Egrone v Republic (Criminal Appeal 86 of 2019)
[2024] KECA 206 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KECA 206 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 86 OF 2019

HM OKWENGU, M NGUGI & HA OMONDI, JJA

FEBRUARY 29, 2024

BETWEEN

JAPHETH LUKOSI EGRONE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court of Kenya at Kisumu (T. W. Cherere, J.) dated 7th September, 2018 in HCCRA No. 25 of 2016)

JUDGMENT

1. The appellant, Japheth Lukosi Egrone, was tried, convicted, and sentenced to life imprisonment for the offence of defilement contrary to Section 8(1) as read with Section (2) of the *Sexual Offences Act*. Briefly, the evidence that emerged at trial was that LB[1], the complainant, herein met the appellant and another boy, who were strangers to him; the appellant parted ways with the friend after they had agreed that he would escort LB home.

   However, the appellant took him to an unknown place and defiled him. In a bid to escape, LB bit the appellant's fingers. Medical examination revealed several tears in LB's anus. The appellant was also examined and found to have bite marks on the left hand, middle and small fingers. In his defence, the appellant admitted having been in the company of LB but denied that he defiled him.

2. In a judgment dated and delivered on 4th March, 2016, the trial court found that the evidence proved the key ingredients of age, penetration and identity of the perpetrator. The trial court in meting out the sentence pointed out that:

   > " ...The section of the law under which he is convicted of (sic) imposes a mandatory sentence. He is hereby sentenced to life imprisonment"

3. Aggrieved by the outcome both on conviction and sentence, the appellant lodged his appeal at the High Court via Kakamega High Court, Criminal Appeal No 25 of 2016. The High Court, in a judgment delivered on 7th September, 2018 (Cherere, J.) dismissed the appeal holding that the prosecution had proved its case; and upheld his conviction on a finding that the ingredients of the offence, namely: age of the victim, penetration and identity of the perpetrator had been proved; and confirmed the sentence.

4. Being aggrieved, the appellant preferred the present appeal faulting the learned Judge for failing to find that his identification was not proper, the prosecution evidence was not corroborated, he was a minor at the time of the commission of the offence; and he was sentenced to a mandatory sentence which is unconstitutional.

5. At the plenary hearing, the appellant abandoned his appeal on conviction; and opted to pursue the appeal on sentence only, and the grounds are that both the trial magistrate and the first appellate Judge erred in law by meting out an unconstitutional sentence, which was arrived at through an unfair trial process. The appellant submits that when he committed the offence, he was a minor aged 16 years old, thus he ought to have been punished pursuant to section 8 (7) of the *Sexual Offences Act*; and guided by Article 53 (1) (f) (i) and (ii) of the *Constitution of Kenya* .

6. With regard to him being a minor, the appellant relies on the record of the trial court which had observed that he was a juvenile; and although the age assessment conducted on him in the year 2015, revealed that he was 18 years old, the assessment report was not tendered in evidence. It is his submission that since he was a minor at the time, he ought not to have been detained except as a measure of last resort.

7. In his written submissions, the appellant contends that he was sentenced to a mandatory sentence without considering the fact that he was a first offender; and urges us to find that he has served a sufficient term to meet the requirement of punishment, deterrence and rehabilitation, to the extent that he is now a transformed person who poses no danger to society. The appellant prays for a sentence that would take into consideration the provisions of section 333 (2) of the *Criminal Procedure Code*.

8. In conceding to the mandatory life sentence being set aside, the respondent acknowledges the declaration on the unconstitutionality of the indeterminate nature of life imprisonment in the recent decision by this Court in Kisumu Criminal Appeal No. 157 of 2017, *Frank Turo vs. Republic* (Judgment delivered on 6th October 2023) which equated life sentence to a term of thirty years imprisonment. The respondent urges that in sentencing the appellant to term sentence, we ought to consider the aggravating factors in this instance which are the serious nature of the offence; particularly the tender age of the victim who was only 8 years old; and find that the appellant deserves a deterrent sentence of 30 years imprisonment, taking into consideration that at the time of sentence he was an adult.

9. Our duty as a second appellate court, under section 361 of the *Criminal Procedure Code* limits us to addressing matters of law only, and not to delve into matters of fact which have been dealt with by the trial court; and subsequently re-evaluated by the first appellate court. This duty has been reiterated in the case of *David Njoroge Macharia vs. Republic* (2011) eKLR thus:

> "...That being so, only matters of law fall for consideration - see section 361 of the *Criminal Procedure Code*. For purposes of this section, severity of sentence is defined as a matter of fact... As this Court has stated many times before, it will not normally interfere with concurrent finding of fact by the two courts below unless such findings are based on

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."

10. The appellant is persuaded that we can interfere with the mandatory minimum sentence which was meted out on the strength of a legislative enactment; and submits that such sentences have since been declared unconstitutional.

11. We echo our acknowledgement in various previous decisions that there has been a shift in the Court's jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*. Indeed, this trend is attributable, indirectly, to the Supreme Court's decision in *Karioko Muruatetu & Another vs. Republic*, Petition No. 15 of 2015 (Muruatetu 1) which ushered a flood of decisions departing from fidelity to the minimum and mandatory sentences in sexual offences. Subsequently the jurisprudence impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* has found expression in cases such as *Maingi & 5 others vs. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and *Edwin Wachira & Others vs. Republic – Mombasa* Petition No. 97 of 2021, Mativo J. (as he then was). The rationale behind this is pegged to the fact that a minimum mandatory sentence takes away the jurisdiction conferred on judicial officers to exercise their discretion when meting out sentence.

12. The appellant also draws to our attention the trial court's own observation, and we take note that on 19th August, 2015, the learned trial magistrate (Makoyo, RM.) referred to him as a subject; and directed that

> "...Andia advocate appointed to represent the minor" We also note that the trial court was later informed on 8th October 2015 that:
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> "The accused is an adult and he can no longer remain in juvenile remand."

13. Indeed, the trial court had on several occasions ordered that the appellant's age be assessed, although the outcome does not appear to have seen the light of day; and whereas it would have been reasonable to draw an inference that at the time of committing the offence, and even at the beginning of the trial, the appellant was indeed a minor, a twist is added to this age of minority situation by the P3 form dated 26th December 2014 issued in respect of the appellant, just a day after the incident, which gave his age as 18 years. The appellant has not presented any document to confirm his age, but consistently maintains that at the time of the incident, he was 'underage'. Given this scenario of shifting numbers, and without an age assessment report, the best we can say is that the appellant was in the extremely youthful age bracket.

14. What is clear to us is that in meting out the life imprisonment sentence, and having it affirmed by the first appellate court, there was no explanation given as to why the appellant had to serve the minimum, other than that this was the minimum legal sentence provided in the law. Indeed, the learned Judge stated thus:

> "The age of the complainant having been established, the trial court could not deviate from the applicable sentence imposed under the *Sexual Offences Act*. The sentence imposed on the appellant is lawful and there is no reasonable cause to interfere with it."

15. Our perusal of the record confirms that the appellant was given an opportunity to tender his mitigation, which counted for nothing in light of the mandatory sentence which was bobbing its head in the penal waters. This, then, ushers in section 333 (2) of the *Criminal Procedure Code* which provides that:

2) Subject to the provisions of section 38 of the *Penal Code* (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

16. The appellant was remanded in custody from the date of arrest on 26th December 2014 until the date of sentence on 4th March 2016. We take note that in pronouncing the sentence, and later affirming it as legal, there was no indication by either of the two courts, as regards the date on which the sentences would commence; or whether the period the appellant had spent in remand while awaiting trial had been considered. We, therefore, find that there was an error in law; and in application of the principles of sentencing; Therefore, there is need to interfere with the mandatory sentence meted out under the Act as the same has been declared unconstitutional.

17. Taking all these factors into consideration, the nature of the offence, the age of the victim, particularly his extreme youthfulness, which compelled the trial court to order for his being remanded at the Juvenile Remand unit, we find it reasonable and just to set aside the life sentence imposed; and substitute it with a 15 years imprisonment, which shall be computed from 26th December 2015, being the date of the appellant's incarceration. The appeal on sentence out thus succeeds.

DATED AND DELIVERED AT KAKAMEGA THIS 29TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR