Ngaruni v Republic (Criminal Appeal E034 of 2022)
[2023] KEHC 18037 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEHC 18037 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E034 OF 2022

LW GITARI, J

MAY 4, 2023

BETWEEN

NICHOLAS KYALO NGARUNI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. This is a first appeal filed by the Appellant herein against his sentence. The Appellant was facing two counts. In the first count, the Appellant was charged with the offence of defilement contrary to Section 8(1)(3) of the *Sexual Offences Act*. The particulars of this charge were that between 26th December, 2019 and 1st January, 2020 at Tharaka South sub-county, within Tharaka Nithi County, the Appellant intentionally caused his penis to penetrate the vagina of SW, a child aged 13 years.

2. In the second count, the Appellant was charged with the offence of procuring an abortion contrary to Section 160 of the Penal Code. On this charge, it was alleged that on 6th February, 2020 at Tharaka South Sub-county, within Tharaka Nithi County, the Appellant administered drugs to SW aged 13 years, knowing that it was intended to procure a miscarriage.

3. The Appellant was found guilty of the two offences and was sentenced to serve 20 years and one year imprisonment respectively.

4. The appeal is based on grounds which can be summarized as follows:

    a. That the learned trial magistrate erred in both points of law and facts by imposing a harsh and excessive sentence upon the Appellant.

    b. That the learned trial magistrate still erred in both matters of laws and facts by imposing a harsh sentence without taking into consideration the Appellant's mitigating factors.

c. That the learned trial magistrate still erred in both matters of laws and facts by failing to take into account the Appellant's dignity.

5. The Appellant thus prays for this appeal to be allowed by setting aside the sentence of 21 years and substituting it with a lenient sentence.

The brief facts of the case are hat the complainant in this case S.W is a child who at the time this offence was committed was aged thirteen (13) years. A birth certificate was produced in the lower court as exhibit P1 showed that she was born on 24/8/2006. She was a student at [Particulars Withheld] Primary School. According to her the appellant was her boyfriend and on 26/12/2019 and 1/1/2020 she had sexual inter-course with the appellant. According to her on 26/12/2019 she went to the house of appellant at about 9.00 pm after he picked her from her home on a boda boda. The appellant took her to his house and removed her clothes as she lay on his bed. The appellant removed his trouser and they had sex. The appellant used a condom. The complainant stated that she had a lot of paid but did not scream. The appellant then took her home.

The appellant went for her again on 1/1/2020 and picked her from home at 9.00 pm using a boda boda. He took her to his house and had sexual intercourse with her without using any protection. He then took her back home. The complainant started experiencing stomach pains and decided to go to Tunyai Dispensary where some tests were done. On 4/2/2020 she was informed that she was pregnant. The Medical Officers at Tunyai Dispensary later called the Head Teacher of her school and informed him that the complainant was pregnant. She in turn informed the complainant's mother. The complainant's mother confirmed from the treatment notes that the complainant was pregnant. She took the complainant to Tunyai Police Station where the report was made. On 6/2/2020 the appellant went to the complainant's home and gave her some tablets which he told her to take at the time of going to bed and the pregnancy would be aborted. The complainant did as instructed by the appellant and when she woke up the next morning she experienced some stomachache but did not tell anyone. Later in the evening she started bleeding and it continued upto 13/2/2020. On 13/2/2020 she went to school. She was told to go to Tunyai Dispensary and on being examined by the Medical Officer he noted that she had procured an abortion. She was escorted to Marimanti Police Station where the matter was reported. She was then taken to Marimanti Level 4 Hospital where she was admitted upto 20/2/2020 due to bleeding and incomplete abortion. The complainant informed Madam Ann that the appellant is the one who made her pregnant. A P3 form was filed. The appellant was then arrested and charged.

The clinical officer Lilian Wahu (PW3) who produced a P3 form on behalf of the colleague Emilio Gaichu told the court that there was evidence of defilement as she had been pregnant and had an incomplete abortion. She produced the P3 form and the ultra sound report as well as the discharge summary.

The appellant gave a statutory statement in his unsworn defence. He denied the offence and alleged that the complainant was beaten and forced to implicate him. He further alleged that money was demanded from him and since he had no money he was charged. The trial magistrate in a well reasoned Judgment found the appellant guilty on the charge of defilement and procuring an abortion and convicted him.

6. The appeal was canvassed by way of written submissions.

7. It is the Appellant's submission that the mandatory nature of the sentence provided for in Section 8(3) of the *Sexual Offences Act* No. 3 of 2006 deprives courts of their legitimate jurisdiction to exercise their judicial discretion in sentencing. He relied on the cases of Christopher Ochieng' –vs- Republic [2018] eKLR, Jared Koita Njiri –vs- Republic [2019] eKLR, and Evans Wanyonyi –vs- Republic [2019] eKLR which relied on the famous case of Francis Karioko Muruatetu & Another –vs- Republis

[2017] eKLR. The Appellant argues that the stare decis in the Muruatetu case directs that mandatory sentences are unconstitutional. Citing the cases of Evans Wanjalya Siibi –vs- Republic [2019] eKLR and Gillick –vs- West Norfolk and Wilbesch Area Health Authority [1985] 3 ALL ER 402, the Appellant maintained that the 21 years' imprisonment that he is serving is unduly harsh and urged the Court to substitute it with a soft, lesser and lenient one.

8. On the ground of appeal that the trial court failed to take into consideration the Appellant's mitigation, the Appellant gave mitigation that he is a young man whose life has been severely affected by the 21 years' imprisonment imposed upon him as he had not laid down a foundation of a family. That he was 19 years old during the time of his arrest and at that time he was young with little knowledge of the world around him. He beseeches this Court to be guided by the provisions of Section 4(1) and (2) of the *Probation of Offenders Act* (Cap 64 of Laws of Kenya).

9. In opposition to the Appeal, the Respondent submitted that the law on sentencing is that an appellate court should not interfere with the sentence unless it is demonstrated that the court appealed from acted on the wrong principles, ignored material factors, and took into account irrelevant considerations, or unless the whole of that sentence is manifestly excessive. The Respondent cited the case of RMM v. State [2021] eKLR and Bernard Kimani Gacheru v. Republic [2002] eKLR to support this position. The Respondent thus submitted that the appeal should be dismissed as the Appellant has not shown any compelling reasons why this Court should interfere with the sentence as meted by the trial court.

10. I have considered the grounds of appeal as well as the submissions by the parties. The only issues that arises for determination is whether the Appellant has given sufficient reasons to warrant this court to interfere with his sentence.

11. This is a first appeal. A first appeal to this court is by way of a re-trial. This means that it is the duty of this Court exhaustively appraise and re-evaluate the evidence that was adduced before the trial court, make its own findings, and draw out its own independent conclusion. [See Okeno vs. Republic [1972] EA 32 and Kiilu& Another vs. Republic [2005] KLR 174]

12. The Appellant in this case has only appealed against the sentence meted out against him. I however confirm that I have considered the proceedings before the trial magistrate and evaluated the evidence. Having done so I find that the evidence tendered proved the charges against the appellant beyond any reasonable doubts. The conviction was therefore sound.

13. The imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime is one of the prime objectives of criminal law. The Court of Appeal in the case of Thomas Mwambu Wenyi vs. Republic (2017) eKLR cited the decision of the Supreme Court of India in Alister Anthony Pereira Vs State of Mahareshtra where the court expressed itself as follows:

> " There is no straight jacket formula for sentencing an accused person on proof of crime. The courts have evolved certain principles: twin objective of sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstance of each case and the courts must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all

aspects including social interest and consciousness of the society for award of appropriate sentence."

14. In this case, the sentence prescribed in law for the first count of defilement is twenty (20) years' imprisonment as per the provisions of Section 8(3) of the *Sexual Offences Act* which stipulates as follows:

> " 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."

15. For the first count, it follows that the learned trial magistrate followed the law in sentencing the Appellant to twenty (20) years imprisonment which is the minimum sentence under the Section.

16. On the second count, Section 160 of the Penal Code provides as follows:

> " Any person who unlawfully supplies to or procures for any person anything whatever, knowing that it is intended to be unlawfully used to procure the miscarriage of a woman whether she is or is not with child, is guilty of a felony and is liable to imprisonment for three years"

17. The Appellant was sentenced to serve only one year out of the three years that he was liable to serve as prescribed in the above provision. In my view, the sentence meted against the Appellant in the second count was equally lawful, appropriate, and lenient in the circumstances.

In RMM –v- Republic (2021) eKLR the court observed that the Court of Appeal in the case Ahmad Abolfathi Mohamed & Another –v- Republic Criminal Appeal No.135/2016 sets the conditions under which a sentence may be interfered with as follows:-

> " As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle, ignored material factors, took into account irrelevant considerations; or on the whole that sentence is manifestly excessive."

Similarly, The Court of Appeal, on its part, in the case 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 fact 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 matter already states is shown to exist."
>
> Further, in Kenga- v- Republic (Criminal Appeal 4 of 2020) KECA 126 (KLR) (18th February 2022). The Court of Appeal at Malindi further noted that "As regards sentence,

> the Supreme Court of Kenya in its directions in Francis Karioko Muruatetu & Another vs. Republic Katiba Institute & 5 Others (Amiscus Curiae) [202021] eKLR has since pronounced that its earlier decision in the same case did not invalidate mandatory sentence or minimum sentences in the Penal Code, the *Sexual Offences Act* or any other statute and that its previous decision "cannot be authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*."

The appellant strongly feels that the mandatory nature of the sentence provided for in Section 8 (3) of the *Sexual Offences Act* deprives court their legitimate jurisdiction to exercise their judicial discretion. He has relied on Muruatetu's Case (supra.) The Supreme Court of Kenya gave directions in Muruatetu's Case and stated as follows inter-alia:-

> " We therefore reiterate that this court's decision in Muruatetu did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Statute."

The Supreme Court decision in Muruatetu cannot be authority to say that the minimum sentences prescribed under the *Sexual Offences Act* contravenes *the Constitution*. It is therefore clear that the Muruatetu's case did not interfere with the minimum mandatory sentences under the *Sexual Offences Act*. The sentence imposed by the trial magistrate was proper as it was the minimum sentence provided under the Section. The appellant has not demonstrated that the trial court acted on a wrong principle, or ignored material facts or took into account any irrelevant considerations or that the sentence was harsh or excessive.

I find that there is no material laid before me to warrant this court to interfere with the sentence imposed by the trial magistrate. Considering all the facts of the case which show that the appellant took advantage of the complainant who was a minor aged thirteen years and defiled her and gave her unknown drugs to procure an abortion, the sentence imposed is appropriate.

I find that I have no reason to interfere with the sentence.

18. On the issue of whether the trial court considered the Appellant's mitigation, it is clear from the record that the only statement the Appellant made in his mitigation is that he was a first time offender. The trial court considered his mitigation and noted that the Appellant did not plead for leniency or demonstrate any remorse. He was an adult at the time of committing the offences and took advantage of a thirteen years old standard 8 girl. On this issue, it is my view that the trial court did take into account the Appellant's mitigation.

Conclusion:

19. In the circumstances I find that this appeal is without merits. I order that:-

    1. This appeal is dismissed.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF MAY 2023.

L.W. GITARI

JUDGE

4/5/2023