Nyarigoti v Republic (Criminal Appeal 271 of 2019)
[2025] KECA 156 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 156 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 271 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

CHRISTOPHER OTWERE NYARIGOTI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (Maina, J.) dated10th December, 2013 in HCCRA No. 203 of 2011)

JUDGMENT

1. The appellant, Christopher Otwere Nyarigoti, was arraigned before the Chief Magistrate's Court in Kisii in Criminal Case No. 2274 of 2009. He was charged with the offence of defilement of a girl contrary to section 8(1)(2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on the 13th day of October, 2009, at Nyanza Province, now Kisii County, the appellant intentionally and unlawfully penetrated the vagina of SMN, a girl aged 6 years using his genital organ namely, penis.

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 of the main charge.

3. The facts of the case were as follows.

4. On 6th October, 2009, the complainant, a class one (1) pupil at [Particulars Withheld] Academy was in the house with her mother, AG. The complainant's mother had contracted two people, the appellant and one Evans Mwose (Evans) to thrash sugarcane within her compound. At around 8.00pm, she went to the kitchen to prepare supper and when it was ready, she called all the children and the appellant to go and eat. It was then that she realized that the complainant was missing. She looked for the child to

no avail and the said Evans told her that he had seen the complainant in the company of the appellant, heading towards the sugarcane crushing machine.

5. After sometime, they both returned home and she saw the appellant holding the complainant's hand. When the complainant entered the house, her mother realized that her skirt was bloodstained. She inquired from the complainant about what had happened and she told her that the appellant had defiled her. The complainant's mother reported the matter to her mother-in-law, FM, and brother-in-law, RO; both of whom apprehended the appellant and took him to Nyachege AP Post and he was later transferred to Gesonso Police Post.

6. Thereafter, the complainant was taken to Kisii Level 5 Hospital for treatment and a P3 form was filled. The said P3 form and the bloodstained skirt were produced as exhibits in the trial court. A P3 form for the appellant was also produced.

7. The appellant pleaded guilty and the learned magistrate convicted and sentenced him to fourteen (14) years imprisonment.

8. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

9. The High Court (E.N. Maina, J.) dismissed the appeal and enhanced the sentence to life imprisonment as provided for by the law, in a judgment dated 10th December, 2013.

10. It is that decision of the High Court that triggered the present appeal. While the appellant had couched two grounds of appeal – one against conviction; and the other against sentence – before us, he abandoned his contest against conviction and only litigated on the sentence as enhanced by the High Court.

11. In his written submissions, the appellant attacked the sentenced imposed upon him by the High Court on three grounds. First, he argued that it was an error for the High Court to enhance the sentence on appeal without a proper, written notification of intention to pursue enhancement of sentence by the Director of Public Prosecution (DPP), and in the absence of a cross-appeal by the DPP. Second, the appellant attacked the mandatory nature of the sentence imposed under section 8(2) of the *Sexual Offences Act*. Arguing that the same was unconstitutional and relying on recent jurisprudence on the question, the appellant urged this Court to set aside the sentence of life imprisonment and impose an appropriate sentence that takes into account the circumstances of the offence, the victim and himself as the offender. Finally, the appellant, again relying on our recent jurisprudence, urged that the life imprisonment sentence was unconstitutional due to its indefinite and indeterminate nature.

12. In responding to the appellant's submissions, Mr. Kimanthi, Senior Prosecution Counsel, argued that the record showed that when the appeal came up for hearing before the High Court, the appellant indicated that he was ready to proceed, whilst the learned prosecution counsel indicated his desire to apply to have the sentence enhanced if the appellant was to proceed with the appeal. Thereafter, the learned judge communicated the same position and cautioned the appellant on the danger of proceeding with the appeal. However, the appellant defied the warning and insisted on proceeding. Therefore, according to counsel, by choosing to proceed with his appeal under the circumstances, the appellant assumed the risk of having the sentence enhanced in the event that his appeal was not successful. As such, he is not entitled to challenge the decision of the learned judge.

13. Counsel also argued that the sentence of life imprisonment was the proper and legitimate sentence. In the same breath, he took cognizance of the emerging/evolving jurisprudence in this Court's decision in Evans Nyamari Ayaka vs. Republic, Criminal Appeal No. 22 of 2018 and Julius Kitsao Manyeso *vs. Republic, Criminal Appeal No. 12 of 2021*, but opined that given the circumstances of the instant

case, the appellant should not benefit from the said emerging/evolving jurisprudence and the sentence imposed was proper.

14. We have considered the appeal and the grounds urged in support thereof, as well as the submissions of both parties. This is a second appeal. Our mandate on second appeal 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 vs. Republic [1971] E.A. 493.

15. As pointed out above, the appellant's appeal is against sentence only. 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 the famous Bernard Kimani Gacheru vs. Republic, Criminal Appeal No. 188 of 2000 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."

16. In the present case, the appellant attacked the sentence imposed by the High Court on legal grounds. Our jurisprudence is, thus, properly invoked. We will consider each of the three grounds raised by the appellant in seriatim.

17. In the first place, the appellant complained that the it was wrong for the learned Judge to have enhanced the sentence without a written notification by the DPP that he intended to pursue enhancement of sentence; or in the alternative without a cross- appeal by the DPP. He also complained that the learned Judge did not give him time to think about the issue before proceeding. He relied on Sammy Omboke and Another vs. Republic (2019) eKLR and Hewet Vosena Kesusa & Another vs. Republic (2022) eKLR. He alleged that he was ambushed and that in the circumstances, his right to a fair trial was infringed.

18. Our perusal of the court record indicates that the following transpired at the High Court. When the case was called out, learned prosecution counsel, Mr. Shabola, warned the appellant that should he proceed with the appeal, he would seek to have his sentence enhanced to life imprisonment as the sentence of fourteen (14) years that was imposed by the trial court was illegal,. The learned judge similarly cautioned the appellant but the appellant insisted on continuing with the appeal despite being cautioned twice. In the ultimate, the appellant informed the High Court that: "I insist on proceeding with my appeal despite the caution".

19. In these circumstances, the appellant cannot be heard to complain that the enhancement of sentence was an ambush on him. It is true that the best practice is for the DPP to issue a written notice that he would be seeking enhancement of the sentence, but that is not a rigidly talismanic rule of law. The requirement is that the appellant is substantively informed of the risk he undertakes by proceeding with the appeal. This happened here: the appellant was warned by the prosecution counsel before the

learned Judge repeated the warning, on record, twice. Having failed to heed that warning, the appellant cannot hide under a mechanical rule that the warning should have been in writing.

20. Turning to the second ground urged by the appellant, it is true that until recently our courts were developing a jurisprudential trajectory which impugned the constitutionality of the minimum sentences in the *Sexual Offences Act* on separation of powers grounds. However, that jurisprudential trajectory was snuffed out by a recent binding decision of 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.

21. 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.
>
> 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."

22. In the present appeal, the appellant was charged under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The only penalty under section 8(2) of the Act is life imprisonment. That is what the learned Judge imposed. By dint of rthe Supreme Court decision in Joshua Gichuki Mwangi Case, that sentence was lawful.

23. Finally, the appellant has attacked his sentence on account of the fact that it is indeterminate and, therefore, cruel and unusual and in violation of his right to dignity.

24. It is true that in Julius Kitsao Manyes*o vs. Republic, Criminal Appeal No. 12 of 2021* and Evans Nyamari Ayaka vs. Republic, Criminal Appeal No. 22 of 2018, two different benches of this Court impugned the constitutionality of life imprisonment where it is defined to mean the natural life of a prisoner. In the latter case, this Court translated life imprisonment to thirty (30) years.

25. However, as the Supreme Court held in the Joseph Gichuki Mwangi Case, this Court lacks jurisdiction to entertain any issue which was not first raised on first appeal at the High Court. In the present appeal, the appellant did not preserve the issue of constitutionality of the indeterminate nature of the life sentence imposed on him, by first raising it at the High Court. We are, consequently, bereft of jurisdiction to consider it.

26. The result is that the appeal fails in its entirety. We hereby dismiss it.

27. 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