Arogo v Republic (Criminal Appeal 71 of 2020)
[2025] KECA 2268 (KLR) (19 December 2025) (Judgment)

Neutral citation: [2025] KECA 2268 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 71 OF 2020

MS ASIKE-MAKHANDIA, HA OMONDI & LK KIMARU, JJA

DECEMBER 19, 2025

BETWEEN

ABEL NYANSERA AROGO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal against the sentence from the Judgment of the High Court of Kenya at Kisii (D.S. Majanja, J) dated 21st September, 2018 in HCCRA No. 28 of 2018)

JUDGMENT

1. Abel Nyansera Arogo, the appellant herein, was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*(SOA). The particulars of the offence were that on 25th March, 2013 at Gesoni Sub-location, Kisii Central, Kisii County, the appellant caused his penis to penetrate the vagina of VM (name withheld), a child aged 15 years. He was alternatively charged with committing an indecent act with a child contrary to section 11(1) of SOA. The particulars of the offence were that on the same day and in the same place, the applicant touched the vagina of VM, a child aged 15 years with his penis. The appellant pleaded not guilty to the charge. After full trial, the appellant was convicted of the main charge and sentenced to serve twenty (20) years imprisonment.

2. Aggrieved by the conviction and sentence, the appellant appealed against the decision before the High Court sitting at Kisii. His appeal against both conviction and sentence was dismissed. The appellant filed his second, and perhaps last appeal, to this Court.

3. In his memorandum of appeal, the appellant abandoned appeal against conviction and instead, challenged the sentence that was imposed on him. The appellant stated that the minimum mandatory sentence imposed on him was unconstitutional. He was aggrieved that the 1st appellate Court had "felt bound" to give effect to the sentencing provisions of the SOA and thereby declined to exercise judicial discretion. He faulted the 1st appellate Court for not applying section 333(2) of the Criminal Procedure

Code before considering his appeal on sentence. The appellant complained that the custodial sentence that was imposed on him was harsh and excessive. He therefore asked this Court to reduce the custodial term of imprisonment that he was sentenced to serve.

4. During the plenary hearing of the appeal, the appellant, who was acting in person, informed the Court that he will rely entirely on his written submission. In the said submission, he relied on the cases of GK V. Republic [2021] KECA 232 (KLR) where this Court declared mandatory minimum custodial sentences under SOA to be an infringement of the trial courts' sentencing discretion to consider the peculiar circumstances of each convict's case. He also relied on Maingi & 5 others v. Director of public Prosecution & another [2022] KEHC 13118 (KLR) where Odunga, J (as he then was) held that the prescribed minimum mandatory sentences under the SOA was unconstitutional. The appellant submitted that the mandatory minimum sentence that was meted against him amounted to inhuman and degrading punishment and therefore violated his constitutional right as enshrined in Article 29(d) and (f) of *the Constitution*. The appellant complained that the period that he was in remand custody was not taken into account pursuant to section 333(2) of the Criminal Procedure Code and therefore urged the Court to allow the appeal in that regard.

5. The appeal is opposed. Ms. Kitoto, learned Prosecution Counsel also relied on the written submission filed. In her submission, she stated that the sentence that was imposed on the appellant is legal. The authorities cited by the appellant had since been overtaken and clarified by the Supreme Court's decision in Republic v. Gichuki Mwangi & others [2024] KESC 34(KLR) which held that mandatory minimum custodial sentences under the SOA were legal. She urged the Court to dismiss the appeal for lack of merit.

6. This is a second appeal. This Court's jurisdiction when considering such appeals is provided for under section 361 of the Criminal Procedure Code. This Court is mandated to consider only matters of law in the appeal and not delve into factual matters that the two courts below reached concurrent findings. This Court in Karani v. Republic [2010] 1 KLR 73 held thus;

> "This is a second appeal. By dint of the provisions of section 361(1) 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 appellant Court considered matters they ought not to have considered or they failed to consider matters they should have considered or 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 a matter of law."

7. In this present appeal, the appellant's appeal is against sentence only. Section 361(1) of the Criminal Procedure Code provides that sentence is a matter of fact and therefore not amenable for consideration by this Court unless the appellant established some breaches of *the Constitution* or the law. The appellant submitted that he was sentenced to serve a mandatory minimum custodial sentence which had been declared unconstitutional by this Court in GK v. Republic (supra). The respondent, however, countered this argument by submitting that the position in the cited cases had since been overtaken by the decision of the Supreme Court in R. v. Gichuki Mwangi & others (supra).

8. We have considered the said submission and agree with the respondent that mandatory minimum custodial sentences prescribed under the SOA are legal as held by the Supreme Court in the above case. The decisions relied on by the appellant are no longer good law in light of the decision rendered by the Supreme Court under the stare decisis principle. The appellant's ground of appeal in that regard cannot therefore succeed.

9. As regard whether the court's below should have taken into consideration the period that the appellant was in remand custody prior to his conviction by the trial court in determining the custodial sentence to be awarded, by dint of section 333(2) of the Criminal Procedure Code, this Court has perused the proceedings of the trial court and noted the following: the appellant was arraigned before the said court on 14th April, 2013. The appellant initially pleaded guilty to the charge. However, when the case was mentioned on the following day i.e 15th April, 2013 for facts to be read to the appellant, he changed his plea. A plea of not guilty was thereby entered. He was ordered released on bond pending trial. He was released on bond on 23rd April, 2013 after securing someone to stand surety.

10. It is therefore evident that the assertion by the appellant to the effect that the period that he was in remand custody was not taken into account or consideration is inaccurate. The appellant was out on bond during the entire period of trial. He cannot therefore benefit from section 333(2) of the Criminal Procedure Code. That ground of appeal too fails.

11. The upshot of the above reasons is that the appeal lacks merit. It is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF DECEMBER,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 original.

DEPUTY REGISTRAR.