Ogutu v Republic (Criminal Appeal E031 of 2020)
[2025] KECA 155 (KLR) (7 February 2025) (Judgment)

Neutral citation: [2025] KECA 155 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E031 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 7, 2025

BETWEEN

HO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kakamega, (Musyoka, J) dated 10th April, 2019 in HCCRA No. 53 of 2017)

JUDGMENT

1. The appellant herein, Harrison Ogutu, was tried and convicted at the Senior Principal Magistrate's Court at Mumias of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act* (Act). He was sentenced to life imprisonment; the only sentence available under that sub-section.

2. The particulars of the offence as they appeared in the charge sheet were that on the 17th day of March, 2015, at 4:00pm at Mumias sub-county of Kakamega County, he intentionally caused his penis to penetrate the vagina of BA, a child aged 8 years.

3. He had also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual offences, the particulars as to the date, time, place and victim being the same as those in the main charge.

4. The appellant pleaded not guilty to both the main and alternative charges. The prosecution called five (5) witnesses; and the appellant gave a sworn statement and called two witnesses. At the conclusion of the trial, the learned magistrate found that the main charge had been proved beyond reasonable doubt and convicted him. In doing so, the learned magistrate noted that the appellant had been charged under section 8(1) as read with section 8(3) of the *Sexual Offences Act* but that the offence revealed in the

trial was one under section 8(2) since the complainant was eight years old. The learned magistrate dealt with this discrepancy as follows:

> " ....I do note that the penalty section in the charge sheet is indicated as 8(3) as opposed to section 8(2) as the child was found to be 8 years old. As I have found [the] accused has committed the offence, I will correct the error under the provisions of section 382 of the Criminal Procedure Code as well as the opinion of the court in David Mwangi Njoroge v Republic [2015] eKLR. I find the accused guilty of the offence of defilment contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*..."

5. This fact, that the appellant was charged under section 8(3) of the Act but was convicted under section 8(2) of the Act was one of the main issues the appellant took up on appeal to the High Court. At the High Court, he also complained that it was an error to convict him without the evidence of the investigating and arresting officers; that the trial court failed to consider his defence that the charges were trumped up; that the trial was conducted in a manner that violated his due process rights; that it was an error to convict him before medically examining him to ascertain if he was linked to the crime; that he was not permitted to cross- examine the complainant; and that the trial court was in error for not realizing that the complainant had been coached by her parents to frame him.

6. The High Court (Musyoka, J.), in a judgment dated and delivered on 10/04/2019, found all the grounds of appeal to be without merit except the first one: that the trial court erred by convicting the appellant under section 8(2) of the Act while he had been charged under section 8(3) of the Act. The learned Judge reasoned thus:

> " My reading of section 382 is that it does not empower a trial court to correct errors in charges or information or other process. In fact, the provision is not about the powers of a trial court, but of a higher court charged with exercising appellate and revisionary or supervisory powers. The provision, therefore, does not empower the trial court to do what the trial court did in the instant case. The trial court exercised a power it did not have."

7. Then, the learned Judge suggested the way out for the learned magistrate who found himself in those circumstances:

> "I appreciate the difficulty that the trial court found itself in. It came to a finding that the facts placed before it disclosed that an offence had been committed against an eight-year-old child, yet it could not convict him under the charge as framed for the charge he faced was in respect of a child victim aged between twelve and fifteen, and imposing the sentenced prescribed under that portions would have resulted in an illegal sentence. Yet, the action the court took was prejudicial to the appellant for the charge could not be altered at the stage of conviction and sentence without occasioning a miscarriage of justice, and especially the same exposed the appellant to a stiffer penalty than that in the charge sheet that he had all along faced, one way out would have been for the court to convict on the alternative charge instead of purporting to alter charges in the judgment."

8. The learned Judge, then, concluded as follows:

> " In view of what I have stated ...it is clear that the trial court fell into error. As mentioned elsewhere in this judgment, the appellant faced an alternative charge. A court convicts on the alternative charge where the main charge fails, but evidence exists that establishes the offence charged in the alternative. In the instant case, there is evidence that the appellant's penis

did come into contact with the vagina of the minor. Such contact with a child amounted to an incident act, and established commission of the offence defined in section 11(1) of the *Sexual Offences Act*. It attracts a penalty of imprisonment for a term of not less than ten years, with no option of a fine. I shall accordingly quash the conviction of the appellant of the offence of defilement under section 8(2) of the *Sexual Offences Act* and set aside the sentence imposed of life imprisonment, and substitute the same with a conviction under section 11(1) of an indecent act with a child and sentence the appellant to serve a period of twenty- five (25) years in prison."

9. The appellant was dissatisfied with the decision of the High Court. He has taken out his second appeal to this Court. In his initial grounds of appeal, the appellant challenged both his conviction and sentence. On conviction, he primarily challenged the propriety of the High Court to convict him on the alternative charge in the circumstances of his case. He also insisted that his Article 50 rights under *the Constitution* were violated. When the matter came before us for hearing, the appellant abandoned both these challenges to his conviction and informed us that he was only challenging the sentence imposed on him. The respondent opposed the appeal. During that plenary hearing, the appellant appeared in person while the respondent was represented by Ms. Busienei, senior prosecuting counsel in the Office of the Director of Public Prosecutions.

10. As a second appellate court, our jurisdiction is limited to 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.

In Samuel Warui Karimi vs. Republic [2016] eKLR, it was held as follows:

> "This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong -vs- R, [1984] KLR 611."

11. We have carefully considered the appeal, the rival submissions of the parties and the authorities cited in support of the opposing positions.

12. Under section 362(1) of the Criminal Procedure Code, severity of sentence is a matter of fact and, therefore, not a legal issue open for consideration by this Court on second appeal. However, in the present case, the appellant is not just complaining about the severity of sentence but he is complaining about the legality of imposing a sentence that is two and a half times the minimum sentence imposed by statute without the court enumerating the staggering aggravating circumstances that warrant that imposition. This is a matter open for our consideration.

13. The appellant's argument is straightforward. He says that since his conviction is anchored on section 11(1) of the Act, the starting point for sentencing is the minimum provided under that section, which is ten (10) years imprisonment. Considering that he was a first offender, he argues, he should have benefitted from that minimum sentence unless the court considered aggravating factors that pushed the sentence upwards. In the present case, the court, in imposing a sentence two and half times the minimum set by statute, did not, at all indicate what those aggravating factors are. The appellant urged us to set aside the sentence of 25 years imprisonment and, instead, impose the minimum sentence under section 11(1) of the Act, which is ten (10) years.

14. The respondent's submissions focused on the learned Judge's decision to convict the appellant under section 11(1) of the Act. The respondent has submitted at length that the learned Judge should,

instead, have latched on section 186 of the Criminal Procedure Code to convict the appellant of the main charge (under section 8(2)) as the trial court had done since all the ingredients of the offence had been proved. However, we note that the respondent did not file a cross-appeal. This ground is, therefore, not properly before us especially given the fact that the appellant withdrew his challenge against conviction and focused on sentence.

15. Regarding the sentence imposed, the respondent says that the age of the victim at eight years old is an aggravating factor; and that the appellant deserves a deterrent sentence. The respondent cited the recent decision by the Supreme Court, to wit, Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) which 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 because the legislature has signaled that these are serious offences. The respondent argues that we should consider that all the ingredients of defilement were proved in the case.

16. Our view is that the appellant's arguments are not idle. The fact of the matter is that, ultimately, his conviction is under section 11(1) of the Act. If so, the starting point in sentencing is the statutory minimum of ten (10) years imprisonment. A court cannot sentence him for a conviction under section 11(1) while its eyes are firmly on the rearview mirror of the missed opportunity to convict him for the more serious offence of defilement. We would agree that in the circumstances of this case, the tender age of the complainant (eight years) is an aggravating factor. So is the fact that the appellant is an uncle to the complainant. Instead of offering protection to his niece, he chose to be a predator. In the opposite direction, we note that the appellant was a first offender; and that he told the court that he was remorseful and sought forgiveness.

17. Our view is that considering these aggravating factors balanced against the extenuating factors and taking into consideration the statutory baseline of ten years imprisonment, the appropriate sentence is fifteen (15) years imprisonment. Consequently, we set aside the sentence of twenty (25) years imposed on the appellant and its place substitute it with a sentence of fifteen (15) years imprisonment. By dint of section 333(2) of the Criminal Procedure Code, the sentence shall be computed from 20th March, 2015 since the appellant has been in custody since that day.

18. 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