Bett v Republic (Criminal Appeal 311 of 2019)
[2025] KECA 220 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 220 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 311 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

ROBERT BETT ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (Okwany, J.) dated 3rd November, 2015 in HCCRA No. 37 of 2014)

JUDGMENT

1. The appellant, Robert Bett , was the accused person in the trial before the Principal's Magistrate's Court at Kilgoris in Criminal Case No. 512 of 2014. He was charged 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 the 21st April, 2014, at [Particulars Withheld] of Narok County, the appellant caused his penis to penetrate the vagina of MCT, a girl aged three (3) years.

2. The appellant also faced 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 guilty to the main charge and the learned trial magistrate convicted and sentenced him to life imprisonment as provided for by the law.

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.

5. The High Court (W. Okwany, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 3rd November, 2015.

6. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he has raised eight (8) grounds in his Memorandum of Appeal, all of which attacked only his sentence. In summary, he alleged that: he was a layman, a pauper and a first offender, hence a stranger to the court process; the lower courts overlooked the fact that he was 18 years old at the time of his arrest and ignored the principles enunciated in the sentencing policy guidelines; and the sentence imposed was manifestly harsh, excessive and arbitrary.

7. In his written submissions, the appellant argued that the two lower courts failed to scrutinize and analyze the mandatory nature of the sentence which was manifestly harsh and excessive in nature. He opined that even though the interest of justice dictates that a crime ought to be punished, a punishment that is excessive neither serves the interest of justice nor the interest of the society. To buttress this position, he relied on the case of *S v. Scott Crossley* (2018 (i) SACR 223 (SCA), wherein it was held that even though any sentence imposed must have a deterrent and retributive force, an accused person must not be sacrificed on the altar of deterrence. He also argued that this Court, while reviewing the sentence in the case of *Regan Otieno v. Republic* (2022) eKLR, shared the sentiments in *Edwin Wachira & 9 Others v. Republic* and *Philip Mueke v. Republic* (delivered by Mativo, J. and G.V. Odunga, J. respectively as they then were) on the same. Thus, he urged this Court to consider the sentencing policy guidelines and review his sentence.

8. The appellant also asked the Court to consider that he was not represented by counsel at the trial court.

9. Opposing the appeal, the State reminded the court of its duty as the second appellate court, which is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It argued that the appellant was convicted on his own plea of guilty and was sentenced to life imprisonment as per the law. Therefore, he could not challenge his sentence on appeal.

10. Lastly, the State acknowledged the decision of this Court in *Evans Nyamari Ayako v. Republic* (Criminal Appeal 22 of 2018) [2023] KECA 1563 (KLR), on what constitutes life imprisonment and argued that the circumstances of this instant case called for the maximum penalty as the survivor was 3 years old at the time of the incident. It further relied on this Court's decision (differently constituted) in *Onesmus Musyoki Muema v. Republic* (Criminal Appeal 104 of 2021) [2023] KECA 1023 KLR, wherein it was held that the sentence of life imprisonment imposed on the appellant was lawful and legal; thus the court had no basis for interfering with it.

11. We have considered the appeal and the grounds urged in support thereof, as well as the submissions of both parties. This is being a second appeal, our mandate is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. See *Ogolla s/o Owuor* (1954) EACA 270 and *Wanjema v. Republic* [1971] EA 493.

12. As already stated herein above, the appeal is on sentence only. During the trial, the prosecution stated the facts which formed the basis of the charge as follows:

> "On 21st April 2014 at [Particulars Withheld] area, [Particulars Withheld] West, Narok County the complainant who is 3 years old was left by her mother inside her house sleeping in the bedroom. The mother had another child aged 2 months. She took the young child at a neighbour's house as she went to [Particulars Withheld]. Accused was also within the compound. As the mother to complainant was going she forgot taking money, so she went back. When she went to house she found accused person leaving her house and heard the complainant crying. As she entered the house, she asked who had awaken the child. The child said accused had waken her up. As the child was still crying, she decided to check on

what had happened. She noticed some whitish fluid on the child's clothes. She took her outside to check her. She undressed her, she discovered some sperms smeared on her private parts, she raised an alarm. Members of public responded and accused person was arrested, the father of the child was also called. As they were waiting for father to come, accused managed to escape. This matter was reported to Kerinkani Police Patrol Base, the child was taken to Lolgorian Sub- disctrict Hospital for medication. On 23rd April 2014, the accused was traced and arrested by members of public and police. Complainant was issued with a P.3 form which was duly filled. Which show there was penetration and spermatozoa seen. The accused person is then charged with offence before court. The child who is three years is before court. That is the child. I wish to produce the P3 form dated 23rd April 2014 as exhibit 1 and the birth notification. The one dated 22nd August 2011 be produced as exhibit No.2. That is all."

13. The appellant admitted the charge and confirmed the facts to be correct. He was then given an opportunity to mitigate, whereby he prayed for forgiveness and said he would not repeat the offence. Upon considering the offence and the mitigating factors, including the fact that the appellant was a first offender, the learned magistrate stated that the offence was very serious in nature and the only sentence the appellant deserved, was the harsh sentence (life imprisonment) prescribed by the law.

14. Section 361 of the *Criminal Procedure Code* expressly states that severity of sentence alone is a matter of fact and is not to be entertained by the court. Consequently, this court can only interfere with the sentence if it is demonstrated that there has been a material misdirection with regard to the sentence as was stated by this Court in *Bernard Kimani Gacheru v. Republic*, (2002) eKLR 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 stated is shown to exist."

15. Further, the Supreme Court in *Republic v. Joshua Gichuki Mwangi* (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), 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 minimum statutory minimum sentences in sexual offences.

16. 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 recognized 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.

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."

17. Following the doctrine of stare decisis as divined by Article 163(7) of the *Constitution*, this decision by the Supreme Court is binding on this Court.

18. In the present case, the appellant knowingly pleaded guilty of the offence of defilement under section 8(1) as read together with section 8(2) of the *Sexual Offences Act*. The statutory minimum sentence thereunder is life imprisonment. That is what the appellant was sentenced to. In any event, the circumstances here warrant that stiff penalty. The survivor here was a three- year-old child. The appellant assaulted her in her own home. He, thereafter fled the scene. These are aggravating circumstances that place the appellant's crime at the top-most level of heinousness and barbarity. He certainly deserved the life imprisonment sentence.

19. Consequently, we dismiss the appeal in its entirety and affirm the sentence imposed by the two lower courts.

20. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 7TH 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