Esiketi v Republic (Criminal Appeal 37 of 2018)
[2025] KECA 825 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 825 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 37 OF 2018

MA WARSAME, JM MATIVO & PM GACHOKA, JJA

MAY 9, 2025

BETWEEN

TOM OSIRI ESIKETI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Naivasha (Meoli, J.) dated 20th February,2018 in HCCRA No. 215 of 2011)

JUDGMENT

1. The appellant was arraigned before the Chief Magistrate's Court at Naivasha on 18th November 2013 and charged with defilement contrary to Section 8(1) as read together with Section (3) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on the 16th November 2013 at County Council in Naivasha Sub-county within Nakuru County, he intentionally caused his penis to penetrate the vagina of JWA, a child aged 13 years. In the alterative, the prosecution preferred a charge against the appellant of an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. During the trial the prosecution called four witnesses in support of its case. Those were the minor(PW1), her father (PW2) who was a colleague of the appellant, a clinical officer who produced the P3 form, and the Investigation Officer.

3. Upon the closure of the prosecution case, the trial Magistrate S. Mwinzi (SRM Ag), found that the appellant had a case to answer and placed him on his defence. The appellant gave an unsworn statement and denied the charges. He claimed that he was implicated by PW2 as a result of grudge arising from PW2's failure to refund Shs.15,000/- that the appellant had lent him sometime back in September of the same year to enable PW2 to take his daughter to hospital.

4. The learned Magistrate evaluated the evidence tendered before the court and found the appellant guilty as charged and sentenced him to 20 years imprisonment, taking into account the age of the complainant. The appellant was acquitted on the alternative charge.

5. Aggrieved by both the conviction and sentence, the appellant appealed to the High Court at Naivasha on nine grounds. These were condensed into three - the first and second being a challenge to the adequacy of the prosecution evidence adduced at the trial and the third, a complaint that his defence did not receive proper consideration. The High Court noted that the twin contested issues in the appeal were whether the age of the complainant and penetration had been proved.

6. Though appreciating that the trial court had not adverted to the age of the complainant, the High Court held that nothing turned on it as the evidence on record satisfactorily established that the complainant was a minor aged between 13 and 15 years at the time of offence, and the appellant had been charged under the appropriate section 8(3) of the SOA. The learned Judge was equally satisfied that penetration had been proved and agreed with the trial court that the complainant's narrative of the events of the material date sounded convincing and unlikely to be a fabricated story. In the end, Meoli J. dismissed the appeal and upheld the findings of the trial court in entirety.

7. Aggrieved with the judgment of the High Court, the appellant has preferred this second appeal, based on seven grounds, the main of which is against the 20-year sentence imposed on him. This is on account of the sentence being excessively harsh and unjust for he is a first offender with a young family that needs his support and that the sentence contravenes paragraph 4.1 of the Policy Sentencing Directives, 2015. He adds that he is remorseful, regrets his actions and he will work tirelessly to support his family and himself if given another chance; that the Court considers his mitigation and award a lesser sentence or substitutes the remaining sentence with a non-custodial sentence and that the court considers the provisions of section 333(2) of the *Criminal Procedure Code*.

8. The Court was urged to set aside the sentence and set the appellant at liberty; to find that the circumstances of the case did not call for a long sentence thus reduce the 20-year sentence imposed and that the court finds it favourable to award a community service order or to serve a probation service sentence.

9. The appeal was canvased by way of written submissions. At the hearing, the appellant appeared in person and indicated that his appeal was limited to sentence and that he had filed submissions. Mr. Omutelema, Senior Assistant Director of Public Prosecutions, for the state equally informed the Court that he had filed submissions. He reiterated that the sentence was lawful and proportionate in view of the fact that the complainant was 13 years at the time of the commission of the offence.

10. It was submitted for the appellant that the circumstances of the case were not too grievous, as the victim was neither fatally injured or impregnated. He relied on the Judiciary Sentencing Policy Guidelines which among others refers to factors such as the gravity of the offence, the threat of violence against the victim, the nature and type of weapon used by the assailant to inflict harm. Appreciating the judicial nature of sentencing, the appellant reiterated the objective of sentencing is to impose an appropriate, adequate, just and proportionate sentence (Thomas Mwambu Wenyi v Republic [2017 eKLR).

11. The appellant added that he is fully rehabilitated and ready to be productive in building the nation. He urged the Court to find that the time served was sufficient, noting that since his arrest on 16th November 2013, he has suffered mentally, financially, and socially. Having been in custody for 10 years, he was 36 years old at the time of his arrest and is now 46 years of age. In order to persuade the Court, he cited several cases being Douglas Muthaura Ntoribi v Republic [2018] eKLR, Francis Opondo v

Republic (2017JeKLR, Daniel Gichimu & another V Republic (2018JeKLR and Ali Abdalla Mwanza v Republic Criminal Appeal No.259 of 2012.

12. Lastly, the appellant submitted that section 333(2) of the *Criminal Procedure Code* allows both the trial and appellate courts to consider time spent in remand custody when sentencing. In this regard, reference was made to Ahamad Aabolfathi Mohammed & another v Republic (2018] eKLR. He also implored the court to be guided by the decision in James Kariuki Wagana v Republic (2018] eKLR and Jackson Solomon Saitoti v Republic Criminal Appeal 14 of 2018 /2019) eKLR where the courts were allowed to use discretion in sentencing despite the mandatory penalty being prescribed in law.

13. In opposing the appeal, the respondent, in its filed submissions raised two issues. First, that the appeal against sentence is incompetent under section 361 of the *Criminal Procedure Code*. This being a second appeal, the severity of sentence is a matter of fact not appealable to the Court of Appeal. Second, that the appellant was allowed to mitigate before being sentenced and that section 8(3) of the SOA provides for a mandatory minimum sentence of not less than 20 years imprisonment upon conviction. The respondent maintains that the sentence of 20 years is legal and not manifestly excessive. Moreover, that sentencing is a matter of discretion as enunciated in John Muendo Musau v Republic [2013]eKLR.

14. Having considered the record of appeal as well as submissions made by the appellant and the respondent. The only issue before us on a second appeal is that of sentencing. The appellant complained that the 20-year sentence meted out against him by the trial court and affirmed by the High Court was harsh and excessive. He therefore sought the reduction of the sentence to 10 years, and either be set at liberty considering the term which he has already served or alternatively, the court considers a non- custodial sentence.

15. Our role as the second appellate court and our jurisdiction thereunder is limited to matters of law as defined in Section 361 of the *Criminal Procedure Code* as follows:

> " 361. Second Appeals
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> 1. 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."

16. This provision explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court. This was affirmed by this Court in David Njoroge Macharia v. Republic [2011] eKLR as follows;

> " That being so only matters of law fall for consideration-see section 361 of the *Criminal Procedure Code*. As this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such
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> findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings see Chemagong v. R [1984] KLR 611."

17. Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the respondent's appeal on the grounds that his sentence was harsh and excessive is not one that this Court could lawfully determine as it fell outside the purview of the Court's jurisdiction. This is more so, based on the fact that the High Court upheld the trial court's sentence without enhancing the same and the appellant does not challenge the authority or competence of the trial court to pass the sentence.

18. While we appreciate that sentencing is a crucial aspect of the criminal justice system, one of its aims, is to protect the society from the harmful acts of criminal defendants. Sentencing also serves as a deterrent, preventing the accused from repeating the crime and discouraging others from committing similar crimes. Defilement is a particularly serious offence that continues to affect society; hence, the *Sexual Offences Act* aims to protect all persons from harm resulting from unlawful sexual acts.

19. The logic behind mandatory minimum sentences such as that set out in section 8 of the SOA is to set a baseline sentence for perpetrators of particular offences. Given that the legislature acknowledged the seriousness and prevalence of sexual offences in this country and passed the SOA in order to curb it, the judiciary should not disregard this function of the legislature in the name of discretion.

20. The Supreme Court has recently settled the existing tensions on the extent of court's discretion in interfering with mandatory minimum sentences set out in SOA. In Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae) (2024] KESC 34 (KLR) the Supreme Court expressed itself in the following words:

> *"67.* 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 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."

21. In the end, the Supreme Court asserted that the sentence imposed by the trial court against a person such as the appellant and affirmed by the first appellate court was lawful and remains lawful as long as section 8 of the SOA remains valid. The Supreme Court reiterated that this Court had no jurisdiction to interfere with that sentence. As the appellant has not challenged the constitutionality or otherwise of section 8 of the SOA up the court hierarchy, it is inevitable that the appeal must fail.

22. For these reasons, we dismiss the appeal and affirm the 20-year sentence meted on the appellant by the trial court and upheld by the High Court on a first appeal.Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 9TH DAY OF MAY, 2025.

M. WARSAME

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JUDGE OF APPEAL

J.MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIARB., FCIARB

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JUDGE OF APPEAL