MMW v Republic (Criminal Appeal 31 of 2020)
[2023] KEHC 23067 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23067 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CRIMINAL APPEAL 31 OF 2020

CW GITHUA, J

OCTOBER 5, 2023

BETWEEN

MMW ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the conviction and sentence of Principal Magistrate's Court at Kandara Hon. M. Kurumbu S.R.M. in S.O Case No. 18 of 2018)

JUDGMENT

1. The Appellant was tried and convicted of the offence of Sexual Assault Contrary to section 5(1(a)(i) of the *Sexual Offences Act* No.3 of 2006 (hereinafter the SOA). He was sentenced to five years imprisonment.

2. He was dissatisfied with his conviction and sentence and through his then advocates Ms. GMLAW Advocates, he filed an appeal challenging both his conviction and sentence. On 19th June 2023, the Appellant informed the court that he had withdrawn instructions from his advocates and he wished to prosecute his appeal in person. On 25th September 2023 when the appeal was fixed for hearing, he abandoned his appeal against conviction and chose to pursue his appeal against sentence.

3. In support of his appeal against sentence, the Appellant submitted that due to the suffering he had endured in prison, he had introspected on his life and he was now reformed; that he was remorseful for the offence he committed and that if granted a non-custodial sentence, he was going to become a preacher. He urged the court to be merciful and review his sentence considering that while in prison, he had contracted diabetes and medication for the illness is not available in prison.

4. In opposing the appeal, learned prosecution counsel Ms. Muriu supported the sentence imposed by the trial court and submitted that it was fair and lawful and should not be disturbed. Further, Ms.

Muriu submitted that in sentencing the Appellant, the trial Court considered all the mitigating and aggravating factors and properly exercised her discretion in meting out the impugned sentence.

5. Having considered the parties rival submissions, I wish to start by pointing out that sentencing is a matter that rests with the discretion of the trial court but like any other judicial discretion, that discretion must be exercised judiciously and in accordance with the law.

6. The principles that guide an appellate court in deciding whether or not to interfere with a sentence imposed by a lower court are well settled. It is trite that an appellate court should not disturb a sentence unless it is satisfied that it was illegal or that in imposing the sentence, the trial court misdirected itself by taking into account irrelevant factors or failing to consider relevant ones. The sentence can also be overturned if the appellate court was convinced that it was harsh or manifestly excessive.

7. The above principles were well captured by the Court of Appeal in *Bernard Kimani Gacheru v Republic* [2002]eKLR when it stated as follows:

> "On appeal the appellant Court will not easily interfere with the 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 appellant court feels that the sentence is heavy and that the appellant Court might itself have passed the sentence, these alone are not sufficient grounds for interfering with the discretion of the trial Court o sentence unless, anyone of the matters already stated is shown to exist."

8. Guided by the above principles, I have considered the rival submissions made by the Appellant and the Respondent. I have also read the court record. The court record confirms that when sentencing the Appellant, the learned trial magistrate considered the accused's age of 53 years; the fact that he was not a first offender; that he was diabetic and that he was a family man. The court also considered the victim's age and her relationship with the Appellant who is her grandfather.

9. Section 5(1) of the *Sexual Offences Act* which creates the offence of sexual assault prescribes a penalty of not less than 10 years imprisonment which may be enhanced to life imprisonment. The learned trial magistrate however wrongly invoked section 8 (2) of the SOA which is the penal provision for the offence of defilement where the victim was 11 years or below which prescribes a mandatory sentence of life imprisonment.

10. Acting on the wrong premise that section 8(2) of the SOA was the penal provisions applicable to the offence for which the appellant was convicted, the learned trial magistrate applying the principle enunciated by the Supreme Court in F*rancis Karioko Muruatetu & 5 Others V Republic* [2017] eKLR regarding minimum mandatory sentences as interpreted by the courts then, exercised his discretion and sentenced the appellant to five years imprisonment which ran afoul of section 5(1) of the SOA which was the applicable provision.

11. It is clear that the learned trial magistrate erred in law when sentencing the appellant. The sentence was unlawful and is therefore set aside. Having set aside the sentence of the trial court, it now behoves me to determine an appropriate sentence for the appellant in this case. I would have proceeded to substitute the trial court's sentence with the minimum mandatory sentence of ten years imprisonment prescribed under section 5(1) of the SOA had it not been for the holding of the Court of Appeal in *Joshua Gichuki Mwangi V Republic* Criminal Appeal No. 84 of 2015 in which the court held that minimum mandatory sentences provided for in the SOA were unconstitutional for fettering the courts discretion in determining the appropriate sentence in a particular case taking into account the unique

facts and circumstances of each case. The court therefore restored the court's discretion in sentencing in sexual offences.

12. Having considered the mitigating and aggravating factors in this case including the age of the Appellant and the age of the victim as well as their relationship, I find that this is a case that warrants a deterrent sentence considering that the appellant, being the child's grandfather, abused his position of trust and instead of protecting the child became her tormentor. I have also considered the fact that the Appellant was not a first offender. The record shows that he has a previous similar conviction.

13. Taking into account all relevant factors, I find that a sentence of eight (8) years imprisonment is appropriate for the Appellant in this case. Consequently, the sentence imposed by the trial court is substituted with a sentence of eight years imprisonment. The sentence shall take into account the period of about one and a half months that the Appellant was in lawful custody before he was released on bond on 30th April 2018.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 5TH DAY OF OCTOBER 2023.

C. W GITHUA

JUDGE

In the Presence of:

The appellant

Ms. Muriu for the respondent

Mr. Quinteen Court Assistant