Owiti v Republic (Criminal Appeal 108 of 2018)
[2024] KECA 298 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 298 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 108 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MARCH 15, 2024

BETWEEN

ALFRED OUMA OWITI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (T. W. Cherere, J) dated 13th July 2017inH.C Criminal Appeal No. 34 of 2016)

JUDGMENT

1. The appellant, Alfred Ouma Owiti, was convicted by the Senior Resident Magistrate's court at Tamu of the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. He was sentenced to life imprisonment in accordance with Section 8(2) of the *sexual Offences Act*.

2. His appeal to the High court against conviction was dismissed and the sentence of life imprisonment upheld. He is now before us in this second appeal in which he has appealed against sentence only.

3. He is seeking reduction of the sentence that was imposed upon him, pleading that he was doomed in the trial as he had no defence witnesses and therefore opted to keep quiet. He pleads that he has been in custody for a long time and that the prison environment is not a place for "permanent settlement."

4. The respondent relied on written submissions that were prepared by Mr. Patrick Okango, a Senior Prosecuting counsel in the office of the ODPP. Mr. Okango submits that this being a second appeal, the jurisdiction of this Court is limited by Section 361 of the *Criminal Procedure Code* to matters of law only.

5. In regards to the appeal against sentence, Mr. Okango, concedes that the sentence of life imprisonment under Section 8(2) of the *Sexual Offences Act* is a mandatory sentence, and refers to the recent

jurisprudence in the High court and this Court (See *Maingi & 5 others v. Director of Public Prosecution and Another*) Petition E017 of 2021 [2022] KEHC 13118; *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 (unreported)),in which it has been held that life sentence is unconstitutional. Mr. Okango, therefore concedes to the Court setting aside the life sentence, but prays that the same be substituted with a sentence of 30 years' imprisonment, as the victim was a six-year-old girl at the time of the incident and the appellant expressed no remorse.

6. The circumstances of this case as confirmed by the concurrent findings of the two lower courts was that the appellant defiled the complainant whose age was confirmed as six years. The medical evidence reveal that he not only penetrated the sexual organ of the complainant but also caused her injuries on both labia, and her hymen was freshly torn. The matter was aggravated by the fact that the appellant was actually positive for HIV and therefore there was risk of the minor being infected. Under these circumstances, the appellant deserved a deterrent sentence and the sentence of life imprisonment was appropriate.

7. Mr. Okango has appropriately referred to the emerging jurisprudence regarding minimum sentences in the *Sexual Offences Act*, and the indeterminate nature of life imprisonment. In Evans Nyamari Ayako v Republic Kisumu (Court of Appeal) Criminal Appeal No. 22 of 2018, we considered the authorities Mr Okango has referred to, and concluded that the indeterminate nature of life imprisonment falls afoul of the provisions of Article 27 and 28 of *the Constitution*. In the same decision, having reviewed comparative jurisdiction from several jurisdictions we concluded as follows:

> "25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.
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> 26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

8. Applying the reasoning to the present situation, we hereby set aside the sentence of life imprisonment that was imposed on the appellant and substitute thereto a term sentence of 30 years' imprisonment. In accordance with Section 333 (2) of the Criminal Procedure Code, the prison term shall be effective from 6th August, 2015 when the appellant was first arraigned in court.

It is so ordered

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

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.