Matumbati v Republic (Criminal Appeal 105 of 2014)
[2022] KEHC 611 (KLR) (21 April 2022) (Judgment)

Neutral citation: [2022] KEHC 611 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL 105 OF 2014

OA SEWE, J

APRIL 21, 2022

BETWEEN

JOHN MATUMBATI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment, conviction and sentence of Hon. A. Alego, Principal Magistrate, delivered on the 7th day of February 2014 in Eldoret Chief Magistrate's Criminal Case No.2570 of 2012)

JUDGMENT

[1] This appeal was filed on 4th July 2014 against the conviction and sentence passed against the appellant, John Matumbati, by Hon. A. Alego, Principal Magistrate, in Eldoret Chief Magistrate's Criminal Case No.2570 of 2012: Republic v John Matumbai in which the appellant had been charged with the offence of rape contrary to Section 3(1)(a) as read with Section 3(3) of the *Sexual Offences Act*, No. 3 of 2006. It was alleged that on the 10th day of June 2012 in Uasin Gishu District of the Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of EJ.

[2] In the alternative, the appellant was charged with indecent act contrary to Section 11(1) of the Sexual Offences Act; in that, on the 10th day of June 2012 in Uasin Gishu District of the Rift Valley Province, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of EJ.

[3] The appellant denied the charges; and upon his case being tried by the subordinate court, he was found guilty and convicted of the substantive charge of rape. The lower court analysed the evidence adduced by the Prosecution against the appellant and came to the conclusion, after taking into account the

defence case, that the principal charge had been proved beyond reasonable doubt. Accordingly, the learned magistrate proceeded to sentence the appellant to 20 years' imprisonment for the offence.

[4] Being aggrieved by the decision of the lower court, the appellant filed what he termed Mitigation of Appeal, on the following grounds:

[a] That he pleaded guilty to the Charge;

[b] That the sentence imposed on him is harsh and severe.

(c) That he has a family that is wholly dependent on him for subsistence, who stand to suffer as a result of his long incarceration.

[d] That this Court should take into account that he is a first offender with no previous conviction.

[5] Consequently, the appellant prayed that his appeal on sentence be allowed and the sentence set aside; and that a non-custodial sentence be imposed on him instead.

[6] The appellant thereafter filed Amended Grounds of Appeal pursuant to Section 350(2)(v) of the *Criminal Procedure Code* and reiterated his posturing that his appeal is against sentence only. He consequently put forth the following grounds:

[a] That the sentence imposed is excessively harsh and unjust following the recent decision in the Supreme Court in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR;

[b] That he is remorseful and repentant; and that he promises to never repeat such a crime;

[c] That he has a family which depends wholly on him and that the family members are now suffering due to lack of support;

[d] That he has undergone several rehabilitation programs and learnt skills to be a better citizen.

[7] On the basis of the foregoing grounds, the appellant prayed for the following:

[a] that his conviction be quashed;

[b] that the sentence be set aside;

[c] that he be set at liberty or

[d] that the sentence be reduced and/or substituted with non-custodial/probation sentence.

[8] The appellant urged his appeal by way of written submissions pursuant to the directions of the Court on 9th September 2020 and 3rd June 2021. Accordingly, the appellant filed his written submissions on 19th February 2021 along with his Amended Grounds of Appeal. He relied on Section 3(1)(a) of the Sexual Offences Act to demonstrate that the sentence of 20 years imposed by the lower court was excessive. He likewise cited Muruatetu and urged this Court to consider substituting the 20 years imprisonment that was passed against him with a more lenient sentence; including non-custodial.

[9] On behalf of the State, submissions were filed herein on 1st March 2021. Mr. Mugun thereby opposed the appeal and urged the Court to find that the Prosecution called 6 witnesses whose evidence was credible, reliable, cogent and well corroborated. He submitted that all the ingredients of the offence were well proved beyond reasonable doubt; particularly the fact that the complainant did not consent to the act of sexual intercourse. Counsel further pointed out that the complainant was aged 70 years when the alleged offence took place; and that she was not only harmed physically but also psychologically as well. He therefore posited that 20 years' imprisonment imposed by the lower court

was appropriate in the circumstances. In the premises, counsel for the State urged for the dismissal of the appeal.

[10] I have given due consideration to the appeal, as well as the written submissions filed herein by both the appellant and counsel for the State. The agreed facts are that the appellant went to the house of the complainant on the night of 10th June 2012 to ask for salt. The complainant, a 70-year-old woman, opened the door only to be accosted and raped by the appellant. She was taken to hospital by neighbours for treatment; after which the incident was reported to the Police. It was therefore on the basis of the uncontroverted evidence of 6 prosecution witnesses that the lower court based its conviction against the appellant for the offence of rape. Indeed, the appellant conceded in his submissions that:

> "...the offence I committed was both a shame to me [and] to the community and even to God, I have come to realize that crime does not pay but haunts. I have been saved here in prison. I have been born again. I have prayed to God for forgiveness and through my repentance I now know God has forgiven me. I have tried to ask for forgiveness to the complainant and all those I wronged and have promised to forgive me. If I am given a chance by this court, I promised I will never commit any other crime..."

[11] In the premises, although the appeal was initially against both conviction and sentence, the appellant made it abundantly clear that his appeal is confined to the sentence of 20 years' imprisonment. And, as regards sentence, it is trite law that an appellate court ought not to interfere with the discretion of the trial court unless certain factors exist. Hence, *Ogalo s/o Owuora vs. Republic* [1954] 21 EACA 270, it was held that:

> "The principles upon which an appellate court will act in exercising its jurisdiction to review sentence are fairly established. The court does not alter a sentence on the mere ground than if the member of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in*James v Republic [1950] 18 EACA 147*, it is evident that the judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion namely that the sentence is manifestly excessive in view of the circumstances of the case."

[12] With the foregoing in mind, I must acknowledge that, in the Judiciary Sentencing Guidelines, it is suggested, at Paragraph 23.9, that appropriate sentence be determined in the following manner in all cases in which custodial sentence is deemed appropriate:

> "The first step is for the court to establish the ... sentence set out in the statute for that particular offence. To enable the court to factor in mitigating and aggravating circumstances/factors, the starting point shall be fifty percent of the maximum ... sentence provided by statute for that particular offence. Having a standard starting point is geared towards actualizing the uniformity/impartiality/consistency and accountability/ transparency principles set out in paragraphs 3.2 and 3.3 of these guidelines. A starting point of fifty percent provides a scale for the determination of a higher or lower sentence in light of mitigating or aggravating circumstances."

[13] In this instance, the penal provision, which is Section 3(3) of theSexual Offences Act, provides that:

> "A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life."

[14] In the premises, the sentence of 20 years' imprisonment is lawful. I have also looked at the record of the lower court and confirmed that the learned trial magistrate considered the appellant's mitigation and weighed it against the gravity of the offence and circumstances in which the offence was committed. I therefore find no reason to fault the sentence of 20 years meted on the appellant.

[15] I have likewise looked at the appeal against sentence from the prism of Muruatetu,in which the Supreme Court declared unconstitutional the mandatory aspect of the death sentence as prescribed by Section 204 of the *Penal Code*. That decision was made on 14 December 2017. For its full tenor and effect, an excerpt of the decision is restated here below:

> [58] "To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.
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> [59] "We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the *Constitution*."

[16] The Supreme Court then added at paragraph 69 of its Judgment that:

> "Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitutionand invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment."

[17] Following that decision, the Court of Appeal, in *_Jared Koita Injiri v Republic* [2019] eKLR, pronounced itself thus in a Judgment delivered on 7 December 2018:

Arising from the decision in *Francis Karioko Muruatetu & Another vs Republic*, SC Pet. No. 16 of 2015 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 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."

In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

[18] The same stance was taken in a host of other cases before the Supreme Court stepped in with further directions as to the applicability of Muruatetu. The directions are dated 6 July 2021; and, at paragraphs 11, 12 and 14 thereof the Supreme Court stated thus:

> [11] The ratio decidendi in the decision was summarized as follows;
>
> > "69. Consequently, we find that Section 204 of the Penal Code is inconsistent with the Constitutionand invalid to the extent that it provides for the mandatory death sentence for murder. For the avoidance of doubt, this decision does not outlaw the death penalty, which is still applicable as a discretionary maximum punishment".
>
> [12] We therefore reiterate that, this Court's decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Actor any other statute.
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> ...
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> [14] It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court."

[19] It is manifest, therefore, that Muruatetu is of no avail to the appellant. That being the case, it is my finding that his appeal is devoid of merit. It is consequently dismissed.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 21ST DAY OF APRIL 2022.

OLGA SEWE

JUDGE