Masinde v Republic (Criminal Appeal 202 of 2019)
[2024] KECA 212 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KECA 212 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 202 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 29, 2024

BETWEEN

RODGERS SIMIYU MASINDE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma, (Wendoh, J.) dated 9th April, 2019 in HCCRA No. 194 of 2016)

JUDGMENT

1. In an undated memorandum of appeal as well as a supplementary one filed in this Court on 17th February, 2020, the appellant herein challenges the judgment of the High Court sitting at Bungoma (Wendoh, J.) dated 9th April, 2019 affirming both his conviction and sentence. The conviction and sentence was by the Chief Magistrate's Court at Bungoma (Yalwala, Ag. PM, as he then was) rendered in a judgment dated 16th September, 2016.

2. At the trial court, the learned magistrate convicted the appellant of the offence of defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act*. He, then, sentenced him to fifteen (15) years imprisonment, the mandatory statutory minimum under the *Sexual Offences Act*.

3. The High Court upheld both the conviction and sentence.

4. In his two memoranda of appeal before this Court, the appellant had listed eight grounds of appeal contesting both the conviction and sentence. However, when the appeal was called for hearing before us on 26th February, 2024, the appellant orally applied to withdraw his challenge on conviction and proceed only with his appeal against sentence. We so allowed him. Consequently, the appeal herein is only against sentence.

5. In support of his appeal against sentence, the appellant argued that the law, as presently interpreted, allows courts to depart from the statutory minimums in the *Sexual Offences Act* and urged us to do so in his case for four related reasons:

   a. First, that he was very young when he committed the offence because he was only twenty (20) years old;

   b. Second, that he is a first offender;

   c. Third, that he has been in prison for more than ten years already and he is now fully rehabilitated; and

   d. Fourth, that he has a wife and three children at home whom he would like an opportunity to go take care of.

6. Additionally, the appellant urged us take into account the time he was in custody during the pendency of his trial.

7. While conceding that our emerging jurisprudence conceives of departures from statutory minimums under the *Sexual Offences Act*, Ms. Busienei, learned counsel for the respondent, urged us not to reduce the sentence in this particular case. The learned counsel argued that the sentence imposed by the trial court and upheld by the High Court was "just in the circumstances" of the case. However, the learned counsel conceded that the sentence should be reduced by the period the appellant was in custody during trial.

8. In considering the appellant's appeal against sentence, we are mindful of our remit as a second appeal court. Our jurisdiction 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 over which there are concurrent findings of the two courts below. For purposes of this section, severity of sentence is defined as a matter of fact. See *Samuel Warui Karimi v Republic* [2016] eKLR.

9. However, as the appellant correctly points out, this appeal falls for our consideration owing to the shift in our jurisprudence on the imposition of mandatory minimum sentences prescribed in the *Sexual Offences Act*. That shifts amounts to a matter of law and, consequently, within our remit.

10. The shift finds its provenance in the Supreme Court's decision in *Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 (Muruatetu 1). 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) *supra* and *Edwin Wachira & Others v Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was), wherein 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.

11. The brief facts of the case which are relevant for considering the legality of the sentence are as follows. The appellant, a boda boda rider, lured the survivor of the sexual offence, a minor aged 17 years old, to go with him to his house. He told her that he wanted to make her his wife; and she believed him. They remained there for more than a week – from 6th April, 2014 to 15th April, 2014. Each day, the survivor testified, and the court found as factually established, they had sexual intercourse. This only ended

on the 15th April, 2014 when the survivor's grandfather, who had received a tip- off, with the help of the Police, raided the appellant's house and arrested him. The appellant was charged and convicted as detailed above.

12. Taking into consideration all the extenuating and aggravating factors in this case, while acutely aware of the intrinsic seriousness of the offence the appellant committed, we are persuaded that this is a fit case to depart from the statutory minimum which prescribes fifteen (15) years imprisonment in this case. We say so because of the extreme youthfulness of the appellant when he committed the offence. He was twenty years old at the time. While legally an adult, we take judicial notice of the fact that, as an emerging adult, his "hot cognition" – the decision-making neural pathway in an emotionally charged situation that can result in an outcome with a high risk or a high reward - is different than that of fully-transitioned adults.[1] We also take note of the relative small difference in age between the appellant and the survivor – three years since the survivor was seventeen and the appellant twenty years old at the time. Additionally, we note that the crime was not committed with the use of force, menaces or in any other depraved manner.

13. Finally, we considered that the appellant was in custody for part of the time during the pendency of the trial. All considered, we are of the view that the period the appellant has served in custody – just shy of ten years - is sufficient time for penance and rehabilitation for his offence. Consequently, we allow his appeal against sentence to the extent that we set aside the sentence imposed on him and, instead, substitute thereto an imprisonment term equal to the time the appellant has served. The appellant, shall, therefore, be released from prison forthwith unless he is otherwise lawfully being held.

14. Orders accordingly.

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