Matinyit v Republic (Criminal Appeal E022 of 2023)
[2024] KEHC 3035 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3035 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E022 OF 2023

RB NGETICH, J

MARCH 14, 2024

BETWEEN

DANIEL MATINYIT .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the conviction and sentence from the Judgment and/or Decree of Honourable V.O Amboko (SRM) delivered on the 19th November, 2020 at Kabarnet Senior Principal Magistrate's Court Criminal case (S.O) No.23 of 2019)

JUDGMENT

1. The Appellant herein was charged with the offence of defilement contrary to section 8(1) as read with Section 8(4) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 26th day of March, 2019 at about 1900hrs at [particulars withheld] school, maji moto location in Mogotio Sub- County within Baringo County, intentionally caused his penis to penetrate the vagina of FY a child aged 16 years.

2. The Appellant faced an alternative count of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars are that on the 26th day of March, 2019 at about 1900Hrs At [particulars withheld] school, Maji Moto location in Mogotio Sub- County within Baringo County, intentionally touched the buttocks, breasts, anus and vagina of FY with his penis.

3. The Appellant denied all the charges and the case proceeded for full trial with the prosecution calling 5 witnesses in support of their case and Appellant/accused gave sworn statement in his defence. By the judgment delivered on 19th November,2020, the trial Court found that the prosecution proved the charge against the appellant beyond reasonable doubt, convicted and sentenced him to serve 15 years imprisonment.

4. The Appellant being aggrieved and dissatisfied by the decision of the trial court, lodged an appeal to this court on the following grounds: -

    a. That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution's case was not proved beyond any reasonable doubt as required by law.

    b. That the Learned trial magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced did not create a nexus between him and the alleged offence.

    c. That the learned trial magistrate erred in law and in fact by failing to appreciate that the prosecution evidence was marred with contradictions and inconsistencies.

    d. That the learned trial magistrate erred in law and in fact by failing to appreciate that complainant's age was not proved by the prosecution as required by law.

    e. That the learned trial magistrate erred in law by dismissing the Appellant's defense without giving any cogent reasons thereof.

5. The Appellant with the leave of court filed amended grounds of appeal dated 23rd November,2023 raising the following grounds: -

    i. That the learned trial magistrate erred in law and in fact by convicting the accused person when the prosecution had not proved its case beyond any reasonable doubt.

    ii. That the learned trial magistrate erred in law and in fact by not taking into consideration the defence evidence adduced by the Appellant especially the reason that there was no medical or scientific proof that the appellant defiled the complainant.

    iii. That the learned trial magistrate erred in law and in fact by not considering that there were inconsistencies and contradictions in the evidence of the prosecution witness.

    iv. The learned trial magistrate erred in law and in fact by not considering that there was no proof of penetration as provided for under section 8(i) of the *Sexual offences Act*.

    v. The learned trial magistrate erred in law and in fact by being biased in her judgement and therefore convicting and sentencing the appellant on wrong grounds and without giving any convincing reasons.

    vi. The learned trial magistrate erred in law and in fact in meting a manifestly harsh sentence by imposing a sentence of 15 years imprisonment upon the appellant without considering the mitigation of the Appellant and the fact that he is a first offender.

    vii. The learned trial magistrate erred in law and in fact by not considering the fact that the complainant had admitted having a relationship with one Brian Mulama a fact which was corroborated by PW 3.

    viii. The learned trial magistrate erred in law and in fact by relying on hearsay evidence and also failed to take into consideration that there was nothing to link the appellant to the commission of the offence which was instituted after a long period of time after its alleged commission i.e twenty-six (26) weeks thereafter.

    ix. That despite that the trial magistrate meted the mandatory minimum sentence of 15 years, there was no fairness herein in that, her hands were tied and was deprived of her discretion hence could not give appropriate sentence as informed by the circumstances of the case together with the mitigating factors made by the Appellant.

x. That the constitutionality of the mandatory minimum sentence as it is in section 8(1) as read with section 8(2) and (4) and 11(1) of the *Sexual Offences Act* No. 3 of 2006 are inconsistent with or in contravention of Articles 50(2), 25,27,28 and 29 of the *Constitution*.

6. The appellant prays this appeal be allowed on both conviction and sentence and he be acquitted forthwith or in the alternative, the sentence of 15 years be declared manifestly harsh as per the circumstances of the case and the same be reduced.

Appellant's Submissions

7. When the Appeal came up for hearing, Mr. Mwaita representing the Appellant informed the court that they had filed written submissions but he had instructions to abandon appeal on conviction and would pursue appeal on sentence only. He submitted that the appellant has reformed and is character shaped while in prison; and the appellant had a letter from religious organizations and urged this court to exercise discretion to reduce the sentence imposed on the appellant by the trial court.

8. Counsel cited the case of *Yusuf shunzi v director of public prosecution* [2020] eKLR where justice Ogolla held as follows:-

> "...Section 8(2) and 11 provide for mandatory minimum sentences. However, the constitutionality of such sentences is highly doubtful since they do not permit the court to consider the peculiar circumstance of the case in order to arrive at an appropriate sentence informed by those circumstances. While the court has the leeway to impose any sentence over and above the minimum sentence, the sections do not permit the court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances...."

9. That Similarly in the case of *Johnson Silvano Mkirani v Republic* (criminal Appeal no.10 of 2021) [2021] KEHC 300(KLR) Justice John M. Matiro stated inter alia: -

> "...while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered ..."

10. Counsel submitted that it is noteworthy that the development of new jurisprudence on imposition of sentences under the *sexual offences Act* is healthy because of bringing in a pertinent issue on prevailing circumstances being mitigating issues and changes of character arising from such factors as reports on probation and reform of an offender, say while in prison. That such is the scenario in this case.

11. That applying the observations of Justice E. K. Ogola in the said case of *Yusuf Shunzi v director of public prosecution*, counsel urge the court to consider the improvement in the character and the reformist and rehabilitation traits the accused has attained while serving his sentence. That the conditions hitherto are exhibited by the following:-

    i. The accused has obtained a Diploma Certificate from Emmanus Bible School dated 5th September, 2022.

    ii. He has a certificate on foundation bible study series dated 14th April, 2022.

    iii. He also has attained a certificate of participation in peer counselling training from 16th to 24th March 2022.

    iv. Recommendation letter by the officer in charge Nakuru main prison dated 14th February 2023.

v. Recommendation letter by the Principal Prison Chaplain Rift Valley Region dated 146 February 2023.

vi. A letter of progress report on HCCRA NO. E022 of 2023 by the officer in charge Nakuru main prison dated December 2023.

12. And submit that taking into consideration the foregoing developments by the accused, counsel urge this court to consider him and exercise discretion and reduce the sentence as meted by the lower court taking into consideration the decision by Hon. Justice E. K. Ogola in the case of *Yusuf Shunzi v Director of Public Prosecution*.

Respondents Submisions

13. The prosecution counsel Ms. Ratemo submitted that they do not object to request to review of sentence. She submitted that the Appellant was charged with the offence of defilement of a girl aged 16 years and having looked at the records, the Appellant was a laboratory assistant in a school but had relationship with the victim. That he took advantage of his work to defile the victim. That looking at the age of complainant and sentence of 15 years, the trial court looked at the current jurisprudence at time of sentence. That it is not indicated whether the accused was in remand during trial. The Respondent submits that the sentence imposed was within the parameters of the law, however time spent in remand can be considered by the court.

Analysis And Determination

14. The Appellant abandoned appeal on conviction and is now seeking review of sentence on the ground that the sentence imposed was excessive in the circumstances and that he has since reformed. He urged this court to consider his mitigating factors in determining the appropriate sentence.

15. The principles guiding interference with sentencing by the appellate Court were properly set out in *S v Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

16. The other principle to be considered is whether the sentence is manifestly excessive in view of the circumstances of the case. In the case of *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated as follows: -

> " 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]."

17. Further, the Court of Appeal while dealing with the issue of sentence in the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR restated as hereunder: -

> " 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."

18. In view of the above, the appellate court's discretion to interfere with sentence by the trial court is limited to situations where sentence is manifestly excessive in the circumstances of the case or the trial court took into account wrong material or acted on wrong principle.

19. The appellant submitted on constitutionality of mandatory minimum sentences. However, the case cited was decided before *Muruatetu 2 case* where the supreme court clarified applicability of Supreme Court in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR. by stating that it applied to mandatory death sentence in murder cases; the court while clarifying the position in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae)* [2021] eKLR stated as follows:-

> "
>
> "(10) It has been argued in justifying this state of affairs, that, by Paragraph 48 of the Judgment in this matter, or indeed the spirit of the Judgment as a whole, the Court has outlawed all mandatory and minimum sentence provisions; and that although Muruatetu specifically dealt with the mandatory death sentence in respect of murder, the decision's expansive reasoning can be applied to other offenses that prescribe mandatory or minimum sentences. Far from it, in that paragraph, we stated categorically that;
>
> > [48] 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 appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of *the Constitution*; an absolute right".
>
> Reading this paragraph and the Judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the Judgment is only made to Section 204 of the *Penal Code* and it is the mandatory nature of death sentence under that section that was said to deprive

the "courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases".

(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 Constitution* and 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".

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 Act* or any other statute."

20. A reading of the Supreme Court judgement therefore shows that the mandatory minimum sentences provided under Section 8 of the *Sexual Offences Act* remain the statutory and legal sentences for persons found guilty of the offence of defilement.

21. In this case the appellant was convicted of the offence of defiling a minor aged 16 years old. Section 8 (4) of the *Sexual Offences Act* which is the relevant penal provision for the offence of defilement provides that "a person who commits an offence of defilement with a child of between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years". The appellant herein was sentenced to serve 15 years imprisonment. I therefore find that the sentence meted upon the Appellant was just and within the law. The upshot is that the appeal on the sentence is hereby dismissed.

22. Final Orders: -

    This appeal is hereby dismissed.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET

THIS 14TH DAY OF MARCH 2024.

...

RACHEL NGETICH

JUDGE

In the presence of:

Appellant present.

Ms. Ratemo for State.

Elvis, Court Assistant.