Were v Republic (Criminal Appeal 354 of 2019)
[2025] KECA 542 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 542 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 354 OF 2019

HA OMONDI, LK KIMARU & WK KORIR, JJA

MARCH 21, 2025

BETWEEN

VINCENT ONYANGO WERE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (H.K. Chemitei, J.) dated 25th May, 2015 in HCCRA No. 41 of 2013)

JUDGMENT

1. The appellant, Vincent Onyango Were, was the accused person in the trial before the Senior Principal's Magistrate's Court at Siaya in Criminal Case No. 302 of 2012. He was 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 the 5th April, 2012, at xxxxxxx village, xxxxxxxx sub-location, in the then Siaya District of the then Nyanza Province, the appellant caused his penis to penetrate the vagina of EAO1, a girl aged 5 and 1/2 years.

2. The appellant also faced 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 to the charge and a trial ensued, during which six witnesses testified for the prosecution and the appellant gave an unsworn statement in his defence. At the conclusion of the trial, the appellant was found guilty of the main charge, convicted and sentenced to life imprisonment.

4. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. Upon considering the appeal, the High Court (Chemitei, J.) upheld both the conviction and sentence, and dismissed the appeal in its entirety.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal against sentence [1] Initials used to protect her identity only. In summary, he alleges that the sentence imposed was indeterminate, incommensurate with, disproportionate to the circumstances and unconstitutional.

6. In his written submissions, the appellant argued that the sentence of life imprisonment is disproportionate to the circumstances of the case and unconstitutional. The appellant maintains that the mandatory life sentence meted against him is unconstitutional as it denies the trial court the discretion in sentencing and goes against the principles of sentencing.

7. The appellant submits that he has been in custody for 13 years, the period which has taught him a lesson against involvement in crime. He has undergone spiritual transformation, rehabilitation, has gained skills in artisan work, and has earned a certificate in welding, as such he is ready to reintegrate back into the society.

8. Opposing the appeal, the State reminded the Court of its duty as the second appellate court, which is limited to a consideration of matters of law only by dint of section 361(1) of the *Criminal Procedure Code*. Our duty as a second appellate court is confined to a consideration of issues of law only. As was succinctly articulated in Karani vs. R [2010] 1 KLR 73:

> " This is a second appeal. By dint of the provisions of section 361 of the *Criminal Procedure Code*, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

9. It is argued that the instant appeal is improperly before the Court as the issue of sentence was being raised for the first time. Acknowledging the decision in the case of Republic Vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae), the State submitted that this Court cannot determine matters that were never raised before the first appellate court.

10. In urging the Court not to interfere with the sentence, the State submitted that the life imprisonment sentence meted out is the statutory mandatory sentence for an offence under section 8(2) of the *Sexual Offences Act* hence the trial court correctly meted out and affirmed by the first appellate court, the life sentence is the legal sentence that the appellant was sentenced to serve.

11. Having carefully considered the record of appeal, the written and oral submissions made by both parties, the authorities cited, the law, and the Court's mandate, the main issue for determination is whether there is any justification for this Court to interfere with the sentence of life imprisonment that was imposed upon the appellant.

12. The appellant was sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, which provides that:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

13. It is trite that a sentence is meted out at the discretion of the court. The trial court sentenced the appellant to life imprisonment. This sentence was upheld by the High Court, which the appellant

complains is harsh, excessive and unconstitutional. 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 Bernard Kimani Gacheru vs. Republic, (2002) eKLR 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."

14. Further, the Supreme Court in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), 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 sentences in sexual offences. 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 recognized 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.
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> 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."

15. In addition, a perusal of the record indicates that the appellant's grounds of appeal before the High Court only challenged his conviction. The appellant did not, in his first appeal, challenge the constitutionality of the sentence or the severity of the sentence that was meted out by the trial court. He cannot, therefore, raise the issue regarding the constitutionality and severity of his sentence at this

stage. This is because a second appeal to this Court from a first appellate court can only be anchored on a matter determined by the High Court in its decision subject of the appeal before that court.

16. The appellant has also not demonstrated any justification for this Court to interfere with the sentence that was imposed against him. Consequently, the appeal has no merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2025.

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR