Waruguru v Republic (Criminal Appeal E034 of 2022)
[2025] KEHC 5603 (KLR) (6 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5603 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E034 OF 2022

DKN MAGARE, J

MAY 6, 2025

BETWEEN

KENNEDY NDIRITU WARUGURU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the sentence of Hon. K.M. Njalale [PM] in Karatina CMSO Case No. E020 of 2021)

JUDGMENT

1. This is an appeal from the sentence of Hon. K.M. Njalale [PM] in Karatina CMSO Case No. E020 of 2021. The Appellant was convicted on 23.06.2022. The matter was then mentioned before Hon. E. Kanyiri, who sentenced the Appellant. It is not clear how the court came to handle the sentence while the trial court had not been transferred. The conviction is highly irregular and ought to be frowned upon.

2. The Appellant was convicted with the offence of defilement contrary to Section 8[1] as read with 8[3] of the *Sexual Offences Act*.

3. The particulars were that on 31/7/2021 at around 1800 hours in [particulars withheld] village in Kiangoma sub-location within Mathira west sub-county, the appellant caused his penis to penetrate the vagina of JMM, a child aged 12 years.

4. There was an alternative count irrelevant to this appeal. The appellant was found guilty and sentenced to 30 years imprisonment. He then appealed, on what appears to be an appeal on conviction which he withdrew. On taking directions, he opted to amend the petition of Appeal and appeal on sentence only.

5. Being an appeal on sentence, it is unnecessary to rehash all the evidence. The court will, however, summarize the crucial evidence relevant to sentencing. The minor was taken to a room and threatened

with being killed. She was defiled and went home the following day. A P3 was filed and a PRC on 1/8/2021. She stated that the Appellants' hands were broken when he grabbed the complainant. The mother was PW2, who stated that she sent her child, PW1, for milk. She did not return until the following day.

6. PW4 testified that he was a medical doctor. He testified that PRC and P3 was filled. Parties filed submissions, which I shall subsume in the judgment.

Analysis.

7. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand.

8. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya v Republic [1957] EA 336 as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

9. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated as follows on the duty of the court on a first appeal:

> "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination [Pandya v. R., [1957] E. A. 336] and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. [Shantilal M. Ruwala v. R., [1957] E.A. 570]. It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings 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, see Peters v. Sunday Post, [1958] E. A. 424."

10. Section 9 of the *Sexual Offences Act* provides as follows:

8.[1] A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

[2] ....

[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.

[4] ...

[5] ...

11. Having dropped the appeal on conviction, the shot remaining was on sentence. However, the sentence meted out was a minimum sentence. Republic v Mwangi; Initiative for Strategic Litigation in Africa [ISLA] & 3 others [Amicus Curiae] [Petition E018 of 2023] [2024] KESC 34 [KLR] [12 July 2024] [Judgment], it was the supreme court stated as follows:

Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.

66. 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.

12. The minimum sentence for the offence herein is 20 years. The court gave out a sentence of 30 years. Sentencing is the discretion of the court. However, the discretion is governed by sentencing guidelines and surrounding circumstances. The court cannot interfere with discretion unless the same was meted out injudiciously.

13. The power to alter the sentence is set out in Section 354 of the *Criminal Procedure Code*.

The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may-

[a] ....

[b] in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

14. A sentence can only be set aside if it is manifestly excessive having regard to the circumstances of each case. In the case of Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No. 253 of 2003 the Court of Appeal stated thus:-

> " Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered [see also Sayeka v R. [1989 KLR 306]"

15. Sentence is a matter that rests in the discretion of the trial court. The Court of Appeal, on its part, in 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."

16. The court that delivered the judgment is not the same that meted out the sentence. There were no directions in respect of Section 200. The new court did not see the witnesses nor have a feel of the same to be able to understand the most appropriate sentence. In the case of Sugut v Jemutai & 3 others [Civil Appeal 110 of 2018] [2023] KECA 202 [KLR] [17 February 2023] [Judgment] Neutral citation: [2023] KECA 202 [KLR Kiage JA stated as doth: -

> " I have carefully considered those rival submissions by counsel in light of the record and the bundles of authorities placed before us. I have done so mindful of our role as a first appellate court to proceed by way of re-hearing and to subject the entire evidence to a fresh and exhaustive re-evaluation so as to arrive at our own independent conclusions. See Rule 29[1] of the Court of Appeal Rules 2010; Selle Vs Associated Motor Boat Co [1968] EA 123]. I do accord due respect to the factual fndings of the trial court out of an appreciation that it had the advantage, which we do not, of having seen and heard the witnesses as they testified. I am, however, not bound to accept any such findings if it appears that the judge failed to take any particular circumstance into account or they were based on no evidence or were otherwise plainly wrong. I note from the record before us that the learned Judge may not have been in a fully advantageous position in that regard having taken up the case when it was already half-way heard. Her conclusions on the evidence and findings of fact were therefore from a reading of what was recorded by the previous judge."

17. The Appellant was 22 years old and a first offender at the time of sentencing. She relied on the fact that boys keep bullying the complainant and she felt unworthy. This is a genuine and profound effect on the victim. Nevertheless, the stigma is outside the appellant's control. Having committed a heinous act, the appellant must and should be punished. He cannot, however, be punished for circumstances outside his control. The court stated that the appellant does not qualify for leniency. This qualification is not

based on the sentencing guidelines. Nothing in the occurrence of the offence pushed the punishment outside the minimum sentence.

18. Sentencing policy guidelines provide as follows:

    7.17 Where the law provides mandatory minimum sentences,

    51 then the court is bound by those provisions and must not impose a sentence lower than what is prescribed.

    52. A fine shall not substitute a term of imprisonment where a minimum sentence is provided.

    Repeat offenders should be ordered to serve a non-custodial sentence only when it is evident that it is the most suitable sentence in the circumstance.

19. There was no particular heinousness outside the heinousness of the offence itself. Indeed, the court indicated that the minor stated that she had injured her hand. However, this was not reflected in the P3 form.

20. In these circumstances, the proper sentence was the minimum sentence. This was 20 years ago. Consequently, I set aside the sentence of 30 years and substitute it with 20 years.

21. The other issue is the commencement of the sentence. Section 333[2] of the *Criminal Procedure Code* requires that the period spent in custody be taken into consideration. The court did not specify the period from arrest to sentencing. In the circumstances, the said period must be regarded. The court perfunctorily stated, taking into consideration the period he has been in custody. This was not in compliance with Section 333[2] of the *Criminal Procedure Code*.

22. The sentence starts from the date the Appellant was arrested on 4.08.2021, not later. The court must actually take the mathematical precision of the days in custody. The sentence simply complied with the letter without making any meaning at all.

Determination

23. The consequence of the foregoing is that the court makes the following orders:

    a. The appeal on conviction was withdrawn.

    b. The appeal on sentence is allowed. The sentence of 30 years is set aside and substituted with a sentence of 20 years. The sentence shall run from the date of arrest, 04.08.2021.

    c. The file is closed.

DATED, SIGNED AND DELIVERED AT NYERI ON THIS 6TH DAY OF MAY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Kimani for the State

Appellant, pro se – present

Court Assistant – Michael