Ahuba v Republic (Criminal Appeal 137 of 2019)
[2025] KECA 340 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 340 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 137 OF 2019

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

FEBRUARY 21, 2025

BETWEEN

KENNEDY OCHIENG AHUBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Siaya (Majanja, J.) dated 15th January, 2018 in Criminal Appeal No. 86 of 2016)

JUDGMENT

1. The appellant, Kennedy Ochieng Ahuba, was arraigned before the Senior Resident Magistrate's Court at Ukwala on 10th July, 2013. He was charged with the offence of defilement contrary to Section 8(1)(3) (sic) of the *Sexual Offences Act*. The particulars of the charge alleged that on 8th July, 2013, at around 11.30 a.m., within Siaya County, the appellant intentionally caused his penis to penetrate into the vagina of one KAO, a child aged 16 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the charge alleged that on the same date and place, the appellant intentionally touched the vagina of KAO, a child aged 16 years, with his penis.

2. The appellant pleaded not guilty to the charges. The prosecution called four witnesses. It was the evidence of KAO hereinafter "the complainant" that on 8th July, 2013, she was sent on an errand by her mother to deliver Kshs.3,900/= to a neighbour by the name Agolla. On her way back home, she met the appellant on a murram road near Sega Township Primary School. It was her testimony that the appellant forcefully grabbed her and dragged her into his house. He locked her inside the house. A struggle ensued between them. She stated that the appellant overpowered her, unzipped his trouser and proceeded to sexually assault her. She stated that while still locked in the appellant's house, two individuals, Mercy and Mzee came and pleaded with the appellant to release her but he declined their

entreaties. Later on, her mother came to the appellant's house accompanied by police officers. They were arrested and escorted to Sega Police Post where she reported the incident. She was treated at Ambira Sub-District Hospital. It was her evidence that the appellant was well known to her as he was her lover prior to the incident.

3. The complainant's mother, PW2, told the trial court that she sent the complainant to see one of her customers, but the complainant took too long to return to the house. She stated that at about 10.00 a.m., she started asking around about the complainant's whereabouts. She was informed that the complainant might be with the appellant. PW2 stated that she reported the matter to the Chief before proceeding to the appellant's house. She found the house locked. She sought assistance from the police who accompanied her to the appellant's house and arrested him. It was her evidence that the complainant was sixteen (16) years old at the time, and that she was born on 19th December, 1996.

4. PW3, Howard Okeyo, conducted a medical examination on the complainant on 9th July, 2013. His findings were that the complainant had wet-stained pants, tender labia, tender vagina walls, white vaginal discharge, and that her hymen was not intact. The tests further revealed that the complainant was pregnant. It was his finding that the complainant had been vaginally penetrated.

5. This case was investigated by Cpl Stella Chepkoech (PW4), who at the time was based at Ukwala Police Station, assigned to Sega Patrol Base. It was her evidence that on 8th July, 2013, at 10.45 a.m., PW2 came to the police post to report that her daughter had not come back home. She had been informed that she was at the appellant's house. Later that day, two police officers went to the appellant's house where they found the complainant under the appellant's bed. The appellant was also present in the house. They were both arrested and escorted to the police post, and later to Ambira Sub-District Hospital for medical examination. The appellant was later charged before the trial court.

6. The appellant was placed on his defence. He gave an unsworn statement and did not call any witnesses. It was his testimony that he did not know anything relating to the charges levelled against him.

7. The learned trial magistrate upon assessing and analyzing the evidence tendered before the court found the appellant guilty as charged in the principal charge of defilement, convicted him, and sentenced him to serve fifteen (15) years imprisonment.

8. The appellant, aggrieved by this verdict, filed an appeal before the High Court at Siaya. He challenged his conviction and sentence on grounds that the prosecution failed to prove its case beyond all reasonable doubt; and that the trial court relied on uncorroborated evidence to convict him.

9. The first appellate court (Majanja J.), upon re-evaluating the record of the trial court and the evidence tendered before it, saw no reason to disturb the conviction and sentence of the appellant by the trial court. Consequently, he dismissed the appeal in its entirety.

10. The appellant is now before this Court seeking to overturn the decision of the High Court on a second and probably the final appeal. His appeal is nonetheless against the sentence only. He proffered four grounds of appeal: Firstly, that the mandatory nature of the sentence under Section 8(3) of the *Sexual Offences Act* is unconstitutional and not warranted; secondly, that the sentence meted out was harsh and manifestly excessive in the circumstances; thirdly, that this Court be pleased to apply the main objective of sentencing which is rehabilitation;

    and lastly, that the appellant is a first offender and pleads for leniency in the circumstances.

11. The appeal was canvassed by way of written submissions of both the appellant and respondent. The appellant appeared in person. It was his submission that this Court should consider the decisions made by the High Court where the courts held that minimum mandatory sentences under the *Sexual*

Offences Act are punitive, repugnant and offend the principle of fair hearing guaranteed by Article 50 of the *Constitution*. The appellant did not, however, provide the said decisions for our consideration. The appellant urged that courts ought to handle each case according to its own peculiar circumstances. It was his submission that in the instant case, the sexual intercourse was consensual, despite the fact that the complainant was sixteen years old. He submitted that medical evidence did not establish any aggravating factors. He asserted that the age difference between him and the complainant was five (5) years, and that he was a young man who deserves to be given a second chance.

12. The appellant further submitted that the custodial sentence of fifteen (15) years imposed on him was harsh and excessive, and that the law provided for a lesser sentence under Article 50(2)(p) of the *Constitution*, and Section 26(2) of the *Penal Code*. He urged us to bear in mind that rehabilitation is the objective of sentencing, and that continued incarceration does the opposite by turning corrective facilities into detention camps. He pointed out that he is a first offender, and has been awarded an industrial training certificate offered by NITA grade 1, and that he is socially and economically reformed. The appellant urged us to exercise leniency and vary or reduce the custodial sentence that was imposed upon him.

13. In rebuttal, Learned Senior Principal Prosecution Counsel, Mr. Okango, submitted that a second appellate Court is mandated to only consider points of law that were first raised before the first appellate court. It was his submission that the appellant's appeal before the first appellate court did not challenge the constitutionality of sentence meted upon him, and that this issue was therefore improperly before us.

14. With respect to the mandatory nature of the sentence, Mr. Okango urged that the Supreme Court in R. vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC34 (KLR) (12th July 2024) (Judgment) reaffirmed the legality of the mandatory minimum sentences prescribed under the *Sexual Offences Act*. Counsel submitted that the sentence meted out by the trial court was legal and commensurate with the offence. In the premises, he urged us to dismiss the appeal for lack of merit.

15. This is a second appeal. The mandate of this Court on a second appeal is confined to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See Kaingo v. Republic [1982] KLR 213.

16. We have carefully considered the record of appeal, the submissions by both parties, and the applicable law. This is an appeal against sentence. The only issue arising for our determination is whether the sentence meted upon the appellant by the trial court, and affirmed by the first appellate court is sound in law. It is trite law that sentencing is at the discretion of the trial court, and as such this being a second appeal, we cannot interfere with the exercise of this discretion, unless it is shown that the court awarded an illegal sentence.

17. The conditions upon which the appellate court may interfere with the sentence of a trial court were set out in the case of Bernard Kimani Gacheru v. Republic [2002] eKLR where this Court held 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 states is shown to exist."

18. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

19. The appellant was sentenced by the trial court to serve fifteen (15) years imprisonment, upon his conviction. The trial court noted that it had considered the appellant's mitigation, but that the sentence prescribed by Section 8 (3) of the *Sexual Offences Act* was a mandatory sentence. As correctly observed by the learned prosecution Counsel, the appellant on first appeal did not challenge the constitutionality of the sentence meted out by the trial court. The first appellate court was not given the opportunity to render its opinion in regard to the constitutionality of the appellant's sentence, and therefore the appellant is not allowed in law to raise the issue for the first time in a second appeal.

20. The appellant contended that his mitigation was not considered by the trial court as his custodial sentence was the minimum mandatory sentence prescribed by Section 8(3) of the *Sexual Offences Act*. The learned prosecution counsel, on the other hand, was of the view that the custodial sentence meted by the trial court was legal and commensurate with the offence committed.

21. The Supreme Court in R. vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (supra) the legality of mandatory minimum sentences provided for under the *Sexual Offences Act*. The Court held that imposing the mandatory minimum sentences does not, of itself, deprive the sentencing court's power to exercise judicial discretion. The apex court further noted that the sentences imposed under the *Sexual Offences Act* are lawful, and remained lawful, as long as the penalty sections remained valid.

22. We are satisfied that the sentence meted upon the appellant was neither harsh nor excessive, looking at the entire circumstances of the case. The appellant was at the material time an adult aged 22 years. He forcefully dragged the complainant to his house where he sexually assaulted her. He refused to release the complainant even after the intervention of third parties. It took the intervention of the police for the appellant to finally let her go.

23. Considering the seriousness of the offence, we are of the view that the appellant deserved the custodial sentence that was on him. In our view, the custodial sentence imposed by the trial court, and affirmed by the first appellate court, was commensurate with the offence committed. The courts below properly exercised their discretion in upholding the mandatory minimum sentence provided by the law. We have no reason to interfere with that sentence as it is lawful and proper.

24. We find that the appeal is without merit and is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF FEBRUARY, 2025.

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.