Ngesa v Republic (Criminal Appeal E071 of 2023)
[2025] KEHC 7235 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KEHC 7235 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E071 OF 2023

BM MUSYOKI, J

MAY 23, 2025

BETWEEN

KEVIN OUMA NGESA ..... APPELLANT

AND

THE REPUBLIC ..... RESPONDENT

(Being appeal from sentence in Senior Principal Magistrate's Court at Maseno (Hon. J Kimetto PM) dated 7th August 2023)

JUDGMENT

1. The appellant was charged in the subordinate court with defilement of a fifteen-year-old child contrary to Section 8(1) and 8(3) of the *Sexual Offences Act* Chapter 63A of the Laws of Kenya. He also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the same Act. He was tried for the said offences in Senior Principal Magistrate's Court at Maseno, acquitted on the main count but convicted of the alternative count and sentenced to ten years imprisonment.

2. This appeal is against the sentence vide petition of appeal dated 5-12-2023 which contains only two grounds as follows;

    1. That the mandatory nature of the sentence under Section 11(1) of the *Sexual Offences Act* is unconstitutional and not warranted on plea.

    2. That the sentence imposed is harsh and disproportionate in view of the circumstances.

3. When it came to the prayers, the petition prayed for quashing of both conviction and sentence. Section 350(2) of the *Criminal Procedure Code* Chapter 75 of the Laws of Kenya provides as follows;

    > 'A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and, if the appellant is represented by an advocate, by the advocate, and

shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served on the appellant or, as the case may be, on his advocate; and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground of appeal other than those set out in the petition of appeal:

Provided that-

i. subject to the provisions of paragraph

(ii) , where, within five days of the date of the judgment or order appealed against, the appellant or his advocate has applied to the subordinate court which passed the judgment or made the order for a copy of the record of the proceedings before that court, and where the appeal is entered within the period of limitation prescribed by section 349 but before receipt by the appellant or his advocate of the copy of the record, the petition of appeal may be amended on notice in writing to the Registrar of the High Court and to the Director of Public Prosecutions and without leave of the High Court, within seven days of the receipt by the appellant or his advocate of the copy of the record applied for.'

4. The appellant has not sought to amend his petition of appeal neither has he sought to be allowed to argue a ground not included in the petition. In his submissions, he has made reference to his conviction having been flawed for lack of proof of the charges. The respondent perhaps guided by the grounds in the petition, has limited its submissions on the sentence only and in the circumstances this appeal will be treated as one against sentence only.

5. It is the appellant's submissions that the Honourable Magistrate failed to consider his mitigation thereby arriving at severe and excessive sentence. He also submits that the sentence and the trial were in violation of his constitutional rights under Articles 27, 28, 50(2) of *the Constitution*. Other than making reference to these Articles, the appellant has not told the court how and at what instance were his rights under the said Articles violated. I do not see how the appellant's rights were violated and as far as I understand the law, the sentence was lawful noting that it was the minimum sentence provided for under the relevant statute. What this court should consider is whether there is justifiable reason to disturb the discretion if any of the trial Magistrate.

6. It would appear to me that the appellant in filing this appeal had been buoyed by the decision of the Court of Appeal at Nyeri in its criminal appeal number 84 of 2015 in which the Court had held that imposition of mandatory minimum sentences was a violation of the constitutional doctrine of separation of powers. It is instructive that the said decision has since been reversed by the Supreme Court of Kenya in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (2024) KEHSC 34 (KLR) where it held that;

> 'We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the

> Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed.
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> Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on October 7, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remains lawful as long as section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence.'

7. My interpretation of the above decision of the Supreme Court is that once an accused person is convicted of an offence for which there is a statutory minimum sentence, the trial court cannot impose a sentence less than the minimum provided by the statute. The minimum sentence remains lawful and constitutional unless there has been a specific petition calling for declaration of unconstitutionality of the particular Section of the law and the same succeeds.

8. In this matter, the minimum sentence provided by Section 11(1) of the *Sexual Offences Act* is ten years imprisonment. This court therefore has no jurisdiction to vary the sentence below what the Honourable Magistrate handed down. There being no appeal on conviction, this appeal is found to be lacking in merits. The same is hereby dismissed.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered online in presence of the appellant (from Kitale Annex Prison) and in absence of the respondent.