Maliazo v Republic (Criminal Appeal 252 of 2019)
[2024] KECA 326 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 326 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 252 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

MARCH 15, 2024

BETWEEN

JOEL NGATIA MALIAZO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Busia (W. Kiarie, J.) dated 18th July, 2017 in Busia Criminal Appeal No. 22 of 2016)

JUDGMENT

1. Joel Ngatia Maliazo, the appellant herein, was tried and convicted by the Chief Magistrate's Court in Busia of the offence defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. He was sentenced to life imprisonment as the victim of the offence was a five-year-old girl.

2. The appellant appealed to the High Court against his conviction and sentence. The High Court dismissed the appeal against conviction but allowed the appeal against sentence to the extent of setting aside the sentence of life imprisonment and substituting thereto a sentence of 20 years' imprisonment. This was in recognition of the fact that section 8(3) of the *Sexual Offences Act*, which is the penal section under which the appellant was charged, provides for a minimum sentence of 20 years' imprisonment.

3. The appellant has now appealed to this Court against sentence only. He urges the Court to be merciful to him, as he has children and he needs the opportunity to educate them.

4. Learned counsel Ms. Busienei of the ODPP, who appeared for the respondent, opposed the appeal urging that the sentence was sufficient taking into account that the victim was five years old.

5. We have considered this appeal and do note that the complainant was a five-year-old girl, and the appellant should have been charged under section 8(1) as read with 8(2) of the *Sexual Offences Act* which provides for a sentence of life imprisonment. No doubt the appellant benefited from the laxity

of the prosecution in charging him under section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The learned judge of the High Court cannot be faulted for reducing his sentence to a term of 20 years' imprisonment.

6. Under section 361(1) of the *Criminal Procedure Code*, the jurisdiction of this Court on second appeal is limited to consideration of matters of law only. As severity of sentence is under section 361(1)(a) defined as a matter of fact, it is excluded from this Court's jurisdiction. Nevertheless, as the High Court interfered with the sentence that was imposed upon the appellant by the trial magistrate, on the grounds that it was an illegal sentence the legality of the sentence that was imposed by the learned Judge becomes an issue of law that is open for consideration by this Court.

7. As we have already stated, the sentence of life imprisonment that was imposed upon the appellant was indeed an illegal sentence as the trial magistrate used section 8(2) and not section 8(3) of the *Sexual Offences Act*, which is the penal section under which the appellant was charged. The learned Judge was, therefore, at liberty to substitute the illegal sentence with an appropriate sentence, but in so doing it was incumbent that the learned Judge of the High Court properly exercise the discretion in sentencing as would have been expected of the trial magistrate.

8. The sentence of 20 years' imprisonment that was imposed by learned Judge was the minimum sentence provided under section 8(3) of the *Sexual Offences Act*. The jurisprudence that is now gaining ground is that minimum sentences under the *Sexual Offences Act* are inimical to the exercise of discretion by the trial court (see *Maingi & 5 others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR); *Edwin Wachira & Others v Republic* – Mombasa Petition No. 97 of 2021).

9. We note that in substituting the sentence of life imprisonment and sentencing the appellant to 20 years' imprisonment, the learned Judge did not make any reference to the appellant's mitigation nor did he refer to the circumstances in which the offence was committed. This is an error on the part of the learned Judge, that calls for our intervention.

10. Before us the appellant has pleaded for leniency urging that he should be given an opportunity to go and take care of his children. We have noted this plea which must be considered in light of the circumstances of the offence that led to his incarceration. The appellant defiled an innocent five-year-old girl causing her untold anguish including anal bleeding and rectal prolapse. Given these facts, the appellant's action was heartless, heinous and deserving of a deterrent sentence. Had the learned Judge properly directed himself and taken into account all the circumstances, we believe he would have come to the same conclusion that the minimum sentence of 20 years' imprisonment was appropriate. We do not, therefore, find any justification for reducing the sentence.

11. Accordingly, we dismiss the appeal against sentence but order that section 333(2) of the *Criminal Procedure Code* should be applied so that the sentence of 20 years shall run from 15th March, 2016, which is the date when the appellant was first arraigned in court.

Orders accordingly.

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

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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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