Omiti v Republic (Criminal Appeal 170 of 2019)
[2025] KECA 429 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 429 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 170 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 28, 2025

BETWEEN

ZAKAYO OKETCH OMITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (Musyoka, J.) dated 24th December, 2018 in HCCRA No. 2 of 2017)

JUDGMENT

1. Zakayo Oketch Omiti, the appellant herein, and Francis Okutu Wakola (Co-accused), were jointly tried before the Principal Magistrate's Court at Mumias, each being charged with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act* No. 3 of 2006. It was alleged that the appellant, in association with the co- accused, intentionally and unlawfully caused his penis to penetrate the vagina of the complainant VAO (name withheld), a child aged fourteen years.

2. During the trial, nine witnesses testified and the appellant and his co-accused each gave sworn evidence. The co-accused also called his father as a witness. Upon hearing the evidence, the trial magistrate found the appellant and the co-accused each guilty, convicted them, and sentenced the appellant to twenty years imprisonment, while the co-accused who was found to be a minor, was placed on three years' probation.

3. Being dissatisfied with the judgment of the trial court, the appellant filed an appeal in the High Court. Upon hearing the appeal, the High Court (Musyoka, J.), dismissed the appeal finding that the appellant was properly convicted, and that the sentence imposed upon him was legal.

4. The appellant moved to this Court and filed a memorandum of appeal, in which he stated that he was not contesting his conviction but was only challenging the minimum mandatory sentence of twenty years imprisonment that was imposed upon him. He contended that the trial court and the learned

Judge of the High Court did not exercise their discretion in sentencing. The appellant also requested the Court to apply Section 333(2) of the *Criminal Procedure Code* so that his sentence is reduced by the period he served in custody during trial.

5. The appellant filed written submissions in which he urged the Court to apply the emerging jurisprudence that mandatory minimum sentence in defilement cases are unconstitutional and that courts have a discretion to depart from such minimum mandatory sentences. He relied on GK -vs- Republic [2021] KECA 232; Maingi & 5 others -vs- Director of Public Prosecutions & another [2022] KEHC 13; Joshua Gichuki Mwangi -vs- Republic [2020] eKLR; and Dismus Wafula Kilwake -vs- Republic (no citation given).

6. The appellant also referred to the Sentencing Policy Guidelines whose objectives, he stated, were fairness, justice, proportionality and retribution. He pleaded that having been in prison for seven years he is rehabilitated and reformed and should therefore be released.

7. The respondent also filed written submissions which were prepared by Kwame Chacha, a prosecution counsel in the Office of the Director of Public Prosecutions (ODPP). Learned counsel observed that the appellant was convicted under Section 10 of the *Sexual Offences Act*, which provides for a sentence of fifteen years imprisonment, which could be enhanced to life imprisonment; and that the sentence of twenty years imprisonment that was imposed on the appellant is justified by the circumstances of the case. Counsel pointed out that under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact, and is therefore not a legal issue open for consideration by this Court on second appeal. Counsel urged the Court to dismiss the appeal.

8. During the plenary hearing of the appeal, the appellant was in person while Ms. Busienei, Senior Prosecution Counsel, appeared for the respondent. The appellant reiterated that his appeal was against sentence only and urged the Court to review the sentence and also consider the period that he had spent in remand during trial.

9. Ms. Busienei, relying on the submissions that had been filed for the respondent, opposed the appeal, urging that the sentence of twenty years imprisonment that was imposed on the appellant was fair, as the complainant, who was only fourteen years old, was gang raped.

10. This is a second appeal, in which the Court's mandate is restricted to addressing only matters of law. The Court will also not normally interfere with concurrent findings of facts by the two courts below, unless such findings were not based on evidence, or were based on a misapprehension of the evidence, or the two courts below acted on wrong principles in arriving at their findings.

11. The duty of this Court on second appeal was succinctly set out by the Court (Tunoi, Bosire & Onyango-Otieno JJA), in Chris Kasamba Karani v Republic [2010] KECA 478, KLR, as follows:

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

12. Similarly, in Karingo vs. Republic [1982] KLR 213, the Court (Law, Miller & Potter, JJA), affirmed that:

> " 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 the second appeal is whether there was any evidence on which the trial court could find as it did (Reuben Karari C/o Karanja vs. R [1950] 17 EACA 146)."

13. Under Section 361(1)(a) of the *Criminal Procedure Code*, severity of sentence is a matter of fact and therefore, not a legal issue open for consideration by this Court on a second appeal. This was asserted by the Supreme Court in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 other (Amicus Curiae) [2024] KESC 34 (KLR), as follows:

> " Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the *Criminal Procedure Code* which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court."

14. We have considered the appeal, the rival submissions, and the applicable law. The singular ground for determination in this appeal is whether the issue of the minimum mandatory sentence as raised by the appellant is one for consideration by this Court, and if so, whether the Court can intervene in reducing the appellant's sentence. This is an issue of law that is properly before this Court.

15. Section 10 of the *Sexual Offences Act* which creates the offence of gang rape provides that:

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

16. The appellant having been convicted of gang rape, was sentenced to twenty years imprisonment. This was more than the minimum period of fifteen years and less than the life imprisonment provided under Section 10 of the *Sexual Offences Act* under which the appellant was convicted.

17. In sentencing the appellant, the trial magistrate stated:

> "I have considered the mitigation of the 2nd accused person, one Zakayo Omiti, but my hands are tied. It must also be noted that the young child got violently defiled and her virginity broken unwillingly by the accused person who has a wife and a family. The experience will haunt her forever. She found herself in unfamiliar territory that the person who pretended to be a good Samaritan later turned to be a beast without any mercy to a girl good enough to be her daughter. The life and innocence associated with the minor messed up forever, hence the accused person needs a deterrent sentence. I hereby sentence him to serve twenty years in prison."

18. It is clear that the trial magistrate exercised his discretion in sentencing, noting that his hands were tied as his discretion was between imposing a sentence of fifteen years imprisonment and life imprisonment.

The comments made by the trial magistrate show that he opted to sentence the appellant to twenty years imprisonment because of the circumstances in which the offence was committed. In our view, the trial magistrate cannot be faulted as he properly exercised his judicial discretion.

19. In his submissions, the appellant cited several authorities in support of his appeal. While the trajectory of the jurisprudence in the authorities cited by the appellant, was that the minimum mandatory sentences in the *Sexual Offences Act* were unconstitutional, this position has since changed as a result of the decision of the Supreme Court in Republic -vs- Mwangi; Initiative for Strategic Litigation in African (ISLA) & 3 others [amicus Curiae) (supra) in which the Supreme Court asserted that:

> " 56. Mandatory sentence leaves 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 sentence. 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."

20. In that decision, the Supreme Court concluded that a sentence of twenty years which was imposed on the appellant under Section 8(2) of the *Sexual Offences Act* was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. Therefore, the appellant's ground of appeal anchored on the unconstitutionality of the minimum mandatory sentence fails, and this Court has no jurisdiction to interfere with the sentence which is legal. In the circumstances, this appeal has no merit.

21. As regards the appellant's plea to the Court to apply Section 333(2) of the *Criminal Procedure Code*, we have perused the original record of the trial court, and have confirmed that the appellant was arraigned in court on 25th August, 2015. He was granted bond of Kshs.200,000/- with one surety of similar amount on the same day. On 25th September, 2015, one Joshua Ogesa Kibondori was approved by the court as a surety for the appellant, and a release order was issued on the same day for release of the appellant. In the circumstances, the appellant is not eligible to benefit from Section 333(2) of the *Criminal Procedure Code*.

22. The upshot of the above is that the appellant's sentence of twenty years imprisonment is affirmed and the appeal is dismissed.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 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