OMERI v Republic (Criminal Appeal 45 of 2020)
[2025] KECA 2 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 2 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 45 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

ROBERT OMERI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 21st September 2017 in HCCRA No. 121 of 2015)

JUDGMENT

1. The appellant, ROBERT OMERI, was tried and convicted before the Chief Magistrate's Court at Bungoma 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 diverse dates between 1st June 2014 and 6th June 2014 at Busia County, the appellant intentionally and unlawfully, caused his penis to penetrate the vagina of EA (name withheld) a child aged 9 years old. He was sentenced to serve life imprisonment.

2. The appellant, who was aggrieved by the decision of the trial court, filed an appeal before the High Court at Bungoma, against his conviction and sentence. The High Court (Ali-Aroni, J. as she then was) dismissed the appeal and upheld the conviction and sentence in a judgment dated 21st September 2017.

3. The appellant was again dissatisfied with the decision of the High Court and lodged the present appeal. Acting pro se, the appellant has filed an amended petition of appeal in which he has raised five (5) grounds in his self-crafted memorandum of appeal, all of which impugned the sentence imposed against him. The appellant has expressly stated that his appeal is against sentence only.

4. The five grounds of appeal are that, the mandatory life sentence imposed upon him is excessive, harsh and unjust, considering that the appellant was a first offender, and a young man who needed a lesser sentence; that he is remorseful, repentant, reformed and fully rehabilitated, since he has learnt to

take responsibility for his actions; that he was arrested at the age of 17 years and prays that he be reconstituted back in the society to serve as a role model; that the Court invokes the provisions of section 333(2) of the Criminal Procedure Code, in the sentence to be awarded; and that the Court do issue any further orders as may be just and expedient in the circumstances.

5. In support of the appeal, the appellant has filed written submissions in which he submits that he was sentenced to a mandatory sentence which infringes his rights under Article 50, and is unconstitutional as it deprived the trial court discretion in sentencing. The appellant further submits that at the time of the commission of the offence, he was still young pursuing his primary education in standard 6 and that his mitigation was not taken into account. He pleads that he be given a second opportunity to progress in his education, and submits that he has undergone rehabilitative programs, is reformed and ready to be re-integrate back into society. He urges the Court in resentencing him, to consider the period already spent in custody.

6. The respondent opposes the appeal through written submissions duly prepared by Ms. Nyambura Mwaniki a Senior Prosecution Counsel in the office of the Director of Public Prosecutions (ODPP). Ms Mwaniki submits that the trial court considered several parameters, including the nature of the offence, the age of the victim of the offence, the age of the appellant and his mitigation; and that the mandatory minimum sentence that was imposed is lawful and constitutional, and the Court should not interfere with it. In support of the submissions Ms. Mwaniki relies on the Supreme Court decision in Republic vs Joshua Gichuki Mwangi & 4 others (Amicus Curiae). She urges that given the dire post traumatic consequences of sexual offences cases, the sentence of life imprisonment that was imposed on the appellant, is not unconstitutional and is, in the circumstances of the case, deserved.

7. During the plenary hearing, the appellant relied on his written submissions, and reiterated his plea that the sentence be reduced. Ms. Mwaniki also opposed the appeal relying on her written submissions maintaining that the sentence is not unconstitutional. However, Ms. Mwaniki pointed out that according to the age assessment of the appellant, his age was between 18 and 20 years, and that given the inconsistent evidence regarding his age, the trial court ought to have inquired further into the matter at the time of trial. Ms. Mwaniki therefore urged the Court to send the matter back to the trial court for resentencing so that the issue of age is further addressed, and the trial court is properly guided on the appropriate sentence to impose.

8. This being a second appeal, the scope of this Court's mandate is limited to matters of law only, as provided under section 361(1) of the Criminal Procedure Code. As stated in Karingo vs. Republic [1982] KLR 219:

> "A second appeal must be confined to points of law and this court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did."

9. Section 361(1) of the Criminal Procedure Code identifies severity of sentence to be a matter of fact. As the appellant in this appeal has questioned only the sentence that was imposed against him, the conviction is not in dispute nor are the concurrent findings of fact arrived at by the two lower courts. On three occasions the appellant lured the minor, whose age was established to be 9 years, into his house and defiled her. The matter came to the fore, when the minor's mother noticed some suspicious stains on the minor's panty, and upon interrogating her she revealed what had transpired, identifying the appellant as the culprit. The minor was taken to Kopcholia hospital where she was examined by a clinical officer who noting a foul-smelling discharge from her vagina, an absent hymen, bruised labia

and a swollen cervix, concluded that she had been defiled. Consequently, the appellant was arrested and charged with the offence.

10. The issue for determination is whether the appeal before us raises an issue of law regarding the sentence of life imprisonment that was imposed upon the appellant, such as to justify the intervention of this Court. In particular, the underlying question is whether the sentence of life imprisonment that was imposed upon the appellant is harsh, excessive and unconstitutional.

11. The following holding of the Court of Appeal in Bernard Kimani Gacheru vs. Republic (2002) eKLR, is instructive on the issue at hand:

> " 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."

12. The appellant was sentenced to life imprisonment under Section 8 (2) of the *Sexual Offences Act*. That section provides that:

> "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."

13. Thus the sentence of life imprisonment that was imposed upon the appellant, is the mandatory sentence provided under Section 8(2) of the *Sexual Offences Act*. In Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) [2024] KESC 34 (KLR), 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"

14. The Supreme Court, concluded that in the matter before them the sentence that was imposed by the trial court against the appellant and affirmed by the first appellate court "was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid". The position of the appellant before us is no different from that of the appellant in Republic vs Mwangi (supra). His sentence under section 8(2) of the *Sexual Offences Act*, must be deemed lawful for the same reason.

15. There is yet another striking similarity between, the appellant before us, and the appellant in Republic vs Mwangi (supra). Just like the appellant before the Supreme Court, in his first appeal before the High Court, the appellant before us did not raise the issue of the unconstitutionality of the mandatory sentence of life imprisonment The matter is, therefore, being raised before this Court for the first time. In this regard the Supreme Court gave the following guidance in Republic vs Mwangi:

> " *62* ..... we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence of murder. This was our

approach and direction in Muruatetu which must remain binding to all courts below.

63. Returning to the issue of the constitutionality or otherwise of minimum sentences under the *Sexual Offences Act* and discretion to mete out sentences under the said Act, we note that the Court of Appeal failed to identify with precision the provisions of the *Sexual Offences Act* it was declaring unconstitutional, left its declaration of unconstitutionality ambiguous, vague and bereft of specificity. We find this approach problematic in the realm of criminal law because such a declaration would have grave effect on other convicted and sentenced persons who were charged with the same offence. Inconsistency in sentences for the same offences would also create mistrust and unfairness in the criminal justice system. Yet the fundamental issue of the constitutionality of the minimum sentence may not have been properly filed and fully argued before the superior courts below.

63. The proper procedure before reaching such a manifestly far-reaching finding would have been for there to have been a specific plea for unconstitutionality raised before the appropriate court. This plea must also be precise to a section or sections of a definite statute. The court must then juxtapose the impugned provision against *the Constitution* before finding it unconstitutional and must also specify the reasons for finding such impugned provision unconstitutional."

16. The appellant not having properly raised the issue of the unconstitutionality of the sentence before the High Court, the issue was not preserved for our determination, and is not, therefore, properly before us in this second appeal. This is another reason why this appeal cannot succeed.

17. Finally, the appellant raised the issue of his age and it was the respondent's view that this should be looked into. We have carefully considered the record of appeal, and we are satisfied that the trial court properly addressed the issue. The record shows that on 20th June 2014 when the appellant first appeared in court, the trial magistrate directed that his age be assessed. On 23rd June 2014, the appellant appeared in court where the magistrate recorded that she had seen the age assessment report and proceeded to take the appellant's plea. Clearly the trial magistrate was satisfied that he was not under 18 years hence the plea taking.

18. It is evident that the appellant later raised the issue of his age again, and his mother was asked to avail his birth certificate. The mother later produced a birth certificate which indicated that the appellant was born on 25th May 2000, but when she was interrogated, she said the appellant was born in 1997. This prompted the trial magistrate to order the authenticity of the birth certificate to be investigated, and it was found to be a false document. The appellant was referred to the hospital for a second age assessment. The Court also called for a pre-bail report which confirmed that he was 18 years. In sentencing the appellant, the trial magistrate noted that he was youthful being just over 18 years old.

19. It is, therefore, clear that the trial court addressed the issue of the appellant's age, and was satisfied that he was just over 18 years old. As the trial court observed, notwithstanding the appellant's youthful age, the trial court had no option but to impose the mandatory sentence that is prescribed by the law. The sentence was, therefore, neither unlawful nor harsh or excessive.

20. The upshot of the above is that this appeal has no merit. It 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