Ogutu v Republic (Criminal Appeal 2 of 2019)
[2025] KECA 336 (KLR) (21 February 2025) (Judgment)

Neutral citation: [2025] KECA 336 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 2 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 21, 2025

BETWEEN

BENAD ODONGO OGUTU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Siaya (Aburili, J.) dated 19th December, 2018 in HCCRA No. 10 of 2017)

JUDGMENT

1. Benad Odongo Ogutu , the appellant herein, was the accused person in the trial before the Senior Resident Magistrate's Court at Ukwala in Criminal Case No. 643 of 2016. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that on the 8th day of October, 2016, at [Particulars Withheld] within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of J.A., a child aged 13 years.

2. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to the twenty (20) years imprisonment, the minimum sentence provided under section 8(3) of the *Sexual Offences Act*.

4. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Siaya *via Criminal Appeal No. 10 of 2017*.

5. The High Court (R.E. Aburili, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 19th December, 2018.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised two (2) grounds in his self-crafted Amended Memorandum of Appeal, both of which impugned his sentence. They are as follows:

    a. That both lower courts erred in law by meting and upholding a sentence that is against the law and incommensurate and disproportionate in the circumstances of the case.

    b. That both lower courts erred in law by meting [out] and upholding the sentence without considering that the same went against the appellant's right to fair trial as it ignored both the mitigating factors and went against the principles, aims, and purposes of conviction and sentencing which includes rehabilitation.

7. Consequently, the appellant prayed that the appeal be allowed; the sentence be set aside and/or be substituted with the "least punishment" and for the sentence to run from date of arrest which was 22nd October, 2016.

8. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango, appeared for the respondent. Both parties relied on their submissions.

9. This is a second appeal. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact that have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See Samuel Warui Karimi vs. Republic [2016] eKLR.

10. The appellant submitted that the mandatory nature of the sentence deprived the trial learned magistrate the discretion to sentence him according to the circumstances of the case and argued that the *Sexual Offences Act* impermissibly breaches judicial independence by curtailing judicial discretion in sentencing. He cited Jared Koita Injiri vs. Republic, Criminal Appeal No. 93 of 2014 and Maingi & 5 Others vs. *Director of Public Prosecutions & Another (Petition E017 of 2021)* [2022] KEHC 13118 (KLR); Evans Wanjala Wanyonyi vs. Republic, Criminal Appeal No. 312 of 2018 all decisions which impugned the mandatory minimum sentences in the *Sexual Offences Act*.

11. The appellant also submitted at length that the long sentences in the *Sexual Offences Act* belie the rehabilitation objective of sentencing and that the effect was unconstitutional. This is because, he argued, international human rights law provides that all prisoners including those serving life sentences be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved. He cited European Court of Human Rights in Vinter & Others vs. The United Kingdom, Application No. 66069/9, 130/10 and 3896/10 (2016) III ECHR and a South African case, Muchunu & Another vs. Republic (AR332/21) [2022] ZAKZPHC 12 (29 April 2022) which, he said, held that while it is true that it is the interest of justice that crime should be punished; punishment that is excessive serves neither the interest of justice nor those of the society.

12. Ultimately, the appellant urged this court to revise his sentence and or set him at liberty as he has already served imprisonment of over 7 years. Lastly, he prayed for this Court to hold that his sentence should run from the day of his arrest which was on 22nd October, 2016, pursuant to section 333(2) of the *Criminal Procedure Code*.

13. Mr. Okango opposed the appeal on sentence and reminded this Court of its jurisdiction as a second appellate court which is limited by dint of section 361(a) of the Criminal Procedure to deal with matters of law only and not delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court as was held in Njoroge vs. Republic [1982] KLR 388.

14. Counsel rejected the appellant's submissions that his mitigation was not considered and the sentence meted out was incommensurate and disproportionate; and contended that the trial learned magistrate considered the appellant's mitigation before sentencing him to 20 years imprisonment as provided for by the law.

15. Nonetheless, counsel took cognizant of the recent jurisprudence in Maingi & 5 Others vs. Director of Public Prosecutions & Another (supra) wherein mandatory minimum sentences in the *Sexual Offences Act* were declared unconstitutional. He also cited this Court's decision in Joshua Gichuki Mwangi vs. Republic, Criminal Appeal No. 84 of 2015, in which the unconstitutionality of mandatory minimum sentences was affirmed.

16. Guided by the stated authorities, counsel conceded that the trial learned magistrate was categorical that she was constrained by the law to sentence the appellant to the mandatory minimum sentence of 20 years. As such, he submitted that the same be set aside but urged that considering the aggravating factors herein including the fact that the appellant was a person in authority who abused the trust the complainant had in him , the appellant deserved a severe sentence. Counsel proposed a sentence of 15 years imprisonment based on the fact that the appellant withdrew his appeal on conviction and he also has a good rehabilitation history.

17. Lastly, counsel contended that section 333(2) of the Criminal Procedure was inapplicable in this case as the appellant was out on bond during whole period of his trial. Thus, his sentence cannot run from the day of his arrest.

18. We have carefully considered the appeal, the rival submissions by the parties and the authorities cited.

19. The facts of the case, which are deemed to be admitted by the appellant following the concurrent findings of the two courts below and his withdrawal of his appeal against his conviction, are as follows.

20. On 8th October, 2016, at around 6.00pm, the complainant went back to school after the rest of the students had left to collect her book. It began to rain. At the time, the appellant who was a teacher at the school, was in the staffroom. He asked her to move to where he was. When she did that, he forcibly held her by her jacket, placed her on the table in the staffroom and defiled her. While the complainant did not report immediately due to stigma and trauma, two of her colleagues, who had apparently witnessed the incident reported the matter. It was then reported to the police and ultimately charges were brought against the appellant.

21. As we noted above, the appellant's entire appeal is only against the sentence of twenty years imprisonment that was imposed on him. His argument is that section 8(3) of the *Sexual Offences Act* under which he was sentenced is unconstitutional for taking away judicial discretion in sentencing and for sanctioning minimum sentences that are so long that they offend the main objective of sentencing under *the constitution*, namely, rehabilitation of the offender.

22. These are constitutional arguments. Until recently, they found a foothold in our jurisprudence including from this Court. However, that trend was decidedly halted by the Supreme Court in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024). In that case, the Supreme Court categorically held that the mandatory minimum

sentences in the *Sexual Offences Act* are not unconstitutional and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

23. The apex Court held:

> "56. 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. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
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> 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

24. Following the doctrine of stare decisis as provided for under Article 163(7) of *the Constitution*, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise.

25. There is a second reason for rejecting the appellant's appeal on constitutional grounds. He is only raising it before us for the first time. As the Supreme Court re-confirmed in the Joseph Gichuki Mwangi Case, this Court lacks jurisdiction to entertain any issue that was not first raised on the first appeal at the High Court. In the present appeal, the appellant did not preserve the question of unconstitutionality of the sentence imposed before the High Court. We are, thus, precluded from considering it on a second appeal.

26. Lastly, the appellant prayed that his sentence runs from the day of his arrest which according to him was on 22nd October, 2016. However, as rightly submitted by the State, the record shows that the appellant was arrested on 25th October, 2016, and arraigned in court on 26th October, 2016. Thereafter, on 28th October, 2016, he was granted bond and the trial proceeded while he was out on bond. Thus, the import of section 333(2) of the Criminal Procedure is inapplicable in this case.

27. The upshot is that the appeal herein fails and is dismissed in its entirety. We hereby uphold the sentence of twenty (20) years imprisonment on the appellant which will run from 26th January, 2017, the date he was sentenced.

28. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 21ST 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