Oduor v Republic (Criminal Appeal 153 of 2018)
[2024] KECA 213 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KECA 213 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 153 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 29, 2024

BETWEEN

JAIRO OLUOCH ODUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Siaya (Makau, J.) dated 6th October, 2016 in HCCRA No. 8 of 2016)

JUDGMENT

1. The appellant, Jairo Oluoch Oduor, was the accused person in the trial before the Principal Magistrate's Court at Ukwala in Criminal Case No. 371 of 2014. He was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that it was alleged that on the 5th day of July, 2014, at around 1.00pm in East Uholo location within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of P.A.O., a child aged 12 years. The appellant was also faced with 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 victim, date and place of the alternative count were the same as that in the main charge.

2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to twenty (20) imprisonment, according to the law at the time.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court at Kisumu via Criminal Appeal No. 8 of 2016.

4. The High Court (J.A. Makau, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated 6th October, 2016.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal. Acting pro se, he raised seven (7) grounds in his self-crafted Memorandum of Appeal, all of which impugned his sentence.

6. The appeal was argued by way of written submissions followed by oral highlighting by both parties. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango appeared for the respondent. Both parties relied on their submissions.

7. While 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 vs. Republic* [2016] eKLR.

8. The appellant decried what he termed "the unconstitutionality" of his sentence on the one hand, whilst he pleaded for leniency on the other hand. He argued that the sentence of twenty (20) years imprisonment was excessive and prayed that we set it aside and substitute the same with a lesser sentence.

9. The appellant submitted that at the time he committed the crime, he was a first offender, a layman and a pauper. However, he has since undergone rehabilitation and various vocational trainings at the prison and has taken positive steps towards correcting his wrong doing. He also urged the Court to consider the time that he spent in custody during the pendency of his case. He cited *Josiah Mutua Mutunga & Another vs. Republic* [2019] KLR in this regard.

10. Mr. Okango, learned counsel for the respondent, conceded that the trial court sentenced the appellant to the mandatory minimum sentence provided for in section 8(3) of the *Sexual Offences Act* which our emerging jurisprudence has declared unconstitutional to the extent that it does not afford a convicted person an opportunity to mitigate and for the judicial officer an opportunity to consider the individual circumstances of the offence, offender and victims when sentencing. Learned counsel cited *Maingi & 5 others vs. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), in which Odunga, J. (as he then was) addressed the issue of the mandatory nature of sentences in the *Sexual Offences Act* and held that they impede the exercise of judicial discretion. He also cited this Court's decision in Nyeri Criminal Appeal No. 84 of 2015 *Joshua Gichuki Mwangi vs. Republic* (unreported).

11. However, Mr. Okango rejected the appellant's contention that the sentence was excessive, on the ground that the victim of the offence was a minor aged twelve (12) years. He argued that in sentencing the appellant, the trial court considered the appellant's mitigation in the following terms:

> "Accused's plea in mitigation considered. The offence is serious and calls for a deterrent sentence."

Therefore, Mr. Okango argued, the trial court exercised its discretion, which can only be interfered with if it is demonstrated that it was exercised illegally or wrongly. In this regard, counsel argued that there was no allegation or evidence that the trial court exercised its discretion wrongly, and urged that the sentence was not excessive.

12. We have carefully considered the appeal, the submissions of the parties and the authorities cited in support of the appeal against sentence.

13. We agree with the respondent about our emerging jurisprudence on mandatory minimum sentences. We acknowledge that there has been a shift in the Court's jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*. The trend is attributable, if only indirectly, to the Supreme Court's decision in *Karioko Muruatetu & Another vs. Republi*c, 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 vs. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) supra and Edwin Wachira & Others vs. 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.

14. The brief facts of the case which are relevant for considering the legality of the sentence are as follows. The survivor went to collect firewood with her friends PW2 and PW3. They met with the appellant advised them to go to the further end of the forest ostensibly because firewood was more plentiful there. As they all collected firewood, the appellant called the survivor. She refused to go to where he was. The appellant, then, went to where the survivor was and asked her not to speak loudly whilst he inquired whether he should go for a condom. The survivor told him that she did not know anything about that. Afterwards, the appellant forcibly removed the survivor's clothes and had sexual intercourse with her without protection. He warned her not to tell her mother about the incident. But the survivor reported the matter to her mother and she was taken to hospital where she was treated. The appellant was later identified, arrested and charged with the offence.

15. We have considered the circumstances surrounding the offence, the offender and the victim. We have also considered all the aggravating factors and noted that the only one extenuating factor is that the appellant is a first offender. In the specific circumstances of this case, we agree with the State that the indicative sentence of twenty (20) years imprisonment in the *Sexual Offences Act* is warranted. While it is true that the appellant did not use any depraved violence on the survivor, we note that the survivor was of very tender years; and that the deviant act was perpetrated by the use of menaces. It is also clear that the act was planned as the appellant tricked the survivor and her friends to go further into the forest so that he could have a better opportunity to perpetrate his wrongful act. In the premise, we concur with the State that a sentence of twenty (20) years is the proper and just sentence for the defilement perpetrated by the appellant in this case.

16. The upshot is that the appeal against sentence fails and is hereby dismissed. The record shows that the appellant had spent fifteen (15) days in lawful custody before he was released on bond (between 6th July, 2014 when he was arrested and 22nd July, when his bond was approved). Therefore, in compliance with section 333(2) of the Criminal Procedure Code, we direct that these period shall be taken into account when computing the appellant's sentence.

17. Orders accordingly.

DATED AND DELIVERED AT KISUMU 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR