Telewa v Republic (Criminal Appeal 85 of 2019)
[2024] KECA 217 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KECA 217 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 85 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 29, 2024

BETWEEN

ALISI TELEWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kakamega, (W. Musyoka, J.) dated and delivered on 7th February, 2019 in Kakamega High Court Criminal Appeal No. 100 of 2015)

JUDGMENT

1. Alisi Telewa, the appellant herein was tried and convicted by the SRM's Court at Kakamega of defilement of a seven-year-old girl and sentenced to life imprisonment. His appeal to the High Court was dismissed against both conviction and sentence. He appealed to this Court against both conviction and sentence. When the appeal came up before us for hearing on 26th February 2024, he abandoned his appeal against conviction and opted to proceed with the appeal against sentence only.

2. In support of his appeal the appellant argued two grounds ofappeal in regard to sentence. First, that the life sentence that wasimposed upon him was harsh and excessive given his age which was 76 years. Second, that the indeterminate life sentence that was imposed upon him is unconstitutional and does not give him an opportunity to reform, nor does it give him any hope of possible release.

3. During the trial, the complainant, a minor whose age was stated as seven years, and whose evidence the trial magistrate found consistent with that of her grandmother and that of Sifuna Kizito, a Senior Clinical Officer at Malaba District Hospital, identified the appellant whom she referred to as Khuhu (meaning grandfather), as the person who had defiled her. Sifuna Kizito who examined the minor found that the walls of her vagina allowed one finger on high vaginal swab for microscopy, and that

there were epithelial cells and pus cells that were seen on the vaginal swab, confirming that there had been penetration of her vagina.

4. The appellant, upon conviction on 4th September, 2015, stated in his mitigation that he was 68 years old, and had two children and one sister who depended on him. The trial magistrate was also requested to treat the appellant as a first offender. The trial magistrate, in sentencing the appellant to life imprisonment, did not make any reference to the appellant's mitigation nor did she make any comments that demonstrated the exercise of her discretion.

5. In dismissing his appeal against sentence, the learned Judge of the first appellate court noted that the appellant had been convicted of defiling a minor whose age was 12 years and was lucky to have been sentenced to 15 years' imprisonment when the sentence ought to have been that of life imprisonment. Clearly, the learned judge misapprehended the facts and misdirected himself, as the appellant was convicted of defiling the complainant whose age was proved to be 7 years. Moreover, the appellant was not sentenced to 15 years' imprisonment, but was sentenced to life imprisonment as provided under Section 8(2) of the *Sexual Offences Act*. The learned Judge therefore failed to properly address the appellant's appeal in regard to sentence.

6. Notwithstanding the minimum sentence of life imprisonment provided under Section 8(2) of the *Sexual Offences Act*, the appellant is faulting the High Court and the trial court for failing to exercise discretion in considering the sentence that was imposed against him, claiming they did not take his mitigation, that included his age, into account.

7. Section 361 of the *Criminal Procedure Code* limits the jurisdiction of this Court on second appeal to matters of law only and severity of sentence is identified as a matter of fact. The court can only hear an appeal in regard to sentence where a matter of law arises. In this case a matter of law arises regarding the exercise of the trial court's jurisdiction in sentencing as the first appellate court which had the jurisdiction to consider the appellant's mitigation and the exercise of the trial court's discretion in sentencing, failed to do so. This was further aggravated by the misapprehension of the first appellate court of the relevant facts regarding the sentence. It is for this reason that we find it necessary to intervene.

8. Under Rule 33 of the *Court of Appeal Rules* this Court has general powers in hearing any appeals as far as its jurisdiction permits.

> "(a) to confirm, reverse or vary the decision of superior court;
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> b. to remit the proceedings to superior court with such directions as may be appropriate; or
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> c. to order a new trial, and to make any necessary incidental or consequential orders including orders as to costs."

9. The issue is how should we intervene in this matter? Should we remit this matter back to the High Court for the High Court to do that which it ought to have done but failed to do? Or should we do that which the High Court ought to have done by reconsidering the exercise of discretion by the trial court, the fairness and adequacy of the sentence that was imposed upon the appellant?

10. While it would have been desirable to have the matter remitted back to the High Court for it to properly address the appeal in regard to sentence, we have taken note of the age of the appellant who stated he was 76 years old, and the fact that the sentence was imposed upon him almost 10 years ago. Remitting the matter back to the High Court would have the undesirable effect of unduly delaying the finalization of this appellate process. In addition, we note that the appellant has raised a pure point of law regarding

the legality of the sentence of life imprisonment that was imposed upon him. This is a matter that would be appropriate for us to address.

11. On the issue of the exercise of discretion by the trial court, it is evident that the trial court did not consider the mitigation of the appellant as she made absolutely no reference to it. She imposed the sentence of life imprisonment as a matter of course. We appreciate that Section 8(2) of the *Sexual Offences Act* that provides the penal sanction in regard to the offence which the appellant was convicted, provides a mandatory sentence of life imprisonment. Nevertheless, a trial court has a responsibility to properly exercise its discretion in sentencing, by taking note of the circumstances before it.

12. In *Kevin Odhiambo v Republic*. Cr Appeal No 144 of 2018 (UR), this Court addressing the development of jurisprudence in regard to mandatory minimum sentences under the *Sexual Offences Act*, had this to say:

> "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), in which Odunga J. (as he then was) first addressed the issue of the mandatory nature of sentences in the *Sexual Offences Act*, and *Edwin Wachira & Others v Republic* – Mombasa Petition No. 97 of 2021, (Mativo J. (as he then was)), in which 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. Further, we take note of this Court's decision in *Joshua Gichuki Mwangi v Republic* [2022] eKLR, wherein it was held that the mandatory minimum sentences under the *Sexual Offences Act* is unconstitutional."

13. Needless to state that mandatory minimum sentences in sexual offences are unconstitutional to the extent that they inhibit the exercise of discretion by the trial court. In addition, this Court in *Julius Kitsao Manyeso v Republic* (Criminal Appeal No 12 of 2021) [2023] KECA 827 (KLR), held that indeterminate life sentence is unconstitutional. For these reasons, we find that the sentence of indeterminate life imprisonment that was imposed upon the appellant was unconstitutional and we must therefore interfere with the exercise of discretion by the trial Court.

14. Having taken note of the appellant's current age and the mitigation which was before the trial magistrate, and also bearing in mind the seriousness of the offence which was committed by the appellant, the complainant being a seven-year-old girl, who trusted the appellant as a grandfather, we set aside the appellant's life sentence and substitute thereto to a sentence of 20 years' imprisonment. To this extent only does the appeal succeed.

It is so ordered.

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

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JUDGE OF APPEAL

I certify that this is

a true copy of the original

DEPUTY REGISTRAR