Kisingwa v Republic (Criminal Appeal 131 of 2019)
[2025] KECA 617 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KECA 617 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 131 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 28, 2025

BETWEEN

SIMON KISINGWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Sitati, J.) dated 27th December, 2015 in HCCRA No. 81 of 2014)

JUDGMENT

1. The appellant, Simon Kizingwa, was arraigned before the Senior Principal Magistrate's Court at Vihiga in Criminal Case No. 1053 of 2012 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 5th December, 2012, at [Partuiculars Withheld], West Maragoli location of Vihiga County, within Western Province, he intentionally and unlawfully caused his penis to penetrate the vagina of a girl named MK, aged 7 years.

2. The appellant 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 in the main charge.

3. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment, the mandatory sentence provided under section 8(2) of the *Sexual Offences Act*.

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 at Kakamega via Criminal Appeal No. 81 of 2014.

5. The High Court (R.N. Sitati, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 27th 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 raised three (3) grounds in his self-crafted Amended Memorandum of Appeal, all of which impugned his sentence. In summary, they are as follows:

   a. The appellant's mandatory sentence of life imprisonment is unconstitutional and should be set aside and substituted with an appropriate sentence.

   b. The appellant's mitigation be considered when determining his sentence.

   c. Section 333(2) of the *Criminal Procedure Code* be considered when determining the appellant's sentence.

7. The appeal was argued by way of written submissions by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Ms. Busienei appeared for the respondent. Both parties relied on their submissions. During the plenary hearing, the appellant confirmed that his challenge was only against sentence of life imprisonment as imposed by the trial court and affirmed by the High Court.

8. This is a second appeal. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See Samuel Warui Karimi vs. Republic [2016] eKLR.

9. The appellant submitted that the indefinite nature of the life sentence that was imposed is unconstitutional, harsh, cruel, excessive and inhuman; and relied on Julius Kitsao Manyeso vs. Republic, Malindi Criminal Appeal No. 12 of 2021, which he said, declared life sentences as unconstitutional. He insisted that this Court has discretion to interfere with his sentence and cited Ogolla S/O vs. Republic (1954) EACA and Wanjema vs. Republic (1971) E.A. 493 for that proposition.

10. He also submitted that the main aim of sentencing is to reform and rehabilitate an offender and relied on Paul Odhiambo vs. Republic, Kisumu Misc. Application No. 55 of 2019, which, he said, held that life sentences do not meet the aim or objective of sentencing. He, thus, urged us to reduce the sentence as we have done in previous cases involving life imprisonment for defilement. He submitted that he has been in prison for almost ten (10) years and that he has reformed and rehabilitated as he has undergone a spiritual course in theology and attained a certificate. Thus, he prayed for a lenient sentence and for this Court to consider the provisions of section 333(2) of the *Criminal Procedure Code* after sentencing him to a definite term.

11. Ms. Busienei opposed the appeal on sentence and reminded this Court of its jurisdiction as a second appellate court which is limited by dint of section 361(a) of the Criminal Procedure to deal with matters of law only and not delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court as was held in NTN vs. *Republic (Criminal Appeal 40 of 2020)* [2021] KECA 301 (KLR).

12. Counsel conceded that the learned magistrate did not consider the appellant's mitigation due to the mandatory nature of the sentence provided under section 8(2) of the *Sexual Offences Act*. Nonetheless, she argued that the sentencing policy guidelines provides that an offender must be punished for deterrence and denunciation purposes; among others. In the present case, she argued,

the circumstances called for the deterrent sentence of life imprisonment since the appellant defiled his own niece and, in the process, infected her with Syphilis.

13. We have carefully considered the appeal, the rival submissions by the parties and the authorities cited.

14. The facts of the case, which are deemed admitted by the appellant following the concurrent findings of the two courts below and his withdrawal of his appeal against conviction, are as follows.

15. On the afternoon of 15th December, 2012, while the complainant was cleaning utensils behind their kitchen, the appellant, who was known to her, called and asked her to go and collect sugarcane from his farm. She went to the appellant's farm. It was then that the appellant removed her panties and told her to lie down. He removed his penis from his trousers and inserted it in her vagina for a while; and she felt a little pain. When he was done, he promised to give her kshs. 10/= and "mutura". Thereafter, the appellant gave her three sugarcane sticks and let her go. She then returned home but did not tell anyone what had transpired.

16. However, that evening, her friend Janet who witnessed the incident told her to tell her mother (PW3) what had happened. At that point, she disclosed what transpired and she was taken to hospital for medical examination and treatment. Later, the matter was reported to the police.

17. AFM (PW2) testified that on 15th February, 2012, her brother, B, informed her that the appellant had called PW1 to go and collect sugarcane at his farm. She then went to look for PW1 in the farm and found the appellant lying on top of her and he did not have his innerwear on. Meanwhile, PW1's blouse and panty were on the ground. When the appellant saw her, he ran away. Afterwards, PW2 went and called PW3, who was attending a burial nearby, and told her what she saw. She also asked PW1 to say what she was doing with the appellant. She testified that PW1 told them that the appellant told her to lie on the ground and promised to give her ksh. 10/= and "mutura".

18. These events were confirmed by AFM (PW2) and EK (PW3). Afterwards, the complainant was taken to hospital where she was examined and the medical personnel confirmed that she had been defiled.

19. As we noted above, the appellant's entire appeal is only against the sentence of life imprisonment that was imposed on him. He argued that the indeterminate nature of his sentence made it unconstitutional as it deters the objectives of sentencing, such as rehabilitation. He also assailed against the mandatory nature of the sentence arguing that it was unconstitutional; and that it was harsh and excessive in the circumstances of this case.

20. It is true that the constitutional argument against mandatory sentences in the *Sexual Offences Act* had attained a foothold in our jurisprudence, including this Court. However, that trend of jurisprudence in respect to the minimum sentences in the *Sexual Offences Act* was definitively halted by 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. Following the doctrine of stare decisis as provided for under Article 163(7) of *the Constitution*, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise.

23. While it is true that the question of the unconstitutionality of the indeterminate nature of life imprisonment is yet to be determined by the Supreme Court following this Court's decisions in Julius Kitsao Manyeso v Republic [2023] KECA 827 and Evans Nyamari Ayako v Republic (2023)eKLR, as the Supreme Court guided in the Joshua Gichuki Mwangi Case, the constitutional question must have been preserved by raising it first at the High Court. It cannot be raised for the first time on appeal at this Court. This is precisely the situation here. The appellant did not challenge the constitutionality of the indeterminate nature of the life imprisonment sentence imposed at the High Court. This Court, therefore, has no jurisdiction to take up the issue on second appeal.

24. The upshot is that the appeal herein fails and is dismissed in its entirety.

25. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 28 TH DAY OF MARCH, 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