Akhonya v Republic (Criminal Appeal 269 of 2019)
[2024] KECA 327 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 327 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 269 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

MARCH 15, 2024

BETWEEN

STEPHEN MAJENGO AKHONYA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Kakamega (Majanja, J.) dated 1st September, 2017 in HCCRA No. 241 of 2011)

JUDGMENT

1. The appellant, S M A, was convicted, on his own plea of guilty, by the Magistrate's Court in Vihiga of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, 2006. The trial court sentenced him to fifty years imprisonment upon conviction.

2. Dissatisfied, the appellant challenged both his conviction and sentence to the High Court. In a judgment dated and delivered on 1st September, 2017, the High Court sitting in Kakamega (Majanja, J.) dismissed his challenge on conviction. At the same time, the learned judge enhanced the sentence imposed to life imprisonment. In doing so, the learned Judge reasoned that life imprisonment was the sole penalty prescribed under section 8(2) of the *Sexual Offences Act*. It was, thus, the Judge concluded, a misdirection for the learned magistrate to have imposed a sentence lower than life imprisonment.

3. Before this Court, the appellant filed a Memorandum of Appeal which persisted in his challenge of both conviction and sentence. However, when he appeared before us for plenary hearing, the appellant withdrew his appeal against conviction. He made it clear that he only wished to challenge the mandatory sentence of life imprisonment as imposed upon him by the High Court.

4. As reframed, the respondent, represented by Ms. B, Senior Prosecution Counsel, conceded to the appeal. Drawing from our recent jurisprudence on the subject, Ms. B urged us to set aside the sentence

of life imprisonment imposed by the High Court and, instead, impose a term sentence of thirty (30) years imprisonment.

5. We agree with both the appellant and the respondent that the sentence of life imprisonment as imposed by the High Court cannot stand for two reasons. First, as the High Court expressed, it considered itself shackled by the mandatory minimum sentence imposed by section 8(2) of the *Sexual Offences Act*. As such, the learned Judge was disabled from exercising his discretion in imposing an appropriate sentence in the individual circumstances of the case. Second, the High Court imposed an indeterminate life sentence.

6. We consider both these issues as matters of law – and not just issues of severity of sentence. As such, they are appropriate subjects within our jurisdiction as a second appellate Court under section 361(a) of the *Criminal Procedure Code*. See *Samuel Warui Karimi vs. Republic* [2016] eKLR.

7. Our emerging jurisprudence has announced that the statutory fettering of sentencing courts with mandatory minimums under the *Sexual Offences Act* is unconstitutional. See, for example, *Joshua Gichuki Mwangi v Republic NYR* (Court of Appeal) Criminal Appeal No. 84 of 2015 (unreported); and *Julius Kitsao Manyeso v Republic* -Malindi (Court of Appeal) Criminal Appeal No. 12 of 2021.

8. Additionally, our most recent jurisprudence has similarly declared life imprisonment as unconstitutional due to the indeterminate nature of the sentence. See *Frank Turo v. Republic* - Kisumu Criminal Appeal No. 157 of 2017 and *Evans Nyamari Ayako v. Republic* – Kisumu Criminal Appeal No. 22 of 2018.

9. In the *Evans Nyamari Ayako Case*, this Court, in applying Articles 27 and 28 of *the Constitution* to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.

10. Consequently, we must allow the appellant's appeal herein to the extent that we declare that the mandatory nature of the sentence of life imprisonment which was imposed on him by dint of section 8(2) of the *Sexual Offences Act*, is unconstitutional. So is the indeterminate term of the life imprisonment actually imposed on him.

11. In the specific circumstances of this case, however, we would agree with the respondent that the objective seriousness of the case and the aggravating circumstances make the life sentence a commensurate sentence: the survivor of the ordeal was a girl of extreme tender years at 8 years old; and the atrocity committed on her resulted in extensive damage and impact to her. The offence called for a stiffly deterrent sentence; one that signals the society's opprobrium to the conduct of the appellant as it reflects the inherent seriousness of the offence.

12. In that regard, in accordance with our decision in *Evans Nyamari Ayako v Republic* (*supra*), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal; on sentence to the extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be computed to begin on 17th July, 2008 in accordance with section 333(2) of the *Criminal Procedure Code* since the appellant was in custody since that day.

13. Orders accordingly.

DATED AND DELIVERED AT KAKAMEGA THIS 15TH DAY OF MARCH, 2024.

HANNAH OKWENGU

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.. JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR