Owino v Republic (Criminal Appeal 138 of 2018)
[2024] KECA 43 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KECA 43 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 138 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 25, 2024

BETWEEN

KENNEDY OKINYI OWINO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Migori (Mrima, J) dated the 30th November, 2016 in HCRA No. 79 of 2015)

JUDGMENT

1. This is a second appeal originating from the appellant's conviction and sentence of life imprisonment by the Resident Magistrate Court for the offence of defilement of a 7-year-old girl. The first appeal was heard and dismissed by the High Court (Mrima, J) hence the appeal now before us.

2. The appellant has challenged the judgment on three main grounds in this appeal. He maintains that the ingredients of the offence of defilement were not established; that his defence was not considered and that the mandatory sentence of life imprisonment is contrary to Article 50(2) of the *Constitution*.

3. During the hearing in the trial court, 8 witnesses testified for the prosecution. This included the minor complainant, her mother, aunt, uncle, her 14-year-old cousin and a teacher. There was also the evidence of the clinical officer who produced the P3 form and a police officer who investigated the case.

4. In brief, the evidence was that on the material day, the minor complainant who was living with her grandmother and aunt, had been left with other children in the home as her grandmother and aunt had gone to a funeral. The complainant was washing dishes within the compound when the appellant who was working as a herdsman within the home, asked her to go and collect more dishes from his house. The complainant and the appellant then proceeded to the house and the appellant forced the child to remove her clothing and he also removed his trouser and violated the child. One of the complainant's cousins, a 14-year-old boy, was passing by, when he heard the complainant crying. On

entering the house, he found the appellant putting on his trousers, and when he sought to know what was going on, the appellant became harsh and chased him away. This boy later reported the matter to the complainant's aunt who together with her grandmother interrogated the complainant, and she revealed that the appellant had sexually assaulted her.

5. The complainant was taken to Awendo District hospital, where she was examined and a P3 form filled. The P3 form indicated that the estimated age of the complainant was 7 years, and that her female genitalia had bruises around the urethra and vagina. The P3 was produced in evidence. Upon being put on his defence, the appellant gave a sworn statement in which he claimed that he worked for the complainant's grandmother for two months and was sacked because he caned the children for uprooting seedlings that he had planted. He denied having defiled the complainant and alleged that he was not paid his salary for two months and was later arrested and charged.

6. The appellant, who is in person, has filed written submissions in support of the appeal. He maintains that the sentence imposed upon him was a sentence under Section 8(2) of the *Sexual Offences Act* which provides for life imprisonment but that mandatory sentence of life imprisonment takes away the discretion of the court in sentencing. The appellant drew the Court's attention to recent jurisprudence that have clearly shown that courts can depart from the mandatory minimum sentences provided under the *Sexual Offences Act*.

7. The appellant cited *Philip Mweke Maingi and 5 Others v Director of Public Prosecutions and the Attorney General* where Odunga J (as he then was), expressed the opinion that minimum mandatory sentences are not consistent with the current constitutional dispensation, particularly Article 27 and 28 of the *Constitution*. This is because the minimum mandatory sentences *prima facie* denies the trial court the opportunity to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence, informed by those circumstances. Consequently. the trial court has no discretion to consider a lesser sentence where the circumstances may be appropriate.

8. The appellant distinguished (*Muruatetu 2*) contending that the Supreme Court did not address itself to the constitutionality of mandatory minimum sentences generally but only addressed the sentence in regard to murder. The appellant referred to *S v Malgas* [2001] (2) SA 1222 SCA 1235 Para. 25 (presumably a South African decision), where it was held that courts are a good deal freer to depart from the prescribed sentences but in doing so, they are to respect and not merely pay lip service to the legislature's view that the prescribed period of imprisonment are to be taken as appropriate when crimes of the specified kind are committed.

9. The appellant argued that the sentences to be imposed on offenders must meet the constitutional demands; that the sentences prescribed under the *Sexual Offences Act* are not necessarily unconstitutional, but may still be imposed where appropriate; that in deciding what sentences to impose, the courts must ensure that the sentence imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*; and that the mandatory sentence provided under the *Sexual Offences Act* must therefore be construed with necessary adaptations, qualifications and exceptions, particularly where they do not take into account the dignity of the individual under Article 28 of the *Constitution*.

10. In addition, the appellant referred to *Dismas Wafula Kilwake v Republc* [2019] eKLR, where the court expressed the view that in appropriate cases the trial court should freely exercise discretion in sentencing, and should be able to impose any of the sentences prescribed, if the circumstances of the case so demands, but should not be constrained to impose the provided sentences, if the circumstances do not so demand.

11. The appellant also submitted that ingredients of the charge of defilement were not proved because the prosecution relied on the evidence of the complainant and her aunt in regard to the age of the complainant being 7 years old. He challenged the reliance on the P3 form as the maker of the P3 form was not called to testify. He submitted that only medical evidence could prove the age.

12. As regards penetration, the appellant maintained that the evidence was insufficient as there was no medical evidence adduced; that the evidence of the minor complainant regarding penetration required corroboration; and that the medical evidence was not satisfactory for such corroboration.

13. Finally, the appellant complained that his defence was not considered. He had claimed that he was at his place of work when the offence occurred and that the complainant's grandmother was unhappy with him because he requested for his two months' salaries. He pointed out that the persons who arrested him were never called to testify. He relied on *Karanja v Republic* [1983] KLR for the submission that his alibi defence was not tested and argued that the prosecution could have invoked Section 309 of the *Criminal Procedure Code* to call further evidence to address the alibi defence that he had raised.

14. The State also filed written submissions through Mr. Okango, Senior Principal Prosecution Counsel. In reply to the grounds raised by the appellant Mr Okango maintained that the offence of defilement was proved to the required standard of beyond reasonable doubt. This included proof of the age of the minor victim as 7 years, notwithstanding the fact that the issue of age was not raised before the first appellate court and cannot be raised before this Court. Counsel pointed out that the child's health card that was produced in evidence proved her age as 7 years, so did the P3 form where the age of the complainant was approximated as 7 years. He cited *Boaz Nyanoti Samuel v Republic* [2022] eKLR, for the proposition that medical evidence is not the only evidence that can prove a sexual offence, the position in law being that the offences of rape and defilement can be proved by way of oral evidence and circumstantial evidence, and not necessarily by medical evidence. Mr Okango submitted that the medical evidence that was adduced, was in the nature of corroboration of the oral evidence of the complainant; and that the P3 form showed that the minor's labia majora was stained with blood, while the vagina had lacerations and blood-stained discharge. Counsel argued that an intact hymen does not negate the facts of defilement where there is sufficient oral evidence to prove the same.

15. On the ground that the appellant's defence was not considered, Mr Okango submitted that the appellant did not raise any alibi but had claimed that he worked in that home as a care taker and left the home on 17th April, 2014, which means that on the date of the incident he was in that home. He even confirmed in his evidence that he saw the complainant. Counsel pointed out that the appellant's defence was properly considered and properly rejected by the trial court. The High Court also equally considered the defence and rejected it.

16. The State conceded the appeal in regard to the life sentence urging the Court to impose a term sentence, instead of the mandatory life sentence. In support thereof, Mr Okango took cognisance of recent jurisprudence including *Philip Mweke Maingi and 5 Others v Director of Public Prosecutions and the Attorney General*; *Joshua Gichuki Mwangi v Republic* (unreported); and *Julius Kitsao Manyeso v Republic*.

17. The appeal before us being a second appeal, under Section 361 of the *Criminal Procedure Code*, our jurisdiction is limited to issues of law only. We reiterate what this Court stated in *M'Riungu v Republic* [1983] KLR, 455:

> "Where a right of appeal is confined to questions of law an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat the findings of fact as holdings of law or mixed finding of fact and law and it should not interfere with the

decision of the trial court or first appellate court unless it is apparent that on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in.

18. The issues of law which we discern for our consideration are whether the first appellate court properly re-evaluated the evidence and came to the right conclusion that the charge against the appellant was proved to the required standard; whether the appellant's defence of alibi was properly addressed; and whether the mandatory life sentence that was imposed on the appellant is proper.

19. The appellant was convicted under Section 8(1) & (2) of the *Sexual Offences Act* which states as follows:

> " 8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

20. Penetration is defined under Section 2 of the *Sexual Offences Act* as "the partial or complete insertion of the genital organs of a person, into the genital organs of another person." Therefore, the ingredients of the offence that had to be proved in order to establish the charge of defilement against the appellant were; that there was an act of penetration that is, the partial or complete insertion of male genital organs, into that of the minor complainant; that the minor complainant was a child under eleven years of age; and that the appellant had been positively identified as the person who committed the act of penetration.

21. In *Bassita v Uganda* S. C. Criminal Appeal No. 35 of 1995 the Supreme Court of Uganda held that:

> " The act of sexual intercourse or penetration may be proved by direct or circumstantial evidence. Usually the sexual intercourse is proved by the victims own evidence and corroborated by the medical evidence or other evidence. Though desirable it is not hard and fast rule that the victims evidence and medical evidence must always be adduced in every case of defilement to prove sexual intercourse or penetration. Whatever evidence the prosecution may wish to adduce, to prove its case, such evidence must be such that is sufficient to prove the case beyond reasonable doubt."

22. The judgment of the first appellate court reveals that the court addressed the evidence and analysed the issue of the complainant's age, penetration and whether the appellant was the perpetrator, before rejecting the appellant's defence and coming to the conclusion that the offence of defilement was established and appellant proved to be the perpetrator.

23. On our part we have similarly examined the evidence and found that the minor complainant testified how the appellant took her to his house, removed her clothing and put her on the bed and "inserted his organs for urinating into my organ for urinating." The description clearly refers to insertion of the appellant's genitals into her genitals. Her evidence was consistent with that of her cousin, the 14-year-old boy who heard the minor complainant crying, and upon entering the house found both the appellant and the minor in the house, with the appellant in the process of wearing his trouser. The evidence of the minor complainant was again consistent with that of her aunt who examined her private parts and noticed that there was blood in her vagina; and the P3 form which confirmed that there were injuries on the minor complainant's vagina. There was, therefore, sufficient credible evidence that penetration had taken place.

24. The age of the complainant was relevant not only to establish the charge of defilement, but also as a relevant factor in the sentence to be imposed under Section 8(2) of the *Sexual Offences Act*. In *Justin Kubasu v Republic*, this Court cited *Edwin Nyambogo Onsongo v Republic* [2016] eKLR, in which the Court cited with approval *Mwolongo Chichoro Mwanyembev Republic*, Mombasa Criminal Appeal No. 24 of 2015, that:

> "...'the question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documents, evidence such as birth certificates, baptism card or by oral evidence of the child, if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among the credible forms of proof...' We think that what ought to be stressed, is that whatever the nature of evidence preferred in proof of the victim's age, it has to be credible and reliable"

25. In regard to the minor complainant's age, there was the evidence of the minor complainant who stated her age as 7 years; the evidence of her aunt who stated the age as 7 years; the health clinic card which indicated the minor's date of birth as 8th May, 2007, consistent with the age of 7 years; and the P3 form which indicated the minor complainant's approximate age as 7 years. We are satisfied that this was sufficient credible evidence that proved the age of the minor complainant as 7 years.

26. As regards the identity of the person who committed the offence, the appellant was identified by the minor complainant who knew him well. The 14-year-old boy also identified the appellant as having been with the minor complainant in the house when the minor was crying. Although the appellant claimed that he raised an alibi defence, we agree with Mr Okango that there was no alibi raised as he did not deny having been in the home on the date when the offence was committed. Moreover, in light of the clear evidence implicating the appellant, his defence of denial was rightly dismissed.

27. We come to the conclusion that the first appellate court properly reconsidered and re-evaluated the evidence and came to the correct conclusion that the charge of defilement was proved to the required standard, against the appellant, and his defence was properly rejected We therefore reject both grounds of appeal and dismiss the appeal against conviction

28. In regard to the appeal against sentence, Section 8(2) of the *Sexual Offences Act* provides the penalty of mandatory life imprisonment for the offence of defilement. As submitted by the appellant and Mr Okango, the issue of mandatory sentences and life imprisonment have been addressed in recent jurisprudence. In *Philip Mueke Maingi & 5 others v Director of Public Prosecutions and another* [2022] KEHC 1318 (KLR), Odunga J, (as he then was) addressed the issue of mandatory sentences. The learned Judge expressed the view:

> "...whereas the sentences prescribed may not necessarily be unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose, the court must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under Article 28 of the *Constitution*. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the *Constitution*, the *prima facie* mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the *Constitution* as appreciated in the Muruatetu 1 case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional."

29. In the subsequent case of *Edwin Wachira and 9 Others v Republic*, High Court at Mombasa Consolidated Petitions Nos. 97, 88, 90 and 57 of 2021, Mativo J. (as he then was), agreeing with Odunga, J. identified the following principles in *Muruatetu 1*, that in his view apply to all mandatory minimum sentences irrespective of the offences.

> "The following principles are discernible from the Supreme Court decision in *Muruatetu one*. These principles are true to all mandatory minimum sentences irrespective of the offence: -
>
> i. A law that takes away judicial discretion can only be regarded as harsh and unjust.
>
> ii. The rights of an accused person to a fair trial under Article 50 of the *Constitution* is absolute as it is one of the rights which cannot be limited pursuant to Article 25(c) of the *Constitution*.
>
> iii. The trial process does not stop at convicting the accused. Sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This necessarily means that the principle of fair trial must be accorded to the sentencing stage too.
>
> iv. Mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in the *Constitution* does not deprive it of its necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of the *Constitution* are not exhaustive.
>
> v. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.
>
> vi. If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Failure to individualize the circumstances of an offence or offender may result in the undesirable effect of 'over punishing' the convict.
>
> vii. A fair trial has many facets, and includes mitigation.
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> viii. Another aspect of the mandatory sentence is its discriminate nature; discriminate in the sense that the mandatory sentence gives differential treatment to a convict under that section, distinct from the kind of treatment accorded to a convict under a section that does not impose a mandatory sentence. Article 27 of the *Constitution* sets out non- discrimination provisions.

30. At paragraph 36 of the same judgment, Mativo J. stated as follows:

> "For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum

penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence."

31. This Court sitting in Malindi has also rendered itself on the issue of indeterminate life sentence in *Manyeso v Republic* (Criminal Appeal 12 of 2021 [2023] KECA 827 (KLR), where the Court found that there was unjustifiable discrimination which was repugnant to the principle of equality before the law in the imposition of mandatory life sentence as the convict is denied an opportunity to be heard in mitigation. The Court also found the indeterminate life sentence inhuman and violating the right to dignity under Article 28 of the *Constitution*. Consequently, the Court found the sentence of indeterminate life imprisonment to be unconstitutional. In our recent decision in *Evans Nyamari Ayako v Republic*, we went a step further to define a life sentence and having referred to jurisprudence from different jurisdictions concluded at paragraph 25 and 26 of our Judgment as follows:

> " This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.
>
> (1) On our part, considering this comparative jurisprudence and the prevailing socio- economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

32. In light of the jurisprudence that we have referred to above, we find that the appellant's appeal in regards to sentence must succeed as the mandatory life sentence that was imposed upon him under Section 8(2) of the *Sexual Offences Act* was unconstitutional, the trial court not having had the opportunity to exercise its discretion. Secondly, as we have pointed out, the indeterminate sentence of life imprisonment also contravenes Article 28 of the *Constitution* as it is inhuman and violates the appellant's dignity.

33. In the circumstances of this case the appellant defiled a 7- year-old girl. The offence was no doubt serious and deserved a deterrent sentence. We find that the sentence of life imprisonment was deserved. However, in accordance with our decision in *Evans Nyamari Ayako v Republic* (*supra*), we translate the indeterminate life sentence that was imposed upon the appellant to a sentence of 30 years' imprisonment.

34. The upshot of the above is that the appeal against conviction is dismissed. The appeal against sentence is allowed to the extent that we set aside the indeterminate sentence of life imprisonment and substitute thereto a sentence of 30 years imprisonment from the date of sentence by the trial court.

Those shall be the orders of the Court.

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

HANNAH OKWENGU

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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