Cheptoo v Republic (Criminal Appeal 11 of 2023)
[2024] KEHC 180 (KLR) (16 January 2024) (Judgment)

Neutral citation: [2024] KEHC 180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDAMA RAVINE

CRIMINAL APPEAL 11 OF 2023

RB NGETICH, J

JANUARY 16, 2024

BETWEEN

EVANS KIPKEMEI CHEPTOO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal against both conviction and sentence arising from the Judgement by Hon. A Towett (SRM) delivered on the 8 th September in Eldama Ravine Magistrate's Court S/O No. 16 of 2019)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual offences Act* No.3 of 2006. The particulars of the offence being that the Appellant on diverse dates during the month of July, 2018 within Baringo County, intentionally and unlawfully committed an act which caused the penetration of his penis into the vagina of IJ a child aged 14 years old.

2. The Appellant faced an alternative charge of indecent act with a child contrary to section 11(1) of the *Sexual offences Act* No.3 of 2006, the particulars of the charge being that the accused on the diverse dates between during the month of July, 2018 within Baringo County, intentionally and unlawfully caused his penis to come into contact with the vagina of IJ a child aged 14 years.

3. The Appellant pleaded not guilty and the prosecution availed a total of 5 witnesses during the trial in support of the charge. Upon considering evidence adduced, the trial court found the accused guilty of the main charge and convicted him of the offence of defilement and proceeded to sentence him to serve 20 years imprisonment.

4. The Appellant having been aggrieved and dissatisfied with the above mentioned judgment, appeals against the judgment on the following grounds:-

a) That the Learned trial magistrate erred in law and fact by convicting the Appellant on the basis of insufficient, contradictory, false uncorroborated and unsubstantiated evidence.

b) That the Learned magistrate erred in law and fact by convicting the Appellant on a charge sheet that was evidently defective.

c) That the Learned trial Magistrate erred in law and in fact by failing to appreciate that the medical evidence produced in court did not support or collaborate the charges and neither did create a nexus between the Appellant and the alleged offence.

d) That the learned trial magistrate erred in law and in fact by failing to accord the Appellant a fair hearing.

e) That the learned magistrate erred in law and in fact by failing to appreciate that the prosecution evidence was marred with contradiction which greatly vitiated the credibility of the prosecution evidence.

f) That the learned magistrate erred in law and in fact by harshly imposing a severe penalty on the Appellant and yet the court had discretion to pass a more lenient sentence.

5. The appellant prays for his appeal to be allowed, conviction quashed, sentence set aside and the Appellant set at liberty.

6. On the 16th November, 2023, the Appellant filed amended grounds of appeal pursuant to the provisions of Section 350(iv) *Criminal Procedure Code* so as to appeal against sentence only as follows:-

i) That the learned trial magistrate erred in law and in fact by failing to appreciate that the mandatory nature of the sentence imposed by Section 8(3) of the *Sexual offences Act* has since been declared unconstitutional.

ii) That the learned trial magistrate erred in law by imposing an excessive sentence that was not reflective of the circumstances of the case.

iii) The Appellant filed written submissions on the 16th November,2023 and indicated that he has resolved to pursue appeal on sentence only.

7. The Appellant submits that the court complied with the provisions of Section 8 (3) which prescribed a mandatory sentence of 20 years. This is the basis of Appellant's argument. He argued that in the case of *Francis Karioko Muruatetu & Another* the apex court stated that minimum mandatory sentences deprive the courts of the requisite discretion to consider the aggravating and mitigating factors which would allow the court's to mete appropriate sentences which are based on the peculiar circumstances of each case.

8. The Appellant submits that the decision of the apex court binds this court pursuant to the provisions of Article 163 (7) of the *Constitution* of Kenya, 2010 which stipulates that all courts other than the Supreme court are bound by the decision of the supreme court. That the mandatory nature of the sentences is what the supreme court in the cited decision declared unconstitutional. That the reasoning in Muruatetu case has now been extended to sentences in sexual offences where the statute prescribes minimum sentences.

9. The Appellant submits that the learned trial magistrate erred substantively in matters of law and principle by donating the judicial powers to an unconstitutional statutory provisions which deprives the courts its discretionary powers despite there being a clear guideline of higher jurisdiction by meting

a mandatory sentence of 20 years imprisonment under the dictates of section 8(3) of the *Sexual offences Act* which had already been declared unconstitutional to the extent that it is mandatory.

10. The Appellant submits that the sentence was excessive and sentencing forms an integral part of any trial process as it not only works to serve justice to the parties involved but also to inspire confidence in criminal justice delivery.

11. That the judiciary sentencing policy guidelines are meant to address disparities, that lack of uniformity and certainty in offences with sentences of more or less similar facts and circumstances and sentencing guidelines is aimed at assisting the court while exercising discretion to balance the various factors to come up with the possible outcome.

12. The appellant states that he has been in custody for over 2 years now which is enough deterrence sentence. That he has learnt with great and excruciating pain that crime does not pay. He argues that he has fruitfully engaged in spiritual trainings offered in the penal facilities and has undergone counselling sessions which have led to a total positive change in behavior. That he has also deeply regretted the offence committed and he is utterly remorseful of the offence and he even endeavored to seek for forgiveness from the complainant herein.

13. That on the other hand, the supreme court's decision in the Muruatetu case gave the following as mitigating factors that are applicable in a rehearing sentence; age of the offender, being a first offender, whether the offender pleaded guilty, character and record of the offender, commission of the offence in response to the gender based violence, remorsefulness of the offender, the possibility of reform and social re-adaptation of the offender and any other factor that the court considers relevant.

14. The Appellant submits that in view of the mitigating factors which the trial court overlooked by dint of the fact that section 8(3) of the *sexual offences Act* imposed a mandatory minimum sentence, he submits that he is a first offender, that he had harmonious relationship with his parents and neighbors and co-existed very well with the family. That he has undergone a lot of transformation and he is now a totally reformed person, he is remorseful of the offence committed and deeply regrets the circumstances that led to the same and his family is willing to accept him back to the society. He also begs this Honourable court to note the detrimental effects of his incarceration to his children who are of a very tender age.

Respondent's Submissions

15. The state counsel Ms Ratemo submitted orally. She argued that the prosecution proved their case beyond reasonable doubt for the offence of defilement. That the law provides that the prosecution needed to prove age of the victim, penetration and also to prove that there was proper identification that the Appellant was the perpetrator.

16. Counsel submitted that the prosecution proved penetration by availing the P3 Form which confirmed that the complainant was 8 months pregnant. That there was further report from the Government analyst for DNA samples which confirmed that the Appellant was the biological father of the complainant's child and on the issue of the age of the victim, the prosecution produced certificate of birth as exhibit confirming that the victim was a minor.

17. The prosecution submits that it proved its case against the Appellant and on the issue of sentence, they submit that the sentence meted was the minimum sentence. That the *Sexual Offences Act* provides a minimum of 20 years imprisonment where the child is aged 12 to 15 years and that the sentence was within the parameters provided and was not excessive as stated in the grounds of appeal. Counsel submitted that the appeal is unmeritorious and should be dismissed.

Analysis and Determination

18. This is the first appellate court and our duty as such was well set out in the case *Okeno v Republic* [1972] E.A 32 as follows:-

> " 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. Republic* [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. Rulwala v. Republic* [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."

19. Also in the case of *Mark Oiruri Mose v Republic* [2013] eKLR Criminal Appeal No.295 of 2012 the Court of Appeal stated as follows:-

> " It has been said over and over again that the first appellate Court has the duty to revisit the evidence tendered before the trial Court afresh, analyze it, evaluate it and come to its own independent conclusion on the matter but always bearing in mind that the trial Court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and to give allowance for that."

20. In view of the above, I have perused and considered the record of appeal, grounds of appeal and the rival submissions by the parties herein. In view of the fact that the appellant is not pursuing appeal on conviction, I will not revaluate evidence before the trial court as the main issue remaining for determination is whether the sentence meted on the Appellant was harsh and or excessive.

21. The Appellant submits that his sentence of 20 years imprisonment was passed by the court being guided by the provisions of section 8(3) of the *sexual offences Act* which is coached in mandatory terms and the appellant submits that this is a bad law as the learned magistrate has no discretion to consider the accused's mitigation, the victims circumstances that might lessen the sentence.

22. From aforegoing submissions, it is clear that the Appellant is applying for re-sentencing following the famous decision by the Supreme Court in *Francis Karioko Muruatetu & 5 Others v Republic,* [2017] eKLR where the supreme court held that mandatory nature of sentences were unconstitutional to the extent that they deprived the trial court of its discretion to mete out an appropriate sentence against an offender after considering his or her plea in mitigation and the aggravating factors surrounding commission of the offence in question. Examples of cases where the Muruatetu decision was applied to sexual offences included the Court of Appeal decision in *Christopher Ochieng v Republic*, [2018] eKLR; *Evans Wanjala Wanyonyi v Republic*, [2019] eKLR; *Dismas Wafula Kilwake v Republic*, [2018] eKLR. The learned trial magistrate apparently exercised her discretion in sentencing in accordance with the jurisprudence then prevailing that trial courts retained discretion to mete out appropriate sentences even in cases where the law prescribed mandatory sentences.

23. However, on 6th July 2021 in *Muruatetu II case* the supreme court issued directions on applicability of *Muruatetu I*; that the decision by supreme court in Muruatetu I case applied only to the mandatory death sentence for the offence of murder prescribed under section 204 of the *Penal Code* and not to any other sentence.

24. The revisionary jurisdiction of this court is wide in scope but it is limited to the parameters set out in section 362 of the *Criminal Procedure Code* which states as follows:

> " The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court."

25. In my view, section 362 should be read together with section 364 of the Criminal Procedure Code which specifies the orders the court can make, in its discretion, if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by Sections 354, 357 and 358 of the *Criminal Procedure Code* if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

26. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No. 253 of 2003 (Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

27. Similarly, in the case of *Wanjema v Republic* (1971) E.A. 493 the court stated as follows;

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

28. I have carefully considered the facts of this case, the severity of the offence, the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, the mitigating and aggravating factors, and the scar the incidence left in the life of the victim. I have also considered the purpose of sentencing and the principles of sentencing under the common law.

29. In determining whether to revise the sentence imposed herein, I note section 8(1), (3) of the *Sexual Offences Act* provides as follows:

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

    2) A person who commits am 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.

30. In this instance, the Respondent is an adult and obviously took advantage of a 15-year-old school going girl and perhaps put to rest all her ambition for further studies and career. The effect of the offence on the minor are long lasting and the psychological effect is even worse. I find the sentence of twenty (20) years imprisonment that was meted herein is lawful and appropriate.

31. Final Orders : -

1) Appeal on conviction is marked as abandoned.

2) Appeal on sentence is hereby dismissed.

3) Period served in remand to be reduced from sentence imposed by trial court.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 16TH DAY OF JANUARY 2024.

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Karanja - Court Assistant.

Ms Ratemo for State.

Appellant Present.