**Ombiro v Republic (Criminal Appeal 211 of 2019)
[2025] KECA 463 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 463 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 211 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 7, 2025

BETWEEN

DENNIS OMBIRO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Being an appeal from judgment of the High Court of Kenya at Kisii (D. S. Majanja, J.) dated 6th March, 2019inHCCRA No. 10 of 2019)

JUDGMENT

1. The appellant, Dennis Ombiro, was the accused person in the trial before the Senior Resident Magistrate's Court at Ogembo in Criminal Case No. 32 of 2018. 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 were that on diverse dates from December 2014 up to 10th April, 2018 at Kenyanya Sub-County, within Kisii County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of V.M.O[1] a child aged 11 years.

[1] Initials used to protect her identity

2. The appellant also faced an alternative charge of committing an indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act* with particulars similar to those 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 as provided for by the law.

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 Kisii *via Criminal Appeal No. 10 of 2019* seeking to overturn

his conviction and sentence. After hearing the appeal, D.S. Majanja, J. affirmed both the conviction and sentence and dismissed the appeal.

5. Undeterred, the appellant has filed the instant appeal seeking to reverse the High Court decision citing 11 grounds against both conviction and sentence. However, at the plenary hearing, the appellant who appeared in person at Kisumu Maximum Prison withdrew his appeal on conviction and pursued his appeal on sentence only.

6. In his written submissions in support of the appeal, the appellant relies on the case of Phillip Mueke Maingi and 9 Others v Republic [2022] eKLR and in the case of Manyeso v Republic [2023] eKLR, and submitted that the mandatory minimum sentence of life imprisonment imposed is harsh, excessive, inhuman and degrading as it brings psychological mental torture. Further, that the mandatory minimum sentences deprive the judicial officer of the discretion to grant sentences that are appropriate and less severe.

7. In reply, Mr. Kimanthi, learned prosecution counsel for the respondent submitted that despite being alive to the recent cases on what constitutes life imprisonment, the circumstances of the instant case called for a maximum penalty. The victim was aged 11 years old, as such, the appellant deserved the life imprisonment. In support, the respondent relied on the case of Onesmus Musyoki Muema v Republic [2023] eKLR in which the Court expressed thus;

> The sentence of life imprisonment imposed on the appellant is lawful and legal sentence, and this court has no basis upon which to interfere with it. Ultimately, the appeal against the sentence is also dismissed."

8. This being a second appeal, this court is restricted under Section 361(1) (a) of the *Criminal Procedure Code* to considering matters of law only as stated by this Court in Stephen M'Irungi & Another v Republic 1982 – 88 1KAR 360:

> "Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

9. Having considered the appeal, the parties' respective submissions made in regard to the sentence, and taking cognizance of the fact that this is a second appeal, the main issue for determination is whether the sentence meted against the appellant was harsh, excessive and unconstitutional.

10. Section 361 of the *Criminal Procedure Code* provides as follows:

> " A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:
>
> a. On a matter of fact, and severity of sentence is a matter of fact; or
>
> b. Against sentence, except where a sentence has been enhanced by the High Court unless the subordinate court had no power under section 7 to pass that sentence."

11. Section 8 (1) as read with Section 8 (2) of the *Sexual Offences Act* under which the appellant was charged provides:

> 8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> "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."

12. The appellant was sentenced to life imprisonment as provided by the law. He, however, faults the trial court and the first appellate court for imposing a mandatory minimum sentence which is harsh, excessive and unconstitutional as it is contrary to Articles 50[2] of *the Constitution*.

13. Section 361(1)(a) of the *Criminal Procedure Code* provides that severity of sentence is a matter of fact, and this Court cannot hear a second appeal on a matter of fact. Under section 361(1)(b), the Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court and unless the trial court had no power to pass the sentence in the first place. This was not the case here.

14. In John Gitonga v Republic [2013] eKLR this Court rendered itself thus on this issue:

> " ...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

15. Sentencing is a discretionary exercise 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. This Court in Bernard Kimani Gacheru v Republic [2002] eKLR stated thus:

> " 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 addition, the Supreme Court in Petition No. E018 of 2023, Republic v 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....

(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"

17. Although the appellant argues that the mandatory minimum sentence imposed is unconstitutional, this Court lacks jurisdiction to interfere with the sentence. Further, from the record, it is evident that the appellant did not before the High Court, challenge the constitutionality of the sentence meted out by the trial court and hence cannot raise it at this stage. In Republic v Mwangi [supra] the Supreme Court stated that:

The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the respondent. Having combed through the record of appeal and proceedings, we note that the constitutionality of the respondent's sentence was also not raised either before the trial court or the High Court. The respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded from addressing the issue on appeal before the Court of Appeal.

18. In the circumstances, the appellant has not established any grounds upon which the Court can interfere with his sentence. We hold that the appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 7TH 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