Juma v Republic (Criminal Appeal E075 of 2022)
[2025] KECA 1620 (KLR) (3 October 2025) (Judgment)

Neutral citation: [2025] KECA 1620 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E075 OF 2022

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

OCTOBER 3, 2025

BETWEEN

STEPHEN ODHIAMBO JUMA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. Stephen Odhiambo Juma, the appellant herein was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* in the Principal Magistrate's Court at Winam in Criminal Case No. 1104 of 2015. The particulars of the offence were that on 22nd September 2015, within Nyamasaria Flyover in Kisumu East District within Kisumu County, the appellant intentionally caused his penis to penetrate the vagina of K.A.O a child aged 7 years.

2. The appellant also faced an alternative charge of committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*. Upon conviction on the main charge, the appellant was sentenced to life imprisonment. He challenged the decision of the trial court before the High Court but his appeal was dismissed in its entirety.

3. Before this Court, the appellant had appealed against both the conviction and sentence. At the plenary hearing of the appeal, on our virtual platform, the appellant appeared in person from Kisumu Maximum Prison, while Mr. Okango, learned Assistant Director of Public Prosecutions, represented the respondent. When asked whether he had anything to add to his written submissions, the appellant begged for forgiveness for the offence and urged the Court to reconsider the life sentence imposed on him as it was severe, and to impose a definite sentence that would allow him to go home. It is thus apparent that his appeal is on sentence only.

4. Opposing the appeal, the respondent submitted that the sentence of life imprisonment is the legally provided sentence for the conviction for the offence with which the appellant was charged. Relying

on the case of Supreme Court case in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) (12 July 2024) (Judgment) in which the apex Court affirmed the mandatory sentences in the *Sexual Offences Act* holding that for as long as section 8 of the *Sexual Offences Act* remains in statutes, legislatively unattended, then the mandatory sentences therein are legal, the respondent submitted that the sentence meted out was the legal sentence and this Court cannot interfere.

5. This is a second appeal, therefore, the Court's jurisdiction is limited to considering matters of law as stipulated by Section 361 of the Criminal Procedure Code. A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at by the two courts below unless such findings are based on no evidence or are based on a misapprehension of the evidence or the courts below are demonstrably shown to have acted on wrong principles in arriving at its findings. (See David Njoroge Macharia v Republic [2011] eKLR). This Court in Karani v R [2010] 1 KLR 73 held that:

> " By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

6. Having considered the record, the grounds of appeal, the submissions of both parties and the Court's mandate, the main issue that falls for determination is whether this Court should interfere with the sentence that was imposed on the appellant.

7. In the instant appeal, 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*. A reading of the provisions of the law under which the appellant was charged shows that Section 8 (1) creates the offence while sub-section (2) stipulates the penalty. It provides that a person convicted under the said sub-section shall be liable for imprisonment for life. The appellant is complaining that the sentence of life imprisonment imposed on him is harsh and excessive therefore, the Court should interfere and substitute the said sentence with a term sentence.

8. Sentencing is a discretionary exercise by the trial court. An appellate court will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in Bernard Kimani Gacheru v Republic [2002] eKLR stated thus:

> " 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 stated is shown to exist."

9. In the same vein, the Supreme Court in Petition No. E018 of 2023, Republic v Joshua Gichuki Mwangi, (supra) in regards to minimum sentences prescribed by section 8 of the *Sexual Offences Act* stated that:

> "66) We must also reaffirm 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. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed....
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> (68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

10. In the circumstances, the appellant has not established any grounds upon which the Court can interfere with his sentence. Further, in light of the above finding by the Supreme Court affirming the lawfulness of penalties prescribed by the *Sexual Offences Act*, this Court shall not interfere with the sentence. We thus find that the appeal lacks merit, and is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF OCTOBER, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR