Abdalla v Republic (Criminal Appeal 205 of 2018)
[2025] KECA 11 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 11 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 205 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

HASSAN SAID ABDALLA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Majanja J.) dated 5th April 2018 in HCCRA No. 78 of 2015)

JUDGMENT

1. The appellant herein was charged and convicted on his own guilty plea in the magistrate's court for the offence of defilement contrary to section 8(1) & (2) of the *Sexual Offences Act*, whose particulars were that on 2nd July, 2014 at 5.00pm at [Particulars Withheld] Village, Mumias District within Kakamega County, he intentionally caused his penis to penetrate the vagina of GMV a child of 7 years. The appellant was sentenced to life imprisonment.

2. The appellant, dissatisfied and aggrieved with both conviction and sentence appealed to the High Court, which affirmed and upheld the decision of the subordinate court. Being dissatisfied and aggrieved with the sentence, the appellant has now filed this appeal.

3. The facts to which the appellant pleaded guilty, was convicted and sentenced by the trial court, and upheld by the High Court were as follows: On 18th July 2014, at 4.00p.m., 7 year old GVM, the complainant was headed home from [Particulars Withheld] School, when she met the appellant, who was known to her, standing by the roadside. She knew him by facial appearance. He took her by her hand and took her to his house/structure in Lumino; locked the door; undressed her; removed her innerwear; removed his trousers and innerwear; and placed the girl on the floor. He inserted his penis into her vagina without using any condom. He penetrated her vagina by using his penis. After he completed defiling her, he ordered her to dress up and to go away and she obliged.

4. Upon reaching home, she informed her grandmother who, in turn, informed one of the girl's teachers. On 2nd July 2014, the incident was reported at Mumias police station; the minor led the police officers to the appellant's home in Lumino, and he was arrested. The minor had already been taken for treatment at Matungu sub-district hospital, and a duly filled P3 form concluded that she had been defiled.

5. The appellant's response to these facts was recorded as: Maelezo ni ya ukweli (The facts are true). In presenting his plea in mitigation, the appellant prayed for forgiveness and was thereafter sentence to the mandatory sentence of life imprisonment.

6. The High Court in light of reviewing the proceedings before the lower court and the principles of recording a guilty plea was convinced that the appellant's guilty plea was clear and unequivocal and went on to dismiss the appeal and affirm the lower court's judgment.

7. Aggrieved by this outcome, the appellant has preferred this appeal before us on grounds that:

    a. he pleaded guilty in the instant case.

    b. the learned appellate Judge erred in law and fact when he upheld the conviction and sentence of death but failed to note that the sentence was awarded in Mandatory form; and the court did not exercise discretion; but also failed to appreciate recent law developments, the Sentencing policy Guidelines 2015 and the constitutional Provisions Article 50(2)(Q); or consider his mitigation given under sections 216 and 329 of the Criminal Procedure Code He thus urges us to review this sentence.

    c. the learned appellate Judge erred in law and fact when he upheld the appellant's conviction and sentence of Life but failed to note that the plea was not unequivocal the language used was not clear, no caution was given to him before he pleaded guilty, thus the appellant was prejudiced. The appellant thus prays that:

        a. the conviction be quashed, and the sentence be set aside and the appellant be set at liberty.

        b. this Court be pleased to re-evaluate the entire evidence tendered, evaluate the judgment by the High Court; and make independent finding on both conviction and proper sentence.

8. The appellant in his written submissions argues that whereas the prescribed sentences may not necessarily be unconstitutional, courts in meting out such sentences, must take into account the dignity of the individuals at the receiving end; and nothing should bar a court from considering the circumstances of each case; and mete out the appropriate sentence.

9. In the written submissions, the respondent opposes the appeal, arguing that the case of Francis Karioko Muruatetu & Another vs. R (Petition No.15 &16 OF 2015; [2021] KESC 31 (KLR), the Supreme Court stated:

> "The decision of Muruatetu and these guidelines apply only in respect to sentences of murder under sections 203 and 204 of the Penal Code".
>
> The respondent also refers us to section 207 of the Criminal Procedure Code on plea taking, and argues that that the law was followed to the letter and that the ingredients were read out to the appellant in a language he understood; and that the appellant agreed to the charge and facts. That there was no error by the two lower courts in approving of the manner in which plea was taken.

10. We have considered the submissions and decisions cited. This being a second appeal, we are mindful of our duty as a 2nd appellate court, that a we must only be confined to points of law; and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others vs. Republic [1982] eKLR.

11. Before we deal with the ground on sentence this Court will first deal with the ground raised by the appellant that his plea of guilty was not unequivocal, on the grounds that the language used was not clear; and no caution was given to him before he pleaded guilty; and that the trial did not record what the appellant said as nearly as possible to his own words.

12. Under this ground the Court must ask itself how should a plea be taken? Section 207 of the Criminal Procedure Code is instructive; and courts have had occasion to elaborate on the procedure and the manner in which a guilty plea ought to be recorded by the trial court. In the case of Adan vs. R (1973) EA 445 and in the Court of Appeal case of Kariuki vs. R (1954) KLR 809 the rendition of the Court was as follows:

    i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands.

    ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

    iii. the prosecution should then immediately take the facts and the accused should be given an opportunity to change or explain the facts or to add to any relevant facts.

    iv. If the accused does not agree to the facts or raises any question of his guilt in his reply it must be recorded and change of plea entered.

    v. If there is no change of plea, a conviction should be recorded as well as a statement of facts relevant to sentence and the accused reply.

13. Further in the case of Kariuki vs. R (supra) the Court went on and stated that:

> "The narration and interpretation of the facts of the alleged offence before the entry of a conviction and asking the appellant if he agreed with the fact is evidence of the precaution which the trial magistrate adopted to ensure that the appellant fully understood the charge before pleading."

14. The trial court's record indicates that the proceedings in the case were conducted in Kiswahili language. The appellant replied to the charge and to the particulars of the charge in Kiswahili language. This Court also noted that the charges were read to the appellant twice., He pleaded guilty both times to the charges and facts. He presented his mitigation to the court in the same language.

15. We are, thus, persuaded that the proceedings were conducted in Kiswahili language, and that the appellant understood the language. This Court also agrees with the High Court that there was nothing in the appellant's mitigation that negated the guilty plea. This ground is without merit and is accordingly dismissed.

16. The appellant also pursued the appeal on sentence, pointing out that recent legal developments have shown that courts have discretion and can divert from mandatory sentences. He refers us to Article 50(2)(q) of *the Constitution* of Kenya 2010 requires courts to review a sentence; an also the 2016 judiciary of Kenya sentencing policy guidelines which lists the objectives of sentencing at pages 15,

paragraph 4:1which include inter alia, rehabilitation. The appellant's contention is that a life sentence is in conflict of the sentencing objectives. The appellant was sentenced to life imprisonment as provided under section 8(2) of the *Sexual Offences Act* although in his grounds of appeal he refers to a death sentence, we take that this may have been a slip on his part. He faults the trial court and the first appellate court for imposing a sentence which is in his view, a mandatory minimum sentence which is unconstitutional.

17. It has been acknowledged in several judicial pronouncements that sentencing is a discretionary exercise by the trial court; and that 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. We refer to the decision instance, in Bernard Kimani Gacheru vs. Republic (2002) eKLR; this Court observed as follows:

> "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 a 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."

18. The submissions made by the appellant regarding recent developments in decisions by courts with regard to mandatory sentences are not misplaced, indeed, that had been a growing trend following the Supreme Court decision in the case of Francis Karioko Muruatetu and Anor vs. R [2017] eKLR regarding the place of the mandatory death sentence, which courts applied in all other cases dealing with mandatory and minimum sentences. However, the Supreme Court of Kenya in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR) clarified minimum sentences prescribed by section 8 of the *Sexual Offences Act* in this manner:

> "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."

19. Having been convicted under section 8(1) as read with section 8(2) of the *Sexual Offences Act*, the sentence imposed upon him and affirmed by the first appellate court was lawful was the statutory mandatory sentence of life imprisonment and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid and legal.

20. We also note from the record of appeal that the appellant did not challenge the constitutionality of the sentence meted out by the trial court in the High Court. In this regard the Supreme Court addressing a similar issue in Republic vs. Mwangi (supra), clarified thus:

> "The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the Respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent's sentence was also not raised either before the trial court or the High Court. The Respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.
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> 19. Likewise, the appellant herein having raised the issue of the constitutionality of the sentence that was imposed against him, for the first time, this Court has no jurisdiction to entertain the issues of constitutionality of the sentence, including his complaint regarding the indeterminate nature of the sentence of life imprisonment ... this appeal fails as the Court has no jurisdiction to entertain the grounds upon which the appellant is challenging the sentence...".

We need not say more, the writing is clearly on the wall, the appellant's appeal fails in its entirety and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar