Manyura v Republic (Criminal Appeal 116 of 2020)
[2025] KECA 995 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 995 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 116 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 30, 2025

BETWEEN

PHILIP OTWOMA MANYURA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Homa Bay (Karanjah, J.) dated 11th October, 2018, in Criminal Appeal No. 2 of 2018)

JUDGMENT

1. This is a second appeal from the judgment of the trial court dated 1st February, 2018, where the appellant (Philip Otwoma Manyura) was charged with the offence of defilement contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 21st December, 2016, at about 1200 hours, at South Kagan Location, in Rangwe Division, within Homabay County, the appellant intentionally caused his penis to penetrate the vagina of M.A.O.[1], a child aged 11 years.

2. He was also charged in the alternative with the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, the particulars of which were that on the same day and in the same location, he intentionally touched the buttocks/breast/anus/vagina of M.A.O., a child aged 11 years, with his penis.

3. The appellant pleaded not guilty to the charges. The trial court heard the evidence of five prosecution witnesses, as well as the appellant's sworn defence. After assessing the evidence placed before it, the trial magistrate found the appellant guilty as charged in the main charge of defilement, and upon conviction, sentenced him to life imprisonment.

[1] Initials used to protect her identity

4. Dissatisfied with the findings, the appellant lodged an appeal before the High Court at Homa Bay against his conviction and sentence. The first appellate court (Karanjah, J.) having heard the appeal, dismissed his appeal on conviction. His appeal on sentence was allowed. The learned Judge set aside the life imprisonment sentence awarded by the trial court, after determining that M.A.O., was twelve (12) years of age, at the material time the offence was committed. The learned Judge found that the proper sentencing section was therefore Section 8(3) and not 8(2) of the *Sexual Offences Act*. The learned Judge substituted the life sentence awarded by the trial court, with a custodial sentence of twenty (20) years, in accordance with the provisions of Section 8(3) of the *Sexual Offences Act*.

5. The appellant is now before us on second appeal. His appeal is against sentence only. He challenges his sentence on the basis of two grounds: that the learned Judge erred in not making a finding that the minimum mandatory nature of the sentence provided under Section 8(3) of the *Sexual Offences Act* is unconstitutional; and that the learned Judge, in awarding the sentence, failed to take into account the period spent by the appellant in remand custody, pursuant to Section 333(2) of the *Criminal Procedure Code*.

6. The appellant, who appeared in person, filed written submissions in support of his appeal. He urged that, by dint of Articles 25(c) and 50(2)(p) of *the Constitution*, he was entitled to the benefit of the least severe prescribed sentence. He submitted that he is a first offender and was remorseful for his actions. It was his submission that the learned Judge erred in directing that his sentence run from the date of its pronouncement, as such failed to take into account the period he spent in remand custody, during the pendency of his trial before the trial court.

7. In rebuttal, Learned Prosecution Counsel, Mr. Okango submitted that the sentence of 20 years imprisonment meted by the first appellate court was sound in law, as it was the minimum sentence prescribed under Section 8(3) of the *Sexual Offences Act*, in light of the decision of the Supreme Court in R vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (Petition E018 of 2023) (2024) KESC 34 (KLR) (12th July 2024) (Judgment), which determined that the mandatory minimum sentences prescribed under the *Sexual Offences Act* remained legal. On the second ground, counsel conceded that the time spent by the appellant in remand custody was not taken into consideration by the first appellate court. He submitted that the appellant was arrested on 22nd December, 2016, and arraigned before the trial court the following day. Although he was granted bond on terms, he was unable to meet the same. In the end, counsel urged us to affirm the sentence awarded by the learned Judge, but take into consideration the period spent by the appellant in remand custody when computing sentence.

8. This being a second appeal, the mandate of this Court is limited by Section 361(1)(a) of the *Criminal Procedure Code*. This mandate was defined by this Court in the case of Peter Osanya v Republic [2016] eKLR as follows:

> " Section 361(1)(a) of the *Criminal Procedure Code* limits our jurisdiction in second appeals like this one to only matters of law. That provision has received judicial interpretation in numerous decisions of this Court such as Chemogong v Republic [1984] KLR 611, Ogeto v Republic [2004] KLR 14 And Koingo v Republic [1982) KLR 213 amongst others. In the latter case, it was pronounced:
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> > "A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless it is based on no evidence. The test to be applied on a second appeal is whether

there was any evidence on which the trial court could find as it did (Reuben Karasi S/O Karanja V. R. [1956] 17 E.A.C.A 146)."

9. We have considered the record of appeal, the submissions by both parties to this appeal, and the law. This is an appeal against sentence. The only issue arising for our determination is whether the sentence of twenty (20) years imprisonment awarded by the first appellate court is sound in law. Its trite law that sentencing is at the discretion of the trial court, and on second appeal, we cannot interfere with this exercise of discretion, unless it is shown that the court awarded an illegal sentence. Further, Section 361(1)(a) of the *Criminal Procedure Code* provides that the severity of sentence is a matter of fact, and as such, outside the scope of this Court on second appeal.

10. The appellant was sentenced by the trial court to serve life imprisonment, upon conviction, which is the penalty prescribed under Section 8(2) of the *Sexual Offences Act*. This sentence was set aside by the learned Judge when the appellant appealed before the High Court. The learned Judge noted that, according to the complainant's birth certificate produced in evidence, she was twelve (12) years old at the time of commission of the offence. Consequently, the appellant ought to have been sentenced under Section 8(3) of the *Sexual Offences Act* which prescribes a minimum custodial sentence of twenty (20) years. The life sentence was set aside by the learned Judge, and substituted by a sentence of twenty (20) years imprisonment.

11. The appellant contends, in his grounds of appeal that the mandatory nature of this sentence is unconstitutional. As correctly observed by counsel for the respondent, the Supreme Court's decision in R vs. Mwangi (supra) determined that mandatory minimum sentences provided for under the *Sexual Offences Act* are lawful, and remained as such, as long as the penalty sections remained valid and in the statute books. The sentence awarded by the first appellate court was therefore sound in law.

12. Counsel for the respondent conceded that the first appellate court, in awarding the custodial sentence, failed to take into consideration the period that was spent by the appellant in custody, during the pendency of his trial before the magistrate's court. As such, his appeal on sentence succeeds to the extent that the period he spent in remand custody prior to his conviction shall form part of his custodial sentence.

13. In the circumstances therefore, we hold that the sentence of twenty (20) years imprisonment imposed by the first appellate court was legal. We affirm the sentence and direct that it shall be computed from the date the appellant was arrested. For avoidance of doubt, that date is 22nd December, 2017.

14. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 30TH DAY OF MAY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR