Odhiambo v Republic (Criminal Appeal 144 of 2018)
[2024] KECA 48 (KLR) (25 January 2024) (Reasons)

Neutral citation: [2024] KECA 48 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 144 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 25, 2024

BETWEEN

KEVIN ODHIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Migori (Mrima, J.) dated 21st May, 2017 in HCCRA No. 45 of 2016)

REASONS

1. When the appellant herein, Kevin Odhiambo, appeared before us for the plenary hearing of his appeal on September 25, 2023, we ordered that his sentence be reduced to ten (10) years imprisonment. We also ordered that the reduction in sentence takes effect immediately meaning that the appellant was released from prison on that day owing to the time already served. We indicated that we will give the reasons for our judgment later. These, in brief, are the reasons for the judgment.

2. The appellant was the accused person in the trial before the Senior Resident Magistrate's Court in Rongo in Criminal Case No. 468 of 2012. He 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 offence were that between September 10, 2012, and September 20, 2012, at Rongo Township within Migori County, the appellant caused his penis to penetrate the vagina of EAO, a child aged fourteen (14) years.

3. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars as to the place, time and identity of the victim of the alternative count were the same as that in the main charge.

4. The appellant pleaded not guilty to both the charge and the alternative charge and the case proceeded to full hearing. The prosecution called a total of six (6) witnesses and closed its case. The trial court

found that the prosecution had established a prima facie case and placed the appellant on his defence. In his defence, the appellant gave unsworn testimony and called no witnesses.

5. At the conclusion of the trial, the learned trial magistrate, in a judgement dated and delivered on February 4, 2013, convicted the appellant and sentenced him to serve a term of twenty (20) years in prison, the statutory minimum according to the *Sexual Offences Act*.

6. Aggrieved by the trial court's decision, the appellant filed an appeal against the conviction and sentence before the High Court via Migori High Court, Criminal Appeal No. 45 of 2016.

7. The High Court dismissed the appeal and upheld the conviction and sentence in a judgment dated and delivered on March 21, 2017.

8. The appellant was again dissatisfied with the decision of the High Court and has lodged the appeal to this Court challenging both conviction and sentence. Acting pro se, he raised five (5) grounds in his homegrown Memorandum of Appeal; four of which impugned his conviction, while one impugned his sentence.

9. Both the appellant and the respondent, who opposed the application, filed written submissions. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango, appeared for the respondent.

10. Although the appellant had filed submissions on all the grounds of appeal, during the plenary hearing of the appeal on September 25, 2023, he informed the Court that he wished to withdraw his appeal against conviction and only pursue his appeal against sentence. We allowed him to so withdraw his appeal against conviction, and conducted a hearing on the appeal against sentence only.

11. The appellant relied on his written submissions in which he argued that under articles 25, 27 and 28 of the *Constitution*, he had the right to: a fair trial; equal protection and equal benefit of the law; and, human dignity. His sole argument was that the sentence imposed on him was in violation of the *Constitution* because the *Sexual Offences Act* deprived the trial court of the discretion to mete out an individualized sentence based on the circumstances of the offence, the offender and the victim of the crime. He urged us to reverse the sentence imposed and re- sentence him to an appropriate one.

12. During the plenary hearing, learned counsel, Mr. Okango conceded that both the trial court and the High Court did not take into consideration the mitigation of the appellant and further conceded that if they did so they would probably have sentenced the appellant to a shorter period in prison given the circumstances. Mr. Okango, thus, graciously, and rightfully so in our view, conceded to a review of the sentence.

13. It is sufficient to point out that our jurisprudence on the minimum sentences prescribed by the *Sexual Offences Act*, 2006 has fundamentally shifted in the recent past. The spark that ignited that shift was provided, if only obliquely, by the Supreme Court in *Karioko Muruatetu & another v Republic*, Petition No 15 of 2015. In reaching its decision finding section 204 of the *Penal Code* unconstitutional to the extent that it only provided a mandatory death penalty, the Supreme Court reasoned that mandatory sentences impermissibly breach the constitutional separation between the legislature and the Judiciary; and that providing for a mandatory sentence that took away the discretion of the sentencing court in imposing the appropriate sentence was unconstitutional. This jurisprudence found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), in which Odunga J. (as he then was) first addressed the issue of the mandatory nature of sentences in the *Sexual Offences Act*, and *Edwin Wachira & others v Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was), in

which mandatory sentences in the *Sexual Offences Act* were found to be unconstitutional to the extent that they deprive the sentencing court of the opportunity to consider the aggravating and extenuating factors and the individual circumstances of each convicted person before pronouncing sentence. In both cases, the judges pegged the unconstitutionality on the statutorily-imposed inability of a judicial officer to exercise discretion to impose an appropriate sentence after taking into account the circumstances of each case and the mitigation offered by the convicted person. Further, we take note of this Court's decision in *Joshua Gichuki Mwangi v Republic* [2022] eKLR, wherein it was held that the mandatory minimum sentences under the *Sexual Offences Act* is unconstitutional.

14. In the present case, both the trial court and the High Court imposed the sentence of twenty (20) years before the shift in jurisprudence. The learned counsel for the respondent is, therefore, right that the two courts did not give the appellant the benefit of his mitigation but felt hamstrung by the minimum sentence stipulated in the statute.

15. On our part, we consider the shift in jurisprudence as a significant matter of the law that gives this Court jurisdiction to entertain the appeal against sentence. Even in doing so, we are acutely aware that our remit as a second appellate court is limited by dint of section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and re-evaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See *Samuel Warui Karimi v Republic* [2016] eKLR. As stated above, the shift in jurisdiction means that the appeal against sentence is not merely about its severity but about the law:

> whether the minimum sentence imposed was the only one possible as the two courts below concluded; whether the appellant's mitigation was taken into account; and if not, whether that would affect the sentence imposed.

16. In the present case, the evidence showed that the appellant, a rather youthful man, in-advisedly befriended the complainant, who had not yet reached the age of consent. The appellant believed he had found a wife. He intended to marry the complainant, and he convinced her to elope with him. The complainant agreed, and no force or compulsion was used. During their short, ill-fated sojourn, the two had sexual intercourse. Of course, the complainant, a minor, was incapable of legally consenting to both the sexual encounters and the marriage.

17. The facts show that there was no violence; no depraved predatory behavior on the part of the appellant. Additionally, in mitigation, the appellant pointed to his youth and ignorance of the law; and the fact that he was an orphan and was taking care of the children of his brother. He said he was remorseful and pleaded for leniency.

18. We have no doubt that if the trial court believed that it was clothed with discretion to impose an appropriate sentence it would have imposed the mandatory minimum sentence of twenty years imprisonment in these circumstances. When we take into consideration all the extenuating circumstances and balancing them against the objective seriousness of the offence of defilement, we formed the opinion that in the specific circumstances of this case, a sentence of ten (10) years imprisonment is sufficient punishment for the offence.

19. These, then, are the reasons for our judgment which was delivered on September 25, 2023.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY,2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR