Okwakau v Republic (Criminal Appeal 63 of 2019)
[2025] KECA 1076 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KECA 1076 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 63 OF 2019

JM MATIVO, PM GACHOKA & WK KORIR, JJA

JUNE 20, 2025

BETWEEN

OLIVER OMUSUGU OKWAKAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the judgment of the High Court at Naivasha (R. Mwongo, J.) dated 7th March 2019 in HCCRA No. 19 of 2017)

JUDGMENT

1. The appellant, Oliver Omusugu Okwakau, was charged with the offence of defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act*. The particulars of the charge were that on 20th August 2014 at xxxxxxx Estate in Naivasha Sub-County within Nakuru County, the appellant defiled T.M.N., a girl aged 14 years. Arising from the same facts, 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 of 2006, the particulars of the charge being that he let his penis to come into contact with the vagina of T.M.N. He denied the charges but at the conclusion of the trial, he was found guilty, convicted and sentenced to serve 20 years in prison in respect of the main charge.

2. The appellant unsuccessfully challenged the trial court's judgment before the High Court. It is the High Court's dismissal of his appeal that brings him before us. In this Court, the appellant's memorandum of appeal mainly challenges the sentence on the ground that minimum mandatory sentences under the *Sexual Offences Act* are unconstitutional. In grounds 4 to 11 of the memorandum of appeal, he urges that we consider his mitigation on the grounds that he is a first offender, that he has been in custody for 10 years, that he comes from a poor family and is 34 years old at the moment, that he is remorseful, that he has learnt his lesson, that he has since reconciled with the complainant's family, and that he has been rehabilitated.

3. When the matter came up for hearing, the appellant appeared in person while Senior Assistant Director of Public Prosecutions (SADPP) Mr. Omutelema represented the respondent. Both the appellant and Mr. Omutelema opted to rely on their respective written submissions.

4. In his undated submissions, the appellant contended that mandatory minimum sentences, specifically the sentence imposed under section 8(3) of the *Sexual Offences Act*, are unconstitutional. In support of this argument, he asserted that mandatory minimum sentences violate Articles 2, 3, 19, 20, 22, 23, 25, 26, 27, 28, and 50(2)(p) and (q) of *the Constitution*, as they strip the Judiciary of sentencing discretion. According to him, this undermines the Judiciary's ability to deliver justice based on the specific circumstances of the particular case.

5. The appellant emphasized the importance of the doctrine of separation of powers, arguing that the legislature's imposition of mandatory minimum sentences encroaches upon the Judiciary's authority to determine appropriate punishment. Additionally, he submitted that the imposition of a mandatory sentence, without considering the mitigating factors, denied him the right to the least severe prescribed punishment. To support these arguments, the appellant cited numerous decisions from our jurisdiction and other jurisdictions, including Julius Kitsao Manyeso vs. Republic in Criminal Appeal No. Criminal Appeal No. 12 of 2021; Kalpana H, Rawal &, 2 others vs. Judicial Service Commission & 3 Others [2016] eKLR; Wilfred Manthi Musyoka vs. Machakos County Assembly & 4 Others [2018] eKLR; Reyes vs. The Queen [2002] 2 A.C. 235, 258; Dismas Wafula Kilwake vs. Republic [2018] eKLR; and Francis Karioko Muruatetu Another vs. Republic [2017] eKLR.

6. The appellant also highlighted his commitment to rehabilitation and presented evidence of his efforts, including a diploma in psychological counselling, and certificates and diplomas in biblical studies from various institutions. He argued that his rehabilitation should be considered a significant mitigating factor in reducing his sentence. He requested the Court to take into account the time he has already spent in custody when revising his sentence. Ultimately, he sought to have his sentence reviewed and reduced, potentially to a non-custodial sentence or a term of imprisonment that reflects the time served and his rehabilitation efforts.

7. Mr. Omutelema relied on submissions dated 16th September 2024 in opposing the appeal. According to counsel, the evidence on record confirmed that the offence was proved. Counsel further urged that the evidence of PW1 was credible and corroborated, and that the appellant's defence was considered and discounted. Mr. Omutelema also submitted that section 43 of the *Sexual Offences Act* cured any possible defect in the charge sheet arising from the omission of the word "unlawful". Urging us to maintain the conviction, counsel submitted that we should uphold the sentence as well. According to counsel, the circumstances of this case deserved the 20 years' imprisonment as imposed by the trial court and affirmed by the first appellate court.

8. We have reviewed the record and keenly read the submissions and authorities relied upon by the parties. The jurisdiction of this Court on second appeals as provided under section 361(1) of the *Criminal Procedure Code* was framed by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) [2024] KESC 34 (KLR) as follows:

> " 48. Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of section 361(1) of the *Criminal Procedure Code* which, in cases of appeals from subordinate courts, 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...

49. 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 was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

9. The appellant has fervently challenged the constitutionality of the minimum mandatory sentences prescribed under the *Sexual Offences Act*, 2006. However, we note that this issue is being raised for the first time before this Court on second appeal. It is a ground that was not raised before the first appellate court or before the trial court. It is thus not an issue that we can take up at this stage. That we are bereft of the jurisdiction to address the appellant's appeal was succinctly expressed by the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (supra) thus:

> "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."

10. Be that as it may, the Supreme Court has, in several decisions, recently reaffirmed the constitutionality of the sentences provided in the *Sexual Offences Act*, 2006.

11. On the other grounds of appeal, the appellant urges that we take into consideration his mitigation, rehabilitation progress and years already spent in custody and reduce his sentence. In our view, albeit disguised in plain sight, the appellant seems to be ushering us into the arena of the severity of his sentence, which is not within our remit. On a second appeal, we are barred from determining questions relating to sentences, except where such sentence has been enhanced by the High Court or where the trial court had no jurisdiction to pass the sentence, which, unfortunately for the appellant, is not the case here. We will therefore decline this invitation.

12. In the end, we find this appeal lacks merit and dismiss it in its entirety.

DATED AND DELIVERED AT NAKURU THIS 20TH DAY OF JUNE 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

.....

. JUDGE OF APPEAL

I certify that this is a True copy of the original

DEPUTY REGISTRAR