Chirchir v Republic (Criminal Appeal E028 of 2023)
[2024] KEHC 6557 (KLR) (5 June 2024) (Judgment)

Neutral citation: [2024] KEHC 6557 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E028 OF 2023

RN NYAKUNDI, J

JUNE 5, 2024

BETWEEN

PHILIP KOECH CHIRCHIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of Hon. E. Kigen in Eldoret law court cr. SO. N0. E144 of 2021)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 15th day of May, 2021 at about 2:00PM at Moiben Sub-county within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of PC a girl aged 5 years old.

2. He was also charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were more less the same.

3. The appellant was convicted on the charge and sentenced to life imprisonment.

4. The appellant was dissatisfied with the findings of the trial court and is now before this court on a first appeal. The appeal is premised on the following grounds:

    a. That the trial court erred both in law and fact when failing to evaluate and analyze the evidence on record and arriving at the erroneous conclusion that the appellant committed the offence.

b. That the learned trial magistrate erred in both law and fact by failing to consider that the prosecution witness evidence were contradictory, questionable, doubtful and untrustworthy to warrant conviction.

c. That the learned trial magistrate erred in both law and fact by not considering that the evidence of penetration was not conclusively proven as per the law requires.

d. That the learned trial magistrate erred in law and fact by not finding that the prosecution has failed to prove its case to the required standard of proof.

e. That the learned trial magistrate erred in law and fact by not observing the appellants right to a fair hearing.

5. The appellant filed his submissions on 20th December, 2023, in which he appears to have abandoned all the grounds of appeal and submitted on sentencing. He expresses regrets having committed the crime and prayed for a lenient sentence.

6. On 25th January, 2024 the respondent was granted leave to file submissions in response to the appeal but the same have not been filed. I shall nonetheless consider the question of sentencing as expressed by the appellant.

Appellant's Submissions

7. The appellant submitted on the issue of life imprisonment. He argued that the type of sentence meted on him was mandatory in nature and the same has been declared unconstitutional in our recent trends. He submitted that the unconstitutionality was due to the fact that mandatory sentences deprive the discretionary power of judicial officers to make independent decisions based on the analysis and findings of every individual case. He further stated that such a sentence denies the offender his/her rights as enshrined under article 50 (2)(p)(q) of *the constitution*. On this, he relied on the case of Julius Kitsao *Manyeso versus Republic CR. App. No. 12 of 2021*.

8. It was the appellant's submission that he regrets committing the offence and that the same was committed under the influence of alcohol, which led to lack of self-control. He stated that he is a first offender and he deserves leniency.

9. Finally, the appellant made submissions on the objectives of sentencing as deduced from the Judiciary sentencing guidelines. He argued that he has undergone a rehabilitation process and programs offered by the prison authorities, which have transformed his life. He therefore prayed for a reduced sentence and urged the court to consider the provisions of section 333(2) of the CPC.

Analysis and Determination

10. Having read through the appeal and the appellant's submissions, the only issue I am called to determine is that of sentencing. Whether the circumstances of this case allow the appellant to benefit from a lesser sentenced as opposed to the life imprisonment imposed.

11. Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* provides for the offence of defilement in the following terms:

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(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 an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

12. Let me at this point in time highlight that our courts are now moving away from imposing life imprisonment. Looking at such trends, life imprisonment is being reserved for the most serious offence.

13. The court high court in Murang'a Criminal Appeal No. 17 of 2019; Simon Irungu Nyambura versus Republic in addressing the issue of life imprisonment expressed itself as follows:

> " In Kenya, such sentences are maximum sentence rather than a mandatory or minimum sentence. Therefore, a court in this country has discretion to impose any lesser sentence up to the maximum if prescribed."

14. In the same decision, the court stated that the typical blanket sentence without a capping is indeterminable, indefinite and incompletable, thereby being unreasonable, absurd and in dignifying hence in violation of article 28 of *the Constitution*. I agree with that school of thought.

15. Similar thoughts were expressed by the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013). That an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

16. The court further reasoned that "if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment."

17. Essentially, life imprisonment to me is pegged on the balance of years a prisoner has till death. Imposing such a sentence will not promote the objectives of sentencing in totality. The issue of life sentence is therefore at crossroads in our legal system for lack of proper definition. However, as noted by the court of appeal in it is not for the court to define what constitutes a life sentence or what number of years must first be served by a prisoner on life sentence before they are considered on parole. This is a function within the realm of the Legislature.

18. In ensuring fairness in sentencing, the supreme court in the Muruatetu case outlined various considerations. The age of the offender, being a first offender, character and record of the offender, whether the offender pleaded guilty, remorsefulness of the offender, commission of the offence in response to gender-based violence, the possibility of reform and social re-adaptation among others that the court might consider relevant.

19. The sentence of life imprisonment is now the most severe penalty in Kenya with the advent of the Supreme Court decision in Francis K Muruatetu VS Republic 2017 eKLR which pronounce itself that mandatory death sentence is unconstitutional. Indeed even mandatory minimum life sentence has been outlawed in our criminal justice system from the concerns raised that it may operate in a

disproportionate manner in some cases. Therefore, the issue which arises in this Appeal is whether the pronouncement of the sentence of life imprisonment by the trial court in conviction of the Appellant constituted a violation of his human rights declared in *the constitution* within the Bill of Rights. In Article 25 (a) of *the constitution* it provides for freedom from torture and cruel inhuman or degrading treatment or punishment. That no one should be subjected to such inhuman or degrading punishment. Whereas in Art. 28 every person has inherent dignity and the right to have that dignity respected and protected. In the same vein Art, 29 provides that every person has the right to freedom and security which includes the right not to be deprived from freedom arbitrarily or without just cause. The jurisprudence of the Superior Courts now makes it very clear that the mandatory life imprisonment attains a particular level of severity in absence of parole or continuous review. There is an irrefutable presumption that incarceration of offenders convicted of serious crimes present a danger to the community and there is likelihood of re-offending hence the justification to impose log deterrent sentences. The core sentence principle influencing this long term sentences is seriousness of the offence more than anything else. Firstly, in general parliament establishes the minimum penalty for the serious instances of the offences based on harm and culpability. However, trial courts should bear in mind the sentencing policy guidelines of the judiciary, objectives, and principles of sentencing. In imposing the sentence the court has to decide and exercise discretion in a manner in which infringement of rights of an offender are constitutionally protected. As for this case, there is no evidence that shows the Appellant is a dangerous person who must be kept out of the community for the rest of his life. In my considered view, one cannot rule out that life imprisonment as a sentence imposed by the trial court as against the Appellant is not in convict with Article 25 (a) 27(1) &(4) 28 & 29 of *the constitution*. The mandatory life imprisonment is in contrast with a term of years imposed against a convict who always look forward to the expiry of that term to walk out of prisons so that can be reunited with his family or communities. I am satisfied from the grounds of this appeal that it is in the interest of justice and keeping with the left hand spirit of *the constitution* the life imprisonment imposed should be reviewed, varied, interfered with, and have it substituted with a determinable period of imprisonment.

20. The appellant at the trial court in his mitigation stated that he has no people to depend on. Equally in his submissions he stated that he is remorseful and he regrets committing the act. I believe such factors and the aggravating factors ought to count in sentencing.

21. In the end, and in considering the objectives of sentencing in totality together with the cited legal provisions, I am inclined to interfere with the life imprisonment sentence and substitute it with 25 years imprisonment. The provisions of section 333(2) have been considered as well and as such the sentence shall run from the date of conviction at the trial court i.e. 28/02/2023. This is in consonant with the Principles in the Rwabugande Moses v Uganda(2017) UGSC 8 the Supreme Court of Uganda profoundly held as follows on a constitutional provision with similar provisions with our section 333(2) of the CPC as follows:

> What is material in that decision is that spent in lawful custody prior to the trial and sentencing of the convict must be taken into account and according to the case of Rwabugande that remand period should be credited to a convict when he is sentenced to a term of imprisonment. This court used the words to deduct and in an arithmetical way as a guide for the sentencing courts but those metaphors are not derived from *the constitution* Where a sentencing court has clearly demonstrated that it has taken into account the period spent on remand to the credit of the convict the sentence would not be interfered with by the appellate Court only because the sentencing judge or justice used different words in the judgment or missed to state that they deducted the period spent on remand. These may be

issues of style for which a lower court would not be faulted when in effect the court has complied with the constitutional obligation in Article 23(8) of *the Constitution*

Both on textual and on inherent conceptual grounds the principles in the above case remains to be good law applicable within our jurisdiction in so far as matters arising under Section 333(2) of the Criminal Procedure Code. It also seems to me that the sentence of life imprisonment in Kenya is no longer considered constitutional sustainable more so when that sentence amounts to issuing an order of committing the convict into prison for the rest of his or her life.

22. It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF JUNE 2024

In the Presence of

Mr. Mugun for the State

Applicant

.....

R. NYAKUNDI

JUDGE