Chungana v Republic (Criminal Appeal E109 of 2021)
[2023] KEHC 27100 (KLR) (19 December 2023) (Judgment)

Neutral citation: [2023] KEHC 27100 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E109 OF 2021

DK KEMEI, J

DECEMBER 19, 2023

BETWEEN

ABUD MANYORORI CHUNGANA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the original sentence of the Chief Magistrate's Court at Bungoma, Hon. G.P Omondi, PM in the Criminal Case No. 45 of 2020 issued on 29th October 2021)

JUDGMENT

1. The appellant herein was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act* as well as an alternative charge of committing an indecent act with a child contrary to section 11 of the *Sexual Offences Act*.

2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the main count and that the trial court sentenced him to serve twenty (20) years imprisonment, after taking into account his mitigation, the pre-sentence report and treating him as a first offender.

3. The Appellant being aggrieved by that decision lodged an appeal to this Court against the sentence *vide* amended grounds of appeal filed in Court on March 6, 2023, on the following grounds:

    i. That the mandatory minimum sentence of twenty (20) years is harsh and excessive.

    ii. That mandatory minimum sentence deprived the Court of its legitimate jurisdiction to exercise discretion and therefore fails to conform to the tenets of a fair trial.

    iii. That he is remorseful and therefore prays that may the Court be pleased to reduce the sentence.

4. This appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions. In a nutshell, the Appellant submitted that subject to the case of Jared Koita

Injiri v Republic, Kisumu Court of Appeal No. 93 of 2014 where the Court of Appeal held that the mandatory minimum sentences as stipulated by the statute are unconstitutional. He urged this Court to consider the dints of Article 25 of the *Constitution* and review his sentence and subsequently reduce the same.

5. Opposing the appeal, the Respondent submitted that the trial magistrate exercised discretion when meting out the sentence against the Appellant and that he was not bound by the mandatory nature of the sentence as provided under law. Counsel relied on the cases of *S v Malgas* 2001(1) SACR 469 (SCA) and *Bernard Kimani Gacheru v Republic* (2002) eKLR.

6. This being the first Appellate Court, it is imperative that i must examine and analyze all the evidence adduced in the trial Court afresh and arrive at my own independent finding and conclusions on both the facts and the law. This is the principle espoused in a plethora of cases including *Kiilu & another v. Republic* [2005] 1 KLR 174 where the Court of Appeal held that:

> "An Appellant in a first Appeal is entitled to expect the whole evidence as a whole to be submitted to afresh and exhaustive examination and to the Appellate Court's own decision in the evidence. The 1st Appellate Court must itself weigh conflicting evidence and draw its own conclusions. It is not function of the 1st appellate Court to merely scrutinize the evidence to see if there was some evidence to support the lower Court's findings and conclusions, only then can it decide whether the Magistrate's finding should be supported. In doing so it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. ....
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> The Appellant seeks to challenge his conviction and sentence for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The Section reads;
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> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
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> (3) A 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.

7. Having been convicted for the offence of defilement, the trial Court considered the Appellant's mitigation that he had a family, was the bread winner of the family, has three children and also takes care of his mother who is paralysed and that he lost his father while he was in remand. The trial Court further called for a pre-sentence report. The trial Court after considering the Appellant's mitigation and the pre-sentence report noted that the Appellant ought to be subjected to custodial sentence and it is for that reason that the trial Court deemed it fit to mete out a deterrent sentence of twenty (20) years' imprisonment in exercise of its discretion.

8. Sentencing is a discretion of the trial court. In *Bernard Kimani Gacheru v Republic* (2002) eKLR, the Court of Appeal stated 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 stated is shown to exist.

9. This Court bears in mind that one of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the Court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. (See *Charles Ndirangu Kibue v Republic* [2016] eKLR). Further, the Court ought to bear in mind the obligation imposed on it by the Judiciary Sentencing Policy Guidelines to take into account the aggravating and mitigating circumstances and their effects on the sentence in determining the most suitable sentence.

10. I note that section 8 (3) of the *Sexual Offences Act* provides that upon conviction, the offender shall be imprisoned for a term of not less than twenty years. Previously, the principle laid down by the Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR, was that, provisions of law which exclude or fetter discretion of a Court of law in sentencing were inconsistent with the *Constitution*.

11. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the *Muruatetu* (2017) case, if the reasoning is applied, the sentence stipulated by section 8(2), (3) and (4) of the *Sexual Offences Act* which is a mandatory minimum should also be considered unconstitutional on the same basis. See *Jared Injiri Koita v Republic* [2019] eKLR.

12. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentences fail to conform to the tenets of fair trial which are an in-alienable right guaranteed under Articles 50 and 25 of the *Constitution*. See *Christopher Ochieng v Republic* KSM CA Criminal Appeal No 202 of 2011 [2018] eKLR, and *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No 93 of 2014 [2019] eKLR.

13. However, the Supreme Court in the case of *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] KLR clarified the position and stated inter alia that the decision in Muruatetu 2017 could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect of sentences of murder under sections 203 and 204 of the *Penal Code*, which was the case before the Supreme Court.

14. In his decision in *WOR v Republic* (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) a (26 April 2022) (Judgment) FA Ochieng J (as he then was) stated *inter alia* that:

> "If the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in section 8 of the *Sexual Offences Act* and that iam unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement and that in my view that renders the sentence unconstitutional as the fact that the prescribed sentence completely precluded the Court from exercising any discretion, regardless of whether or not the circumstances so require."

15. In the recent decision in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment), Odunga J (as he then was) at Machakos High Court [2022] eKLR pronounced himself as follows on this debate of the constitutionality or otherwise of the minimum mandatory sentences stipulated in the *Sexual Offences Act*:

> " This Court does not doubt the good intentions of the drafters of the *Sexual Offences Act* in taking steps to curb the menace of sexual offences and the trauma it causes to the victims of the said offence. The perpetrators of the said offences must be condemned by all means. However, the sentences to be imposed must meet the constitutional dictates.
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> 110. It is also debatable whether minimum mandatory sentences which only prescribe imprisonment as the mode of sentencing are in tandem with the *International Covenant on Civil and Political Rights of 1966*, which Kenya ratified in 1972 and for that reason, Covenant forms part of Kenyan law pursuant to article 2(6) of the *Constitution*. Article 10(3) of the Covenant stipulates that—'[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.' A sentence that does not provide for other options save for custodial sentence may well be frowned upon the ground that it may not achieve the essential aim of sentencing.
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> 111. 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.
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> 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. I gather support from the opinion held by the Court of Appeal in D*ismas Wafula Kilwake v Republic* [2019] eKLR that:
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> > "In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not

convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

113. I however associate myself with the sentiments of the Court of Appeal where it was noted that the Court of Appeal in *Eliud Waweru Wambui v Republic* [2019] eKLR has also rallied the above call for legislative amendments to the *Sexual Offences Act* by opining that; -

> "We need to add as we dispose of this appeal that the Act does cry out for a serious re-examination in a sober, pragmatic manner. Many other jurisdictions criminalize only sexual conduct with children of a younger age than 16 years. We think it is rather unrealistic to assume that teenagers and maturing adults in the sense employed by the English House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1985] 3 ALL ER 402, do not engage in, and often seek sexual activity with their eyes fully open. They may not have attained the age of maturity but they may well have reached the age of discretion and are able to make intelligent and informed decisions about their lives and their bodies. That is the mystery of growing up, which is a process, and not a series of disjointed leaps. As Lord Scarman put it in that case (at p421); "If the law should impose on the process of 'growing up' fixed limits where nature knows only a continuous process, the price would be artificially and a lack of realism in an area where the law must be sensitive to human development and social change." At p 422. In England, for instance, only sex with persons less than the age of 16, which is the age of consent, is criminalized and even then the sentences are much less stiff at a maximum of 2 years for children between 14 to 16 years of age. See *Archbold Criminal Pleading, Evidence and Practice*, [2002] p1720.

The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation. For the reasons we have set out herein, we find that the appellant's conviction was not safe, given the full circumstances of the case and the sentence, clearly imposed on the basis of a mandatory minimum was clearly harsh and excessive."

114. That a strict application of some of the provisions of the *Sexual Offences Act* may cause injustice was appreciated by the Court of Appeal in *Evans Wanjala Siibi v Republic* [2019] eKLR.

> "Once again the unfair consequences of a skewed application of that statute predominantly against the male adolescent is quite apparent:

two youths caught engaging in sex receive diametrically opposite treatment. The girl is branded a victim and guided to turn against her youthful paramour while the boy, Juliet's Romeo, is branded the villain, hauled before the courts and visited with a lengthy jail term. We very much doubt that it conduces to good sense, policy and our own conceptions of justice and fairness that the law should be deployed in a manner so disparative and discriminative in effect. A supposed justice resting on the shaky foundation of injustice against young boys hardly warrants the term."

115. This Court also had occasion to weigh in on the same matter in Yawa *Nyale v Republic* [2018] eKLR where it expressed itself as hereunder: ' It is now clear that certain provisions of the *Sexual Offences Act*, are a cause of concern in this country. The effect of the harsh minimum sentences imposed under the said Act on young people in this country is a serious cause of concern. Our jails are overflowing with young people convicted courtesy of the provisions of the said Act. While I appreciate that sexual offences do demean the victims of such crimes and ought not to be taken lightly, the general society in which we operate ought to be taken into account in order to achieve the objectives of punishment. Penal provisions ought to take into account the objectives intended to be achieved and should not just be an end in themselves otherwise they may end up being unjust especially where the penalties imposed do not deter the commission of crimes where both the victim and the offender do not appreciate the wrongdoing in question.'

116. Having said that the ultimate decision as to what ought to be done must remain that of the legislature. Ours is simply to align the legislation that were in existence before the promulgation of the *Constitution* of Kenya, 2010 with the letter and spirit of the *Constitution*. Having considered the issues raised in this petition, the orders that commend themselves to me and which I hereby grant are as follows:

    1. To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of the *Constitution*. However, the Court are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

    2. Taking cue from the decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR (Muruatetu 1) 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.

    3. Save for the foregoing, the other reliefs are declined since this Court cannot grant a blanket order for resentencing in the manner sought."

16. In my view, although the decision above was a persuasive one to this court, and not binding this Court, I am in agreement that whereas mandatory minimum sentences may be lawful, they indeed deprive the trial Court of the discretion in sentencing having regard to mitigations and circumstances of each case. This is not to say that there would be any justifiable cause for one to defile a child but that each case must be considered on its own facts and circumstances. In any event, the offence of murder is one where there is deprivation of life yet the Supreme Court saw it wise to find that death sentence being mandatory deprived the trial court of the discretion to impose appropriate sentence having regard to mitigations and circumstances of the case.

17. Taking into consideration the decision of the Supreme Court in *Muruatetu 2021* (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory, although, just like in the Muruatetu 2017 decision, the trial Court may, having regard to the circumstances of each case, impose a death sentence, which sentence is lawful.

18. For the above reasons and in consideration of the appellant's mitigation before the trial court, the sentence of twenty (20) years is set aside and substituted with one of fifteen (15) years imprisonment.

19. The upshot of the foregoing observations is that the instant appeal has merit. The same is allowed. The sentence of the trial court is hereby set aside and substituted with a sentence of fifteen years' imprisonment which shall start running from the date of his arrest namely 20/5/2020.

DATED AND DELIVERED AT BUNGOMA THIS 19TH DAY OF DECEMBER 2023

D. KEMEI

JUDGE

In the presence of:

Abiud Manyorori Appellant

Mwaniki for Respondent

Kizito Court Assistant