Omollo v Republic (Criminal Appeal 60 of 2020)
[2025] KECA 982 (KLR) (30 May 2025) (Judgment)

Neutral citation: [2025] KECA 982 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 60 OF 2020

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MAY 30, 2025

BETWEEN

JOSEPH OWINO OMOLLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Siaya (R.E. Aburili, J.) dated 7th October 2019)inHCCRA No. 55 of 2017)

JUDGMENT

1. Joseph Owino Omolo, the appellant herein was charged in the Principal Magistrate's Court at Siaya with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 3rd June 2016 at Kadenge Sub Location in Siaya District within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of CAO a child of 10 years. He faced an alternative charge, of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3/2006.

2. The appellant was tried and convicted of the main charge and was sentenced to life imprisonment. Dissatisfied with both conviction and sentence he appealed to the High Court, which affirmed and upheld the decision of the subordinate court. Being dissatisfied and aggrieved with the judgment of the High Court, the appellant has now filed this appeal to this Court.

3. Being a second appeal, this Court is mindful of its duty that a second Appeal must only be confined to points of law and this Court will not interfere with concurrent findings of the two courts below on facts unless 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. See Karingo & 2 Others v Republic [1982] eKLR.

4. The evidence before the trial court; and which was re-evaluated and analysed by the High Court was as follows: CAO[1] who was the complainant, testified as PW1 told the court that on the material date at 1.00pm while in the company of her grandmother, Anastasia Akinyi and her younger sister, RA[2], the appellant whom the complainant referred to as Owino, visited them and told the grandmother that he wanted to give the complainant something; the [1] Initials used to protect her identity grandmother allowed the complainant to follow him to collect the offered item.

5. The appellant took her to his house, but she refused to enter the house; but he nonetheless pushed her into the house and tied her mouth using a piece of cloth. The appellant then proceeded to undress the complainant, then undressed himself and lay on top of her, inserting his penis into her vagina which she referred to as 'dudu yake and dudu yangu' respectively; and the act of sexual intercourse as 'tabia mbaya'. Later, RA arrived and called out to the complainant so that they could go to school; and although CAO was still inside the appellant's house, he announced that the minor had already gone to school. The appellant finished the act, then dressed the complainant, and hid her under the bed.

6. Later, CAO's grandmother arrived and shouted at the appellant to open the door; the appellant bolted and attempted to run away but a crowd that had responded to the grandmother's call of distress, apprehended him. The complainant identified the appellant as Owino who was her neighbour at home, saying she used to see him visit her grandmother's house on several occasions, asking for alcohol despite the fact that her grandmother never used to sell alcohol.

7. PW2 narrated how while in the company of the complainant on their way from school, heading home for lunch, they met the appellant whom she referred to as Owino. The appellant followed them to their grandmother's home and told the grandmother that he wanted to give the complainant something, and the grandmother allowed the complainant to go with the appellant.

8. She confirmed later following the appellant and the complainant to the appellant's house where she found the door locked; called out the complainant's name; and she heard the appellant's voice telling her to go to school. She thus returned to inform her grandmother what the appellant had told her, prompting the grandmother to proceed to the appellant's house while shouting for help, thereby attracting people who gathered and helped to apprehend the appellant as he attempted to run away. PW2 identified the appellant as Owino who she used to see every day at the road near her home.

9. PW3, the complainant's grandmother confirmed that on the material date at 1.00pm, the appellant, Owino, went to her house and asked for permission to go with the complainant so that he could give her something. Being aware that the appellant's mother sold sugarcane, she thought that the appellant wanted to give the complainant sugarcane, and that is why she allowed the complainant to go with the appellant. Things took a different turn when PW2 returned home to tell her that the appellant claimed the complainant had already gone to school; went to appellant's house and urged him to open the door; found him bare chested and the complainant under the bed, she raised the alarm, leading to a response from members of the public who apprehended the appellant as he attempted to flee from the scene.

10. Both the complainant and the appellant were taken to hospital and the incident was reported to the police. PW3 identified the appellant as Owino, a neighbour whom she had known since birth; he was a frequent visitor to her home.

11. A medical examination conducted by Sila Oluoch, PW5 a clinical officer found that the complainant had blood stained pants, lacerations on Labia Minora, a torn hymen and fresh blood on the wall of labia minora. He formed the opinion that there was evidence of forceful vaginal penetration. PW5 also examined the appellant who was 25 years old. No abnormalities were noted on the penis. A urinalysis indicated the presence of red blood cells and sperm cells. Based on the laboratory findings PW5 opined

that there was clear indication of ejaculation and said ejaculation was recent. PW5 produced both P3 forms and age assessment report of the complainant.

12. Fatuma Cherono, PW6 investigated the case and later charged the appellant with the offence and produced the complainant's blood stained panties as an exhibit.

13. In his sworn defence, the appellant denied committing the offence.

He confirmed that he knew the complainant well; he calls her Chris; and he always greeted her when she went to the market. That on the day in question, while seated next to his door, members of the public arrested him. He further stated that he had no grudge against the complainant or her grandmother; and had no reason to believe that they wanted to frame him.

14. The trial court, having considered both the prosecution and appellant's case was satisfied that the ingredients of the offence of defilement had been proved by the prosecution, leading to his conviction and sentence of life imprisonment. He contested this outcome before the High Court, on grounds that the charge sheet was defective and did not disclose with clarity the particulars of the offence, that there was a violation of his rights under Article 50(2)(j) of *the Constitution*, as he was not served with witness statements and other documents the prosecution intended to rely on during trial; that the medical report was wanting as it did not establish penetration; that there was no corroboration of the complainant's evidence and that DNA was not carried out to link the blood found on the complainant's panties with the complainant or the appellant; and that age assessment was tainted with variances of ages 8-9 and 10; and that the sentence was harsh. The High Court dismissed the appeal on conviction for want of merit but allowed the appeal on sentence to the extent that the life sentence was set aside, and substituted with a term sentence of 75 years in prison.

15. As already pointed out, on this appeal, our focus is on points of law, unless the findings by the two courts below on facts were not backed by evidence, or are based on a misapprehension of the evidence, or the two courts are shown demonstrably to have acted on wrong principles in making those findings. The appeal before us relates to the sentence only; and the appellant pleads that the 75 years imprisonment is manifestly excessive considering the life expectancy of human beings is at 66.7 years average by the World Health Organization (WHO). He enumerates several cases in which life sentence was substituted with either, 15-25 years imprisonment.

The appellant asserts that he is remorseful to the victim, her family and the society at large; that he was a young man when he committed the offence and that he is now reformed having been rehabilitated while in prison.

16. In opposing the appeal, Mr. Okango on behalf of the respondent, acknowledges the dilemma the learned judge faces as this Court in the case of Evans Nyamari Ayako v Republic Criminal Appeal No.22 of 2018, held that life sentence means 30years, and yet the Supreme Court decision in Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition No. E018 of 2023) [2024] KESC 34 (KLR) was that the mandatory sentences under *Sexual Offences Act* (including life sentence) are still valid. Identifying what he terms as the 'paradox that this Court is faced with is to determine whether the term sentence of 75 years is less severe to a life imprisonment sentence', he urges us to defer to the recent decision by the Supreme Court to the effect that mandatory minimum sentences under the *Sexual Offences Act* are valid and constitutional.

17. Indeed, the Supreme Court was tasked in Republic v Mwangi;

Initiative for Strategic Litigation in Africa (ISLA)& 3 Others (Amicus Curiae) (supra) with determining whether the imposition of mandatory sentence under the *Sexual Offences Act* was constitutional and in compliance with Articles 25, 27, 28 and 50 of *the Constitution*. The Court held

that the imposition of minimum mandatory sentences did not interfere with the independence of the Judiciary under Article 160 of *the Constitution*, nor did it undermine judicial discretion. The apex Court went on to hold that any sentence that is imposed by a trial court and affirmed by the first appellate court is lawful and remains lawful as long as section 8 of the *Sexual Offences Act* remains valid. The Court of Appeal has no jurisdiction, in the circumstances, to interfere with any such sentence.

18. A more recent development in relation to the Nyamari case (supra), in which the State appealed against this Court's position equating a life sentence to 30 years; and the Supreme Court in setting aside this Court's decision, and finding that the life imprisonment sentence is valid and lawful, held inter alia in R v Evans Nyamari Ayako Petition No. E002 of 2024 at para 44 that the Court of Appeal usurped Parliament's legislative mandate by substituting life imprisonment for thirty (30) years imprisonment; and violated stare decis that Muruatetu I decision did not apply to other cases with mandatory minimum penalties, pointing out 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...Striking down a sentence provided for in statute must be based not only on evidence and sound legal principles, but on 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..."

19. This Court is well guided by the Mwangi case (supra) as well as the Nyamari decision which has restored life sentence as the natural span of an individual's life; and not a computation of years. This Court thus finds that it has no jurisdiction to interfere with the sentence as affirmed by the High Court.

The upshot of the foregoing is that the appeallant's appeal lacks merit and is dismissed.

It is so ordered.

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

ASIKE - MAKHANDIA

JUDGE OF APPEAL

.....

H.A.OMONDI

JUDGE OF APPEAL

.....

L.KIMARU

JUDGE OF APPEAL

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

DEPUTY REGISTRAR