Mikokho v Republic (Criminal Appeal E032 of 2020)
[2025] KECA 205 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 205 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E032 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

ABEL JOMO MIKOKHO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (R. N. Sitati, J.) dated 25th October, 2019 in HCCRA No. 45 of 2015)

JUDGMENT

1. Abel Jomo Mikokho, the appellant herein, was charged before the Chief Magistrate's Courts in Kakamega, with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that between December, 2012 and March 2013 within Kakamega County, the appellant intentionally caused his penis to penetrate the vagina of MK a girl aged 14 years.

2. The appellant pleaded not guilty to the charges and the matter proceeded to trial, where the prosecution called 6 witnesses. The appellant was thereafter placed on his defence, and upon considering the evidence, the trial magistrate found him guilty, convicted him, and sentenced him to 20 years imprisonment.

3. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. On considering the appeal, the High Court (R.N. Sitati, J.) agreed with the findings of the trial court. She upheld both the conviction and sentence thus dismissing the appeal in its entirety.

4. The appellant was aggrieved by the decision of the first appellate court and filed this appeal faulting the learned judge for meting out the minimum mandatory sentence which is unconstitutional; failing to note that the age of the victim was not proved; failing to invoke Section 333[2] of the *CPC*; and failing to consider the appellant's mitigation.

5. At the plenary hearing, the appellant was present in person at Kisumu Maximum Prison while Ms. Busienei learned prosecution counsel appeared for the respondent. The appellant intimated to the Court that his appeal was against sentence only.

6. In support of the appeal, the appellant submitted that he was sentenced to a mandatory minimum sentence which is unconstitutional. The appellant urged the court to interfere with the sentence of 20 years meted out against him and in doing so, it considers the time already spent in custody as he was never released on bond.

7. In opposing the appeal, the respondent submitted that the victim's age at the time of the offence was confirmed by the doctor, and her age was proved to be 14 years and thus the sentence of 20 years imprisonment was proper.

8. In urging the Court not to interfere with the sentence, the respondent submitted that the victim was severally defiled as a result of which she conceived but unfortunately lost the pregnancy. Regarding the time already spent in custody, the respondent conceded that the same be considered.

9. This being a second appeal the Court is restricted under Section 361(1) (a) of the *Criminal Procedure Code* to considering matters of law only. The principles guiding interference with sentencing by the appellate Court were properly set out in the Supreme Court in *Republic v. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) thus:

> " Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

10. Having considered the appeal, the parties' respective submissions made in regard to the sentence, and taking cognizance of the fact that this is a second appeal, the main issue for determination is whether or not, to interfere with the sentence that was imposed by the lower court and affirmed by the superior court.

11. Section 361(1)(a) of the *Criminal Procedure Code* provides that severity of sentence is a matter of fact, and this Court cannot hear a second appeal on a matter of fact. Under section 361(1)(b), the Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court and unless the trial court had no power to pass the sentence in the first place. This was not the case here.

12. The minimum sentence provided for defilement of a child aged between twelve and fifteen years under section 8(3) of the *Sexual Offences Act*, is 20 years imprisonment. That was the sentence imposed upon the appellant. The sentence passed against the appellant is the minimum mandatory sentence provided under the law which the appellant complains of being harsh and unconstitutional.

13. Sentencing is an exercise of discretion by the trial court. In *Benard Kimani Gacheru v. Republic* (2002) eKLR it was thus stated:

> " It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere

with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist."

14. Nothing was laid before this Court to show that the trial court failed to properly exercise its discretion in sentencing, or that there was justification for the first appellate court to intervene, but that it failed to do so.

15. A perusal of the grounds of appeal filed by the appellant in his appeal before the High Court shows that the appellant did not raise any ground against his sentence nor did he challenge the constitutionality of the mandatory sentence imposed upon him before the High Court. The appellant is raising it here for the first time in his submissions before this Court, but he is precluded from raising new grounds at this second appellate stage. This is so because an appeal cannot arise before this Court on a matter that was not determined by the court from whose decision the current appeal arises.

16. In *PW v. Republic* (Criminal Appeal 199 of 2019) [2024] KECA 1117 (KLR) (30 August 2024) (Judgment) this Court observed that:

> "In any case, in his first appeal, the appellant did not take any issue with the sentence, as all the grounds of appeal were against his conviction, and so it is not open to him to raise it now, nor is it open to us to address the issue of sentence without the benefit of the opinion of the High Court."

17. Similarly, in the Supreme Court decision in *Republic v. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (*supra*); the Supreme Court held that since the appellant failed to raise the issue of the constitutionality of the sentence as a ground of appeal in the High Court, he was precluded from raising the issue on appeal before the Court of Appeal. The issue having not been raised before the first appellate court, it follows that it cannot fall for determination in this appeal.

18. Having re-evaluated the record of appeal, it is evident that the sentence imposed by the trial court against the appellant and affirmed by the first appellate court was lawful, and in accordance with the provisions of section 8(1) as read with section 8(3) of the *Sexual Offences Act*. In the premise and guided by the holding in the Supreme Court decision cited above, the sentence imposed on the appellant shall remain undisturbed, except having raised the uncontested argument, that due regard ought to have been given to the period he spent in custody while awaiting trial, we hold that under section 333(2) of the *Criminal Procedure Code* the appellant is indeed entitled to have that period considered in computing sentence, and we therefore direct that computation of the sentence shall begin 7th of April 2014 which is the date he first appeared in court. Accordingly, the appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF FEBRUARY, 2025.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR