JON v Republic (Criminal Appeal 267 of 2018)
[2025] KECA 8 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 8 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 267 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

JON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisumu (E. M. Maina, J) delivered on 21st April 2016 in HCCRA No. 102 of 2014)

JUDGMENT

1. JON, the appellant herein, was tried and convicted by the Magistrate's Court at Nyando, for the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 26th November, 2013 at Nyando District within Kisumu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of VA (name withheld) a child aged 9 years.

2. Upon conviction, the appellant was sentenced to life imprisonment. He challenged the decision of the trial court in an appeal before the High Court, but his appeal was dismissed. The appellant is now before this Court on a second appeal. In his original memorandum of appeal, the appellant raised 9 grounds on both conviction and sentence. The appellant also filed a supplementary grounds of appeal in which he raised two grounds in regard to sentence only.

3. The prosecution case rested on the evidence of 4 witnesses who included, the victim VA, (name withheld), VA's mother EA (name withheld), Sergeant Rachael Chelengat (Sgt Chelengat), the investigation officer who was then attached to Ahero Police Station, Chrisantus Mwangi (Mwangi), a Clinical Officer at Ahero Sub- District Hospital, who examined the minor and filled the P3 form.

4. In a nutshell, the two lower courts made concurrent findings that VA was at the material time 9 years old; that the appellant who is an uncle to VA, pulled her into his house, removed her underpants and

penetrated her vagina using his penis while lying on her on the bed. VA went back home, but did not inform her mother. The following morning, her mother noticed a change in VA's walking, and upon questioning her, VA revealed what the appellant had done to her. VA's mother took her to hospital where VA was examined by Mwangi who noted bruises on her labia majora and minora, bleeding in the vagina as well as a foul smell, and vaginal discharge indicative of sexual activity. Mwangi filled the P3 form concluding that there was penetration. The matter was reported to the police and Sgt Chelengat, who was tasked with investigating the case, arrested the appellant and caused him to be charged. The appellant's defence alleged that he was framed by VA's mother due to a land dispute was rejected.

5. During the plenary hearing of the appeal, the appellant informed the Court that he was limiting his appeal to sentencing only. He urged the court to consider the sentence and the mitigating factors.

6. In his written submissions the appellant argued that the mandatory minimum sentence imposed upon him is unconstitutional, and amounts to unfair trial, cruel and inhuman punishment, and is contrary to Article 25 of *the Constitution*. In addition, that the mandatory nature of the life imprisonment deprived the trial court its discretion to impose an appropriate sentence upon the appellant, taking into account the facts and the mitigating factors that were put forward.

7. The appellant further submitted that he had been in prison since 27th November, 2013, during which period he has undergone biblical and theological studies, is rehabilitated and has reformed; that he is 68 years old; and that the Court should therefore consider a determinate sentence.

8. The respondent filed written submissions in response to the appeal which were prepared by Mr. Patrick Okango, learned Senior Prosecution Counsel in the Office of the Director of Public Prosecutions (ODPP). Mr Okango, who also appeared for the respondent at the plenary hearing, conceded the appeal in regard to the unconstitutionality of the sentence. Learned counsel relied on the High Court decision in Maingi & 5 others vs Director of Public Prosecution & another [2022] KEHC 13118 KLR; the Court of Appeal decision in Joshua Gichuki Mwangi vs Republic. Nyeri Criminal Appeal No 84 of 2015; and Malindi Criminal Appeal No 12 of 2021 Julius Kitsao Manyeso vs Republic, in which the Court of Appeal declared the indeterminate life sentence unconstitutional. Counsel urged the Court to set aside the life sentence that was imposed upon the appellant, and consider a term sentence taking into account the aggravating factors, including the victim in question having been 9 years old. Mr. Okango proposed a term sentence of 25 years' imprisonment.

9. This being a second appeal, this Court is restricted under Section 361(1)(a) of the Criminal Procedure Code to considering the appeal on matters of law only. As was stated by this Court in Stephen M'Irungi & Another vs Republic 1982 – 88 1KAR 360:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

10. The facts in this case are now not in dispute as the appellant has opted to pursue his appeal against sentence only. We adopt the facts in accordance with the concurrent findings of the two lower courts as earlier summarized in this judgment. Sentence having been identified under section 361(1) of the Criminal Procedure Code as a matter of fact, the appellant's appeal would only be open to our consideration if an issue of law arises in regard to the sentence.

11. Sentencing is a discretionary power exercised by the trial court, taking into account the facts before the court and the mitigation factors advanced by an accused person. An appellate court will not interfere with the sentence meted out, unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. For instance, in Bernard Kimani Gacheru vs. Republic (2002) eKLR the Court of Appeal stated 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 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."

12. Having considered the record of appeal, the oral and written submissions made by both parties, and taking into account the Court's mandate as circumscribed under section 361 of the Criminal Procedure Code, it is evident that the appellant has raised an issue regarding the legality of the mandatory nature of the sentence of life imprisonment that was imposed on him under section 8(2) of the *Sexual Offences Act*, and the constitutionality of the sentence of life imprisonment. Both these issues are issues of law and therefore the appeal properly falls within our mandate, the main issue being whether the sentence that was imposed on the appellant was illegal or unconstitutional.

13. The appellant was convicted for the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* which provides:

    8(1) a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    8(2) "A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

14. The appellant having been sentenced in accordance with section 8(2) of the *Sexual Offences Act* as above quoted, the sentence imposed upon him of life imprisonment was as provided by that statute. The question is whether this sentence is illegal or unconstitutional. As submitted by the appellant and Mr Okango, the High Court in Maingi & 5 others vs. Director of Public Prosecutions & Another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and this Court in Joshua Gichuki Mwangi vs Republic, Nyeri Criminal Appeal No 84 of 2015 both respectively declared the mandatory sentences under the *Sexual Offences Act* to be unconstitutional. However, this position has since been reversed by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 KLR, wherein the Supreme Court declared the mandatory sentences under the *sexual offences Act* to be lawful. The Supreme Court was categorical that:

> " Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence."

15. It follows, that although sentencing is a power entrusted to the discretion of the trial court, that discretion is limited where the statute has provided a mandatory sentence, and, therefore, in the case of the appellant where section 8(2) of the Sexual Offences' Act, had provided a mandatory sentence, the trial court had no option, but to impose that sentence. Although the appellant argues that the sentence of life imprisonment is unconstitutional, an examination of the record reveals that the appellant did not raise this issue in the trial court or in the High Court. The issue was not, therefore preserved for our consideration and cannot be raised at this stage, as there is no finding by the High Court upon which it can be anchored. In Republic v Mwangi (supra) the Supreme Court considering a similar situation stated:

> "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.

16. Likewise, we find that the appellant has not laid the proper basis upon which we can interrogate the constitutionality of the sentence that was imposed upon him. The upshot of the above is that the appellant has failed to established any grounds upon which the Court can interfere with his sentence. His appeal therefore lacks merit and is accordingly dismissed.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR