Oduor v Republic (Criminal Appeal 32 of 2019)
[2024] KECA 218 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KECA 218 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 32 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 29, 2024

BETWEEN

ERICK OKOTH ODUOR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Siaya (R.E. Aburili, J) dated 18th February 2019inSiaya High Court Criminal Appeal No. 34 of 2018)

JUDGMENT

1. Before us is the appellant Erick Oduor's second attempt to have the sentence of 15 years imprisonment meted on him set aside, following his conviction for the offence of defilement of LA[1], a child aged 17 years, contrary to section 8(1) as read with section 8(4) of the Penal Code. The incident giving rise to the charges took place on the 19th of July 2018 in Ugunja sub-county within Siaya county.

2. The appellant was in a relationship with LA, who had disappeared from her parents' home. Eventually both the [1] Initials LV used to protect the identity of the minor appellant and LA were apprehended, and they admitted to having had sexual relations. The appellant, upon being arraigned in the magistrate's court at Ukwala, pleaded guilty to the charge of defilement and was convicted on his plea of guilty. In mitigation, he stated that LA was his girlfriend, and he had not forcefully had intercourse with her; and that she had agreed to go to school the following day. He was sentenced to serve 15 years in prison.

3. Dissatisfied with the decision the appellant appealed to the High Court citing grounds that he was not in the right state of mind when the plea was being read to him; not all facts were considered when the judgment was being read; none of the witnesses including the complainant testified in the case; and that he was never given enough time to prepare for the case. So he prayed for a re-trial for the full facts to be considered.

4. When the matter was scheduled for hearing before the High Court, the appellant filed his amended grounds of appeal asserting that he had not been given ample time to prepare himself during the plea and that the trial court went ahead to sentence him without a warning; that the trial court erroneously convicted him without considering that the entire prosecution case was insufficient and unsatisfactory in law, as medical evidence produced in court exonerated him from the alleged offence.

5. The appeal was opposed by the State. In her judgment, the learned judge pointed out that:

> " I have considered this appeal against a plea of guilty. Section 348 of the Criminal Procedure Code provides that no appeal shall be allowed in the case of an Accused persons who has pleaded guilty and has been convicted on that plea by a subordinate Court, except to the extent of or legality of the sentence. I have considered Section 8 (4) of the *Sexual Offences Act* and it provides that a person who commits an offence of Defilement with a Child between the age of sixteen and 18 years is liable upon conviction to imprisonment for a term of not less than 15 Years."

6. The trial judge noted that the complainant was 17 years old and though she willingly had sexual intercourse with the appellant, who was her 25 year old boyfriend, she lacked the capacity to consent; that the appellant should have known better; and a retrial would not sanitize that fact. Consequently, the plea on a retrial was declined; and the appeal was dismissed for lack of merit.

7. The appellant was once again dissatisfied with the decision by the High Court and he filed his memorandum of appeal dated 21st February 2019 in this Court. He contends that the learned judge erred in law by upholding the sentence of 15 years without considering the provisions of Article 50(2)(p) of *the Constitution*; upholding his conviction and sentence without noting that the plea was equivocal and failing to note that he did not explain the facts leading to the commission of the said offence.

8. During the plenary hearing of the matter on the 15th of November 2023, the appellant appeared in person whereas Miss Busienei was present for the State.

9. The crux of the appellant's argument against sentence is drawn from a plethora of emerging jurisprudence, that the mandatory minimum is no longer considered constitutionally permissible. He asks us to set aside the minimum 15 years sentence imposed on him and substitute it with a more appropriate term. The appellant relied entirely on his written submissions dated 3rd November 2023, in which he urged us to find that imposing the mandatory minimum sentences was unconstitutional and smirked of discrimination against persons charged under the *Sexual Offences Act*, as they are statutorily denied the opportunity to mitigate on the nature of sentence to be meted out.

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 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 no 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".

9. The appellant is persuaded that although the mandatory minimum sentence was meted out on the strength of a legislative enactment, this Court can interfere with it; and he reiterates that such sentences have since been declared unconstitutional, if meted out.as the only available options.

1. In opposing the appeal, Miss Busienei submits that the plea was unequivocal. Drawing from Kariuki v. R. (1954) EA 445, she argues that the procedure and how the plea was entered was strictly followed; thereafter a sentence which was within the law as provided was meted; thus the appellant had failed to demonstrate any illegality; and there was no error on the part of the learned judge. We are, thus, urged not to interfere with the conviction and sentence.

11. We have considered the submissions by both parties.

Being a second appeal, under section 361 of the Criminal Procedure Code, our mandate is confined to a consideration of matters of law, and not interfere with the concurrent findings of fact arrived at in the two courts below, unless the finding was based on no evidence.

12. The appellant's main contention is that the sentence was harsh in the circumstances. The appellant pleaded guilty to the charge; and we are therefore guided by section 348 of the Criminal Procedure Code which bars an appellant from appealing on conviction save on the extent and legality of the sentence.

13. With regard to the sentence, section 8 (4) of the *Sexual Offences Act* provides that a person who commits an offence of defilement with a child between the age of sixteen and 18 years is liable upon conviction to imprisonment for a term of not less than 15 Years. Indeed, the issue of mandatory sentences has been addressed in recent jurisprudence. For instance, in Philip Mueke Maingi & 5 others v Director of Public Prosecutions and another [2022] KEHC 1318 (KLR), Odunga J, (as he then was) expressed the view that:

> " ...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."

14. This was closely followed by the case of Edwin Wachira and 9 Others -vs- Republic, High Court at Mombasa Consolidated Petitions Nos. 97, 88, 90 and 57 of 2021, in which Mativo J. (as he then was), agreeing with Odunga, J. stated that irrespective of the offence, a law that takes away judicial discretion can only be regarded as harsh and unjust; the trial process does not stop at convicting the accused, as sentencing is a crucial component of a trial when the court hears submissions that impact on sentencing, and therefore the principle of fair trial must be accorded to the sentencing stage too.

15. We share the sentiments expressed by the learned judge. Mitigation is an important congruent element of fair trial; and 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.

16. In this instance, although in their romance-filled world, the appellant and LV were lovers engaging in consensual adult conduct, albeit with lack of legal capacity to consent on the part of LV, the learned judge felt inhibited to individualize the circumstances of the offence or offender, due to the mandatory minimum provision; and all she could say, was that the appellant ought to have known better as society had put him in a position of trust, and to be responsible over LV. With greatest of respect to the learned judge, this was not some sort of familial responsibility laden relationship, it was boy-meet-girl, fall-in-love, indulge-their-raging-hormones, but-don't-drop-out-of-school arrangement." That is why the appellant repeatedly stated that the next morning LV was to go to school.

17. Of course it was legally unacceptable conduct, but did it warrant 15 years in prison? We share the view expressed by Mativo, J, that a rigid application of the penalty under the *Sexual offences Act* may easily result in the undesirable effect of 'over punishing' the offender. There can be no gain-saying that there has been a shift in the Court's jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*. Certainly, this trend is attributable, indirectly, to the Supreme Court's decision in Karioko Muruatetu & Another v Republic, [2017] eKLR (Muruatetu 1), which ushered a flood of decisions departing from fidelity to the minimum and mandatory sentences in sexual offences. Following the floodgates that seemed to have run amok with the decision in Muruatetu 1, the Supreme Court gave directions on 6th July 2021 in the case of Francis Karioko Muruatetu & Another vs. Republic; Katiba Institute & 5 Others; (Amicus Curiae) [2021] e KLR (Muruatetu II), the learned judges clarified that:

> " It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with *the Constitution*. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.
>
> (15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

18. Subsequently the jurisprudence impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases has found expression in such as Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and Edwin Wachira & Others v 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.

19. Clearly from the record, in meting out the 15-year 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; and the appellant should have known better.

20. The discriminatory aspect of the mandatory minimum sentence in sexual offences found expression when this Court rendered itself in *Julius Kitsao Manyeso -vs- Republic (Criminal Appeal 12 of 2021 [2023] KECA 827 (KLR),* that there was unjustifiable discrimination which was repugnant to the principle of equality before the law, in the imposition of mandatory sentence as it denied a convicted person an opportunity to be heard in mitigation. Actually, it renders the entire concept of plea in mitigation meaningless. As aforesaid, the rationale in a variety of decisions post Muruateteu II in relation to offences under the *Sexual Offences Act* is that the mandatory nature of the minimum or maximum sentence, takes away the power of the court to exercise its discretion.

21. Taking into account the circumstances in this matter, we echo the sentiments expressed by Mativo, J. that each case ought to be considered individually taking into account the peculiar characteristics of each individual, thus maintaining the dignity of each person as provided under Article 28 of *the Constitution*. Certainly the scenario where a young male adult and a young girl at the brink of exiting teenage, choose to sample pleasures of the flesh, is totally different from a fully mature man who lures a young teenage girl with goodies; or even forces her to indulge in adult conduct against her will or better judgment. The appellant stated:

> " L was my girlfriend, I asked her about her age. She said she was 17 years old. That is why I say I never forced her into sex. I now know that it is wrong to have sex with a 17 year old girl"

22. From the foregoing, we find that the circumstances in this case warrant exercise of our discretion in favor of the appellant. We thus allow the appeal, set aside the sentence and substitute it with a 5 years imprisonment, which shall be computed from 23/7/2018, being the date of the appellant's 1st appearance in court the appellant having remained in remand from that date. The appeal on sentence thus succeeds.

DATED AND DELIVERED AT KAKAMEGA ON THIS 29TH DAY OF FEB. 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