuki Mwangi v Republic (supra), the Court was clear in its mind that the sentences prescribed under the *Sexual Offences Act* are not unconstitutional and can still be meted out in deserving cases. We therefore disabuse the notion that the sentences prescribed under the *Sexual Offences Act* are unconstitutional. The Court only held that when imposed merely because they are mandatory without considering the circumstances of the case, then just like in Muruatetu 1 they contravene the constitutional principles.
>
> ...
>
> 47. In our view, even without the application of the ratio in Muruatetu 1,we find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same, as the minimum mandatory sentences, does not meet the constitutional threshold particularly Article 28 of the *Constitution*."

11. It is clear that from the above cases that the sentences prescribed under the *Sexual Offences Act* are not unconstitutional and can still be meted out in deserving cases. Section 8 (3) of the *Sexual Offences Act* provides thata 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.

12. In this case the trial magistrate imposed a sentence of 30 years. The complainant in this case was 14 years at the time of the offence and as a consequence of the defilement became pregnant and had a difficult delivery due to her age. She was forced to drop out of school and cater to her child. However, I also note that the appellant was a first offender and sought for leniency in his mitigation. In the presentence report, the trial court was asked to exercise its discretion. The trial court did consider that the appellant's

mitigation. He was a first offender and in my view the sentence meted was harsh. I therefore set aside the sentence of 30 years and substitute it with 20 years in respect of both counts and the sentences shall run concurrently. The period the appellant spent in remand shall be taken into consideration in computing his sentence.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 15TH DAY OF AUGUST, 2023

R.E. OUGO

JUDGE

In the presence of:

David Simiyu Wanyama /Appellant in person

Miss Omondi For the Respondent

Wilkister C/A