Wangila v Republic (Criminal Appeal E098 of 2022)
[2023] KEHC 26134 (KLR) (28 November 2023) (Judgment)

Neutral citation: [2023] KEHC 26134 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E098 OF 2022

REA OUGO, J

NOVEMBER 28, 2023

BETWEEN

PHILIP WANGILA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. C.M. Wattimah (SRM) in Sirisia SRM`s Court Sexual Offences Case No.23 of 2021 delivered on 17/11/2022)

JUDGMENT

1. The Appellant, Philip Wangila, was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, 2006. The particulars of the offence were that on the 15th day of July 2021 within Bungoma County, he intentionally and unlawfully caused his penis to penetrate into the vagina of DK a child aged 14 years old. He was also charged with an alternative count of Committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. A trial ensued and, in the end, the trial magistrate found that the prosecution had proved its case to the required standard and sentenced the appellant to 20 years imprisonment. The appellant is dissatisfied with the sentence meted out by the trial court and filled his petition of appeal before this court on 28/11/2022 challenging the sentence on the following grounds that he is remorseful and seeks the leniency of the court as the 20-year sentence against him is manifestly harsh and excessive.

3. The appeal was canvassed by way of written submissions and both parties have filed the rival submissions. The appellant submits that the prosecution case did not warrant the trial magistrate to apply a punitive sentence and he urges the court to depart from the decision of the trial court. He cited the decision in *Julius Koita Injira v Republic* Criminal Appeal No. 93 of 2014 where the court held that mandatory minimum sentence under the *Sexual Offences Act* is unconstitutional as the trial court

ought to have discretion in sentencing. He also relied on the decision in Criminal Petition No. E017 of 2021 at Machakos and Petition No. 97 of 2021 as Consolidated with No. 88 of 2021 at Mombasa. He argues that the nature of the trial magistrate's sentence meant that his mitigation was ignored. In Julius Kitsao Manyesi Criminal Appeal No. 12 of 2021, the court held that a sentence that renders mitigation to be of no value is unjustifiably discriminative, unfair and repugnant to the principle of equity before the law under Article 27 of *the Constitution* of Kenya. He also submitted that the court should invoke provisions of section 333 (2) of the *Criminal Procedure Code* and make a pronouncement that the sentence runs from the date of arrest- see *Paul Omondi Odipo & 4 Others v R* Misc Application No. E041 of 2021.

4. The respondent opposed the appeal and submitted that the offence committed by the appellant is a serious one in the sense that the victim went through a traumatizing experience and that the aggravated circumstances outweigh the mitigating factors. On whether the sentence was excessive, the respondent argues that the law expressly provides for the minimum sentence in offences of defilement and which is what guided the trial court in passing the sentence. The birth certificate shows that the child was 12 years old at the time of the offence and therefore the sentence meted out fell within the provisions of section 8 (1) as read with 8(3) of the *Sexual Offences Act*. The respondent urged the court to exercise its powers as provided in section 354 (3) (b) of the *Criminal Procedure Code* and sustain the sentence passed.

5. The appellant is a first offender. In his mitigation before the trial court, he sought a lenient sentence, non-custodial, so that he could help his parents. The trial magistrate in its ruling held that it had considered the appellant's mitigation and the circumstances of the offence and sentenced him to 20 years imprisonment.

6. The appellant was charged with defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006 and the evidence supports the fact that the child was 12 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. The court in Edwin Wachira & 9 others vs. Republic constitutional petition no. 97 of 2021 held that:

> ...sentencing remains a discretionary power, exercisable by the court and involves the deliberation of the appropriate sentence. To the extent that the provisions of sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the *Sexual Offences Act* deprive the court the discretion to determine the appropriate punishment taking into account the individual circumstances of each case, then the said provisions offend the notion of a fair trial contemplated under article 50(1) of *the Constitution*.
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> b. A declaration be and is hereby issued that to the extent that the citizen in a given case of mandatory/minimum sentence has a right to put in a plea in mitigation to show that the imposition of the mandatory minimum sentence is not warranted in his case, then sections 8(2), (3), (4), 11(1), 20(1) and 3(3) of the *Sexual Offences Act* deprive an accused person the right to mitigate which is a core component of a fair trial contemplated under article 50(1) of *the Constitution*.

7. The Court of Appeal sitting at Kisumu in Criminal Appeal No. 166 of 2016,*Cyrus Kavai Onzere v Republic* made the following observations on mandatory sentences:

23. The narrow holding in Muruatetu 1 was that the mandatory death sentence for murder prescribed by section 204 of the Penal Code is unconstitutional because it impermissibly stripped the sentencing court of the discretion to determine the appropriate sentence as a function of the crime committed; the individual circumstances of the offender and the environment; and the impact on the victims and society. This narrow holding is sometimes called the descriptive ratio decidendi of the case. The rare case on the same facts must be decided in exactly the same way.

24. The broad holding in Muruatetu 1 was that that the mandatory death penalty is "out of sync with the progressive Bill of Rights" in Kenya's 2010 Constitution (para. 64) and an affront to the rule of law. The Court also relied on global death penalty jurisprudence to find the mandatory death sentence "harsh, unjust and unfair" (para. 48). This broad holding is sometimes described as the prescriptive ratio decidendi of the precedent. The Supreme Court's prescriptive ratio decidendi is based on the constitutional impermissibility of the legislature denying a sentencing court the discretion to impose a sentence commensurate with the crime, the circumstances and the offender; the structure of our bill of rights – and, in particular, Articles 28 and 50 of *the Constitution*; and the emerging norms of global norms of common decency discoverable from comparative law.

...

31. As Odunga J., (as he then was) and Mativo J. (as he then was) have made clear in Maingi & 5 Others vs Director of Public Prosecutions & Another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and Edwin Wachira & 9 Others vs Republic consolidated with petition No. 88 and 90 of 2021, respectively, the broader reasoning in Muruatetu 1 can be used analogously to find other parts of the Penal Code or other penal statutes unconstitutional for impermissibly abridging the discretion of judicial officers sitting as sentencing courts to take into consideration the individual circumstances of the offence, offender and victim in prescribing an appropriate sentence. However, such a case has to be properly pleaded and be placed before the court or preserved for appeal in the case of an appellate court such as ours.

8. The appellant is asking the court to consider the decision of Mativo j in *Edwin Wachira & 9 Others vs Republic* consolidated with petition No.88 and 90 of 2021 and the analogous application of Muruatetu 1.

9. The trial magistrate in her ruling stated that she had considered the appellant's mitigation and the fact that he was a first offender, however, she still sentenced him to 20 years which sentence in view of the above decisions was excessive. Having considered the appellant's mitigation, the fact that he was a first offender as well as the circumstances of the case, a 15-year sentence would be most appropriate.

10. In the end, I set aside the sentence of 20 years imprisonment and substitute it with a sentence of 15 years in prison. The sentence shall run from 19/7/2021.

DATED, SIGNED AND DELIVERED AT BUNGOMA VIA MICROSOFT TEAMS THIS 28TH DAY OF NOVEMBER 2023

R.E. OUGO

JUDGE

In the presence of:

Appellant in person - Present

Respondent - Absent

Wilkister - C/A