Nyongesa v Republic (Criminal Appeal E035 of 2020)
[2025] KECA 150 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 150 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E035 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

CELESTINE ESEME NYONGESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Achode, J.) dated and signed on 31st October, 2018 delivered by (Riechi, J.) on 22nd November, 2018 in HCCRA No. 3 of 2017)

JUDGMENT

1. Celestine Eseme Nyongesa, the appellant herein, was tried before the Chief Magistrate's Court at Bungoma for 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 on 3rd November, 2013 in Teso North district, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LNS[1] a child aged 12-years-old.

2. The appellant pleaded not guilty to the charge, and a trial ensued. At the conclusion of the trial, the appellant was found guilty of the charge and sentenced to serve imprisonment for 20 years.

3. 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 Bungoma. The High Court (L.A. Achode J.) (as she then was) dismissed the appeal and upheld the conviction and sentence.

4. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal on sentence only.

5. In support of the appeal, the appellant submits that the mandatory minimum sentence for sexual offences is unconstitutional and unwarranted. Relying on the case of Edwin Wachira & 9 Others vs.

Republic and in the case of Yawe Nyale vs. Republic [2013] eKLR, the appellant submitted that [1] Initials used to protect her identity the sentence denies the judicial officer the discretion in sentencing and that it does not meet the sentencing principles.

6. In his mitigation, the appellant states that he has been in custody for a long time during which he enrolled in formal education and managed to attain a K.C.S.E certificate and is currently enrolled at the Prison Tailoring School. The appellant mitigated further that he was the sole breadwinner and prayed for leniency.

7. In opposing the appeal, the respondent contended that Section 8 (3) of the *Sexual Offences Act* is constitutional. In support, the respondent relied on the case of Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) [2021] KLR; and in the Supreme Court decision in Petition No. E018 of 2023 Republic vs. Joshua Gichuki Mwangi and 4 Others (Amicus Curiae), where the Court reiterated that mandatory minimum sentences do not deprive the judicial officers of the power to exercise judicial discretion.

8. The respondent further contended that the sentence of twenty years imprisonment imposed by the trial magistrate and affirmed by the High Court against the appellant is not unconstitutional as this was a deserving case to warrant the same.

9. This being a second appeal, section 361 (1) (b) of the Criminal Procedure Code bars the Court from entertaining appeals against sentence unless the subordinate court had no jurisdiction to pass the sentence or the sentence was enhanced by the first appellate court. Additionally, sentencing is a matter of discretion by a trial court and an appellate court must not replace its views on sentence with those of the trial court unless there are concrete grounds for doing so. This position of the law was recently restated by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) that:

> " 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 grounds of appeal, the rival submissions, and the law, the only 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. The appellant has restricted his appeal to the issue of sentence only. Section 8(3) of the *Sexual Offences Act* which is the penal section under which the appellant was charged provides for a mandatory sentence of imprisonment for a term of not less than twenty years where the child violated is aged between twelve and fifteen years.

12. The victim herein was 12 years and the appellant was sentenced to twenty (20) years' imprisonment. The sentence meted out to the appellant was not an unlawful sentence as it is provided by the law.

13. Sentencing is a discretionary power exercised by the trial court.

    An appellate court will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts.

14. The Supreme Court in Petition No. E018 of 2023, Republic vs. Joshua Gichuki Mwangi, in regards to minimum sentences prescribed by section 8 of the *Sexual Offences Act* stated that:

> "66) We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in the Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy, or benevolence. It ought not to be arbitrary, whimsical, or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed....
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> (68) Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the Respondent and affirmed by the first appellate court was lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence"

15. Further, although the appellant argued before this Court that the mandatory sentence imposed upon him violated his constitutional rights, in his appeal before the High Court, much as the appellant stated that his appeal was against conviction and sentence, the appellant did not raise any grounds against the sentence. The constitutionality of minimum sentences under the *Sexual Offences Act* was, therefore, not preserved as an issue that could be argued before this Court.

16. This Court in Nyaranga & 5 Others vs. Republic (Criminal Appeal 181 of 2017) [2024] KECA 786 (KLR) (5 July 2024) (Judgment) cited with approval the case of Alfayo Gombe Okello vs. Republic (2010) eKLR where the Court found that because:

> "....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have."

17. And in PW vs. *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."

18. The issue of constitutionality of the minimum sentence having not been raised before the first appellate court, it follows that it cannot fall for determination in this appeal. Ultimately, 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

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR