Okinda v Republic (Criminal Appeal E022 of 2020)
[2025] KECA 3 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 3 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E022 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

JACK ODUOR OKINDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Busia, (Kiarie Waweru Kiarie, J.) dated 25th June, 2020 in HC)

JUDGMENT

1. Jack Oduor Okinda, the appellant herein, was charged before the Chief Magistrate's Court at Busia with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on November 27, 2018 in Busia County, the appellant intentionally and unlawfully caused his penis, to penetrate the vagina of IA a girl, aged 6 years.

2. The appellant pleaded not guilty to the charge and a trial ensued,during which five witnesses testified for the prosecution and the appellant gave an unsworn statement. Upon considering the evidence, the trial magistrate found the appellant guilty of the charge and sentenced him to serve life imprisonment.

3. The appellant, being dissatisfied with the judgment of the trial court, appealed to the High Court against his conviction and sentence. The High Court dismissed the appeal, finding that the appellant's conviction was based on sound evidence; that the sentence imposed upon him was proper, and the High Court had no basis to interfere. The appellant has now appealed to this Court against the judgment of the High Court on sentence only.

4. In his memorandum of appeal, the appellant faults the High Court for upholding a harsh sentence without considering his mitigation and the fact that he was a first offender; failing to consider that articles 27(1), 27(2), and 50(2)p of the *Constitution* guarantees him the benefit of the least severe

punishment; and upholding the sentence without invoking sections 216 and 329 of the *Criminal Procedure Code*.

5. At the plenary hearing, the appellant who was in person, relied on his written submissions, in which he complained that his mitigation was not considered, as a result of which the trial court imposed a mandatory life sentence which is unconstitutional, harsh and excessive, and the High Court erred in upholding that sentence. The appellant relied on the Court's decision in Julius Kitsao Manyeso vs Republic, in support of his argument that the sentence of life imprisonment is unconstitutional. In urging the Court to interfere with the mandatory sentence, the appellant argued that sentencing is a matter within the discretion of the Court. He submitted that he is a first offender and at the time of the offence he was only 24 years old and ignorant of the law. That the period he has stayed in custody has enabled him to reform and he is ready to be re-integrated back into the society.

6. The respondent is opposing the appeal through written submissions that were prepared by Ms. Mutellah-Wainaina a Senior Prosecution Counsel in the office of the Director of public Prosecution (ODPP). Ms. Mutellah, who appeared for the respondent during the plenary hearing, relied on the written submission which she orally highlighted. She pointed out that the duty of the appellate court on second appeals, is limited to considering matters of law only and the Court cannot intervene on severity of the sentence, unless the sentence was enhanced by the High Court or the subordinate court had no power to pass that sentence. She argued that this was not the position in the appellant's case.

7. In a nutshell, Ms. Mutellah identified 3 issues for determination in the appeal. These were whether the appellant can canvass, in a second appeal, constitutional issues that were never raised in the High Court; whether the appellant has properly approached the Court; and whether the trial court and High Court properly sentenced the appellant.

8. In regard to the first issue, Ms. Mutellah noted that although the appellant raised the issue of the constitutionality of his sentence, arguing that his rights to a fair trial were violated, this issue was not raised in the High Court. That had the appellant raised the issue, the High Court would have had an opportunity to pronounce itself on the said issue by dint of Article 165(3)(b) and Article 165(3)(d)(i) of the *Constitution* which empowers the High Court to determine, the question whether a right or fundamental freedom in the Bill of Rights, has been denied, violated, infringed or threatened, and to hear any question respecting the interpretation of the Constitution including the determination of the question whether any law is inconsistent or in contravention with the Constitution. This not having been done the issue cannot be raised at this stage.

9. On the second issue whether the appellant has properly approached the Court, Ms. Mutellah contends that the appellant has not properly approached the court, as the issue of the constitutionality of the sentence should have first been raised and fully argued in the High Court before being escalated to the Court of Appeal.

10. Finally, on the issue whether the trial Court and High Court properly sentenced the appellant, Ms. Muttellah countered the appellant's argument, that the trial court and the High Court erred in imposing and upholding a harsh sentence without considering his mitigating factors, by arguing that the sentence was lawful and appropriate, given the circumstances of the case; that the trial court did consider the appellant's mitigation; and that the court did not fail to consider any matters it should have considered.

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

> " 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."

12. Having considered the record of appeal, the written and oral submissions made by both parties, and this Court's mandate as a second appellate court, the main issue that falls for determination in this appeal is whether this Court has jurisdiction to entertain the grounds upon which the appellant challenges the sentence that was imposed upon him, and whether there is justification for this Court to interfere with the sentence that was imposed on the appellant.

13. 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* 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 was sentenced to life imprisonment as provided under section 8(2) above quoted. He however 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, as it is contrary to Article 25 of the *Constitution*.

15. It has been stated time and again 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. For instance, in *Bernard Kimani Gacheru vs. Republic* (2002) eKLR; the Court of Appeal stated:

> " 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."

16. The issue before us is not a novel issue. The Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* [2024] KESC 34 (KLR) addressing minimum sentences prescribed by section 8 of the *Sexual Offences Act* had this to say:

> "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."

17. The appellant was convicted under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The sentence imposed upon him was the statutory mandatory sentence of life imprisonment. The Supreme Court in *Republic v Mwangi* (*supra*) in which the appellant had been sentenced under section 8(3) of the *Sexual Offences Act*, concluded that:

> 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.

18. The appellant's position in this appeal is on all fours with the appellant in *Republic v Mwangi*, (*supra*), as he was sentenced under section 8 (2) of the *Sexual Offences Act*, which remains valid, and therefore the sentence of life imprisonment that was imposed upon him is neither illegal nor unconstitutional. Moreover, the record of appeal shows 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 v Mwangi* (*supra*), put the matter to rest as follows:

> ''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.

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. The upshot of the above is that this appeal fails as the Court has no jurisdiction to entertain the grounds upon which the appellant is challenging the sentence. Nor is there

any justification for this court to interfere with the sentence that was imposed upon the appellant, the sentence being legal.

The appeal 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