Obundi v Republic (Criminal Appeal E006 of 2023)
[2024] KEHC 14318 (KLR) (12 November 2024) (Judgment)

Neutral citation: [2024] KEHC 14318 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E006 OF 2023

RE ABURILI, J

NOVEMBER 12, 2024

BETWEEN

DANIEL NYAWAYA OBUNDI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment, conviction and sentence in Maseno SPM Sexual Offence Case No. 6 of 2018 delivered on16/2/2023 by Hon C.L.Yalwala, SPM)

JUDGMENT

1. The appellant herein Daniel Nyawaya Obundi was charged with the offence of defilement contrary to section 8 (1) (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on diverse dates between 22nd January and 28 January 2018, at Kisumu West sub-county within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of S.A. a child aged 14 years. The appellant also faced the alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*.

2. The prosecution called 4 witnesses to establish a prima facie case against the appellant who was found with a case to answer and was placed on his defence where the appellant gave an unsworn testimony.

3. In his judgement, the trial magistrate found that the prosecution had proved its case against the appellant beyond reasonable doubt. The trial court found that the minor was 14 years old, and that there was evidence of penetration by the appellant who was positively identified as the perpetrator. The appellant was convicted under 8 (1) as read with section (3) of the *Sexual Offences Act* and sentenced to serve 20 years' imprisonment.

4. Aggrieved by the conviction and sentence imposed, the appellant filed this appeal on the 24th February 2023 raising the following grounds of appeal:

a. 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.

b. That the learned trial magistrate erred in both law and facts by relying on the evidence that was contradictory.

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

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

5. The appellant filed written submissions dated 1st July 2024 in which he only focussed on the sentence and faulted the minimum mandatory nature of the sentence provided for under section 8 (3) of the *Sexual Offences Act*. He claimed that the sentence was unconstitutional and not warranted as was held in Petition No. 97 of 2021 Edward Wachira and 9 Others.

6. The appellant further submitted that he was a first-time offender and that he was profusely remorseful, that he had served a sufficient term to meet the requirements of punishment, deterrence and rehabilitation that transformed him into a person who no longer posed any threat to the public.

7. The appellant further submitted that from the victim's lifestyle, it was impossible for him to know that the victim was below 18 years old.

8. In response, Mr. Marete Principal Prosecution Counsel for the State made oral submissions opposing the appeal. It was his submission that all the ingredients of the offence the appellant was charged with were proved beyond reasonable doubt. Mr. Marete submitted that the victim's age was proved while the appellant's identity was not in doubt as the two spent time together.

9. Mr. Marete further submitted that the urinalysis test carried out on both the appellant and the victim showed that both of them had infections; that there were pus and epithelial cells and further that there was penetration as the victim's hymen was absent. It was further submitted that the complainant testified that she had sex for 1 week with the appellant. Mr. Marete further submitted that the appellant's sentence was lawful under sub section 3 despite the fact that the charge sheet indicated that the appellant had been charged under section 8 (1) (2).

10. In a rejoinder, the appellant admitted that he had committed the offence and that he sought the court's intervention in reducing his sentence. The appellant stated, "Ni ukweli nilitenda, Ninaomba tuu mahakama inisaidie kupunguza kifungo kiasi."

11. In essence, the appellant was stating that his appeal was only on length of the sentence imposed which he wanted this court to reduce.

Analysis & Determination

12. As earlier stated, this appeal is against sentence only. A sentence reduction hearing or any other sentencing hearing for that matter is neither a hearing de novo nor an appeal. Such proceedings are undertaken on the understanding that conviction is not in issue. It therefore follows that in such type of proceedings, the convict is not entitled to take up the issue of the propriety of his conviction. He must proceed on the understanding that the conviction was lawful and restrict himself to the sentence and address the court only on the principles guiding the imposition of sentence and on the appropriate sentence in the circumstances.

13. Similarly, the court can only refer to the evidence adduced in so far as it is relevant to the issue of sentencing but not with a view to making a determination as to whether the conviction was proper.

14. While the court is entitled to refer to the evidence in order to determine whether there existed aggravating circumstances or otherwise for the purposing of meting out the sentence, it is not proper for the court to set out to analyze the evidence as if it is meant to arrive at a decision on the guilt of the accused.

15. In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the *Sexual Offences Act* and observed as follows:

> " 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. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

16. Under the *Sexual Offences Act*, the sentence for defilement is prescribed based on the age of the victim of the offence. Although the Act does not expressly say so, the manner the penalty is prescribed show that, the younger the victim, the more severe the sentence. For that reason, the age of the victim of sexual offence is an aggravating factor which the court should always consider amongst other factors in sentencing.

17. In this case, the complainant was aged 14 years at the time of the offence. Thus, the appropriate penalty clause is Section 8(3) of the *Sexual Offences Act* which provides that:

> " 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."

18. Sentencing is an exercise of judicial discretion by the trial court which discretion should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See Shadrack Kipkoech Kogo v R and Wilson Waitegei v Republic [2021] eKLR).

19. However, Courts have been called upon to consider sexual offences to be heinous against minors. It bears repeating that the penalties enacted in the *Sexual Offences Act* reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement. Thus, seriousness of the offence is a relevant factor in sentencing and in sexual offences.

20. In his mitigation before the trial court, the appellant stated that he was depended upon at home and thus he prayed for leniency. The Victim Impact Assessment report ordered by the trial court revealed that the victim had had several sexual partners prior to meeting the appellant and that as a result of her union with the appellant, she became pregnant and despite the fact that the appellant had gotten married and would not marry her, she prayed for a lenient sentence on his behalf. The prosecution on their part prayed for a non-custodial sentence.

21. Nonetheless, as the section 8(3) provides for minimum of twenty (20) years imprisonment, the trial court imposed twenty (20) years imprisonment. In my view, that sentence was appropriate and lawful, having regard to the fact that the minor had no capacity to consent to being defiled. The fact that the minor admitted to having had several other sexual partners was not a license for her to be defiled by the appellant. I am not in agreement with the prosecution that this was a case were a non-custodial sentence would have been sufficient, considering that it is the same prosecution that vehemently opposes any reduction of sentences in sexual offences on account of the statute providing for mandatory minimum sentences.

22. It is not lost to this Court that whenever the Court reduces sentences imposed by the trial courts, the prosecution is quick to appeal against such orders. Such reductions were initially influenced by the Muruatetu (1) decision on mandatory sentences. The appeals have led to the Supreme Court making orders that have had the effect of blaming courts' exercise of discretion in sentencing in sexual offences cases. The Supreme court was clear and the decision binds this Court, that its decision in the Muruatetu case did not invalidate mandatory sentences or minimum sentences in the Penal Code, the *Sexual Offences Act*, or any other statute. See the SCoK Petition No. E018 of 2023 – Republic v Joshua Gichuki Mwangi where the Supreme Court allowed the petition of appeal to the extent of setting aside the judgment by the Court of Appeal in Nyeri in which the Court of Appeal had declared [mandatory] minimum sentences for sexual offences unconstitutional in that they limit the discretion of the court. The Supreme Court also ordered that the Respondent convict should complete his 20-year sentence from the date of imposition by the trial court.

23. The Supreme Court agreed with the submissions of the amicus curiae that sterner sentences ensure that prejudicial myths and stereotypes no longer culminate in lenient sentences that do not reflect the gravity of sexual offences. The Court cited the amici's submissions on instances where courts have been influenced by myths, including that: attempted rape is not a serious offence; the absence of separate physical injury renders the crime less serious; and the alleged relationship between the perpetrator and the victim diminishes the perpetrator's culpability. The apex Court highlighted the comparative lessons from different jurisdictions as submitted by the amicus.

24. Further, the Supreme Court held that although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. The Supreme Court also distinguished between mandatory sentences and minimum sentences, where mandatory sentences leave no discretion for the judge to individualize punishment whereas minimum sentences set the floor rather than the ceiling.

25. It held that although the term 'mandatory minimum' has been used in other jurisdictions, it is not applicable as a legally recognized term in Kenya. That a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different sets of meanings and circumstances.

26. The above judgment clarified the misunderstood decision in the Francis Muruatetu & another v Republic [2017] e KLR. In my view, upholding these mandatory minimum sentences is vital to ensuring justice and accountability for survivors where the dignity and rights of survivors are prioritized. The judgment reinforces the importance of stringent penalties in deterring sexual offences and provides a strong framework for protecting and supporting survivors throughout the judicial process. It follows, therefore, that any attempted reversal to this judicial discretion in sentencing would water down the decades of hard work that has gone towards achieving justice and protection for survivors of SGBV. Furthermore, I have no reason and or justification to differ with the Supreme Court decision on this issue.

27. It is my view therefore that the instant appeal is devoid of any merit as regards the sentence imposed on the appellant. I dismiss it and uphold the 20 years' imprisonment imposed by the trial court.

28. This file is closed.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 12TH DAY OF NOVEMBER, 2024.

R.E. ABURILI

JUDGE