Opiyo v Republic (Criminal Appeal E042 of 2023)
[2024] KEHC 5700 (KLR) (21 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5700 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E042 OF 2023

RE ABURILI, J

MAY 21, 2024

BETWEEN

RAPHAEL OKOTH OPIYO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the sentence by the Hon. C. Oruo on the 10.3.2023 in the Principal Magistrate's Court in Winam in MCSO No. E037 of 2022)

JUDGMENT

Introduction

1. The appellant herein Raphael Okoth Opiyo was charged with the offence of defilement contrary to section 8 (1) (4) of the *Sexual Offences Act*. The particulars of the offence were that on the 25th May 2022 in Kisumu Central sub-county within Kisumu County intentionally caused his penis to penetrate the vagina of F.A.O, a child aged 16 years old.

2. The trial court after considering the evidence adduced by the prosecution found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant. The trial court after considering the appellant's mitigation sentenced the appellant to serve 15 years' imprisonment.

3. Aggrieved by the conviction and sentence, the appellant filed his petition of appeal on the 21st March 2023 setting out the following grounds of appeal:

    i. That I pleaded not guilty to the appended charges.

    ii. That the learned trial magistrate erred both in law and facts by sentencing the appellant 15 years' imprisonment without considering that the same had a lot of contradictions.

iii. That the learned trial magistrate erred in both law and facts by sentencing the appellant herein without considering that the medical evidence that was produced before the court of law was not merit to warrant the sentence.

iv. That the learned trial magistrate erred both law and facts by sentencing the appellant herein on what can be termed as acting on wrong principles.

v. That since I cannot remember all of the ingredients of the case, I pray that more grounds will be adduced at th hearing date, after being supplied by certified copy of Lower court records and judgement.

vi. That I pray to be present at the hearing and determination of this appeal.

vii. That the learned trial magistrate erred in both law and facts by failing to establish that the prosecution did not prove its case beyond reasonable doubt.

viii. That the learned trial magistrate erred in law and facts by awarding a manifestly harsh sentence.

ix. That more grounds will be adduced after receiving the court proceedings.

4. At the hearing of the appeal, the appellant informed the court that he wished to withdraw his appeal against conviction and urged the court to consider his sentence only which application was allowed by the court.

5. On sentence imposed, the appellant submitted that it was too long and that he had a family that depended on him. The appellant further submitted that he had been in remand for ten (10) months and had since been in prison for a period of two years. The appellant submitted that he was 30 years old and that he was convicted on 10.3.2023.

6. Opposing the appeal, the Principal Prosecution Counsel, Mr. Marete, submitted that section 8 (4) of the *Sexual Offences Act* provides that the minimum sentence is 15 years' imprisonment upon conviction which the appellant was sentenced to, which sentence was not excessive as the appellant could have been sentenced to a longer term sentence. Mr. Marete urged the court not to interfere with the sentence.

Analysis and Determination

7. I have considered the grounds of appeal and the submissions by the appellant and the prosecution counsel. The appellant was charged and convicted of the offence of defilement contrary to section 8(1)(4) of the *Sexual Offences Act*. He was sentenced to serve fifteen years in prison. Under Section 8(1)(4) of the *Sexual Offences Act*:

> "(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

8. The provisions of section 8(1)(4) of the *Sexual Offences Act* are couched in mandatory terms in respect of the minimum sentence. However, this section and others under the *Sexual Offences Act* have been interpreted differently by Courts. In *Maingi & 5 others v Director of Public Prosecutions & another*

(Petition E017 of 2021) [2022] KEHC 13118 (KLR) (17 May 2022) (Judgment) it was stated by the court:

> "In arriving at its decision the Court was similarly guided by the decision of the Constitutional Court of Uganda in *Susan Kigula & 417 Others vs. Attorney General*, Const. App. No. 3 of 2006 that it is the duty of the courts to pass appropriate sentences on persons convicted of crime and that sentencing is an exercise of judicial function rather than of legislative function and concluded that:
>
> > "The legislature has all the powers to make laws including prescribing sentences. But it is the duty of the courts to ensure that the sentences so prescribed are imposed in accordance with the *Constitution*." (Emphasis supplied)

9. Sentencing is in the discretion of the trial court. I agree with the holding in the Maingi case that sentencing is an exercise reserved for the judicial function, and that it is for the court to ensure that sentences, however prescribed by the legislature, are imposed in accordance with the *Constitution*.

10. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S vs. 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"

11. In *Mokela vs. The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

12. The Court of Appeal for Eastern Africa in the case of *Ogolla s/o Owuor vs. Republic*, [1954] EACA 270, pronounced itself on this issue as follows:

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

13. In *Patrick Muli Mukutha v Republic* [2019] eKLR, Odunga J added his voice to this discourse and after citing some of the cases cited hereinabove stated as follows:

> "
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> "10. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912)

CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-

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"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 –vs- R. (1989 KLR 306)"

11. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. 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."

12. In *Shadrack Kipchoge Kogo vs. Republic* Eldoret Criminal Appeal No. 253 of 2003 the Court had this to say:-

> "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."

14. The right to dignity is guaranteed by Article 28 of the *Constitution*, while Article 27(1) ensures the right to equality before the law. These provisions acknowledge that a person's guilt should not be solely determined by the act committed, taking into consideration the age of the victim. Thus, mandatory sentences have been found to violate the dignity and respect for the person. This is because such sentences preclude the court from viewing an offender in an individual light as a person with individual humanity.

15. In Taifa v Republic (Criminal Appeal E018 of 2022) [2022] KEHC 14230 (KLR) (24 October 2022) (Judgment) it was held that:

> "In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the

Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional." (Emphasis supplied)

16. In WOR v Republic (Criminal Appeal E017 of 2020 [2022] KEHC 412 (KLR) a (26 April 2022) (Judgment) FA Ochieng J (as he then was) held that mandatory sentences under the *Sexual Offences Act* were unconstitutional, when he stated inter alia that:

> "50. Having received the mitigation from the Appellant, and the pre-sentencing report from the Probation Officer, the Court effectively decided that they counted for nothing.
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> 51. Prior to the Supreme Court's decision in the case of *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR, the courts construed mandatory sentences in a literal sense; just like the trial court herein.
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> 52. However, as the Supreme Court held, the mandatory nature of prescribed sentences for the offence of Murder, was unconstitutional because it took away the Court's discretion to be able to determine such sentence as may be informed by the particular circumstances of the case before it.
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> 53. ...
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> 54. However, I hold the considered view that if the mandatory nature of the death penalty was declared unconstitutional, a similar reasoning can extend to mandatory sentences such as those in Section 8 of the *Sexual Offences Act*.
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> 55. I am unable to see any distinction between the mandatory nature of the sentence for the offence of Murder, and the mandatory minimum sentence for the offence of defilement. In my view, what renders the sentence unconstitutional is the fact that the prescribed sentence completely precludes the Court from exercising any discretion, regardless of whether or not the circumstances so require.
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> 56. Accordingly, I do hereby set aside the sentences."

17. The above decisions were made by courts of concurrent jurisdiction and albeit those decisions are not binding on this court, they are good law. In the case of Dismas Wafula Kilwake v R [2019] eKLR the Court of Appeal, referring to the mandatory sentences under the *Sexual Offences Act* stated:

> "We are persuaded there is no rational reason why the reasoning of the Supreme Court which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing. Being so persuaded, we hold that the provisions of Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing". (Emphasis supplied)

18. The guidance given in the Dismas Kilwale case is therefore that: a court must ensure that when sentencing under section 8 of the SOA, the interpretation it gives to the sentencing provision must not take away its discretion and independence in meting out the sentence.

19. Further, the Supreme Court in the case of Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] KLR stated interalia that the decision in Muruatetu 2017

could not be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the *Constitution* but that the said decision only applied in respect of sentences of murder under Sections 203 and 204 of the Penal Code, which was the case before the Supreme Court.

20. In the Taifa v Republic case (supra) this court held:

> " Taking into consideration the decision of the Supreme Court in Muruatetu 2021 (supra), it is clear that the mandatory sentence provided in section 8 (3) of the *Sexual Offences Act* is lawful but not necessarily mandatory, although, just like in the Muruatetu 2017 decision, the trial court may, having regard to the circumstances of each case, impose a death sentence, which sentence is lawful. For the above reasons, I hereby accord the appellant the opportunity to mitigate for this court to consider whether or not to reconsider the mandatory minimum sentence of 20 years imprisonment meted out on him."

21. In the present case, the critical question is whether the trial court at the time of appeal, exercised discretion in meting out sentence. The appellant prayed for leniency. The victim of the offence was a16th year old who, when she asked her mother for money to buy her basic needs which were essentials, the mother told her to look for money. What the young girl found herself into was that the appellant took advantage of her dire situation and took her to a lodging and defiled her, with the connivance of other adults who could have protected her.

22. The trial court stated as follows following the mitigation by the appellant for leniency:

> " ... I note that the complainant V.A.O. was 16 years at the time the offence was committed.
>
> I will therefore sentence the accused person to 15 years imprisonment pursuant to Section 8 (4) of the SOA."

23. In my view, the the trial court did not exercise any discretion after taking into account the mitigation. It merely meted the minimum mandatory sentence provided for in law. Section 8(3) and (4) of the *Sexual Offences Act* applies the phrase is liable upon conviction to imprisonment for a term of not less than twenty years and fifteen years respectively. Sir Henry Webb C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 had this to say on the proper construction of the words "liable to":

> " The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."

24. The predecessor of the court went further in Opoya versus Uganda [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. picked up the conversation inter alia thus:

> " It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

25. A similar position was adopted in D W M vs. Republic (supra) where the Court held that:

> " As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

26. In this case, however, the relevant provisions use the phrases "shall be liable" and "not less than" in the same breath. As a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as Mativo, J graphically put it in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR:

> " The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

27. In the above cited case of Patrick Muli Mukutha, Odunga J further elaborated and stated as follows regarding the use of the word "liable to"under section 8(3),(4) of the *Sexual Offences Act*:

> "
>
> " 18. It is therefore my view that the twin subsections must be read as if the sentences provided are the maximum sentences. Accordingly, bearing the totality of the above principles in mind, it is my view that the use of the words "shall be liable to imprisonment" in section 8(3) and (4) of the *Sexual Offences Act* gives room for the exercise of judicial discretion. The learned trial magistrate noted that the offence was committed against 16 years old girl who would have to live with the trauma of the offence all her life. That position cannot be faulted since as was appreciated in Tito Kariuki Ngugi vs. Republic [2008] eKLR:
>
> "The appeal against sentence has also no merit. The Appellant...caused her trauma which she will have to live with for the rest of her life."
>
> 19. The learned trial magistrate then proceeded to sentence the appellant to fifteen years' imprisonment which as I have found is the maximum sentence. However, the accused is a first offender. In Charo Ngumbao Gugudu vs. Republic [2011] eKLR, the Court of Appeal held that:
>
> "It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by

the trial magistrate and upheld by the superior court, that the complainant was "completely mentally disabled"."

28. That being said, taking into consideration the authorities cited above, it is clear that the mandatory minimum sentence provided in section 8 (4) of the *Sexual Offences Act* is lawful but not necessarily mandatory. It follows that just like in the Muruatetu 2017 decision, the trial court may, having regard to the circumstances of each case, impose a death sentence, which sentence is lawful.

29. In this instance, the appellant is 30 years old and obviously took advantage of a 16-year-old school going girl. The impact of the offence on the minor are long lasting and the psychological effect is even worse.

30. In his submissions, the appellant offered mitigation that his sentence was too long and that he had a family that depended on him. At the trial court, the appellant when asked to offer mitigation he stated that he prayed for leniency.

31. The appellant having withdrawn his appeal against conviction means that he acknowledges that he committed the offence that therefore pursuing an appeal against conviction was futile. The *Sexual Offences Act* prescribes harsher sentences as a way of punishing sexual perverts. However, the regrettable thing is that there is no empirical evidence that harsher or longer sentences reform Offenders or deter the would be offenders. If that were to be the case, then people would not be murdering others since punishment for murder is death. Similarly, we would not have nearly 95% of convicts and therefore, inmates being sexual predators. Reformation depends of an individual's will to change behaviour.

32. Therefore, in this case, despite the 15 years prison term being lawful, as the section 8(4) of the *Sexual Offences Act* uses the term "liable to", I am of the view that the trial court could have exercised discretion and sentenced the appellant to a lesser prison term, the appellant being a first offender.

33. I hasten to add that our prisons are overflowing with long term sentences inmates My visits to prison I gathered that most of them lose hope when they realize that there is no possibility of completing sentences imposed and returning back to the society. Majority of those who have served about ten years in prison engage in rehabilitation programmes and end up being the most rehabilitated and reformed convicts and given the opportunity, they do not re-offend.

34. The appellant also submitted that this court ought to look at the time spent in custody in computing the length of his sentence. This is in line with Section 333(2) of the Criminal Procedure Code which provides that:

> " 333(2) of the Criminal Procedure Code, the same provides that:
>
> (2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

35. From the trial court record, the appellant was arrested on 28th May, 2022, according to the charge sheet. He was first presented in court on the 6.6.2022 and although he was granted bond on the same day, it appears that he was never released and he remained in custody till the conclusion of the case having failed to raise the surety.

36. In the circumstances, I find that in computing the sentence imposed on the appellant, the trial court should have invoked section 333(2) of the Criminal procedure and considered the period spent in

custody by the appellant from the date of arrest until the date of sentencing which was 9 months and four (4) days.

37. The upshot of the above is that the instant appeal is partially successful to the extent that the 15 years imprisonment is set aside and substituted with ten (10) years imprisonment to be calculated from 28th may, 2022 with regards to computation of the appellants sentence in compliance with Section 332 of the Criminal Procedure Code.

38. Signal to issue.

39. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MAY, 2024

R.E. ABURILI

JUDGE