Wamalwa v Republic (Criminal Appeal 273 of 2019)
[2024] KECA 301 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 301 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 273 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

MARCH 15, 2024

BETWEEN

MOSES WAMALWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma (Wendoh, J.) dated 23rd November, 2018 in HCCRA No. 136 of 2014)

JUDGMENT

1. Moses Wamalwa, the appellant, is before us on a second appeal. His first appeal to the Bungoma High Court was dismissed by Wendoh J. in a judgment dated 23rd November, 2018. In that appeal, he had contested both his conviction and sentence by the trial court in Bungoma Chief Magistrate's Criminal Case No. 1210 of 2013. His appeal before us is confined only to sentence.

2. The appellant has listed seven grounds of appeal. Reproduced verbatim, they are as follows:

    1. That the sentence I am serving is harsh and excessive.

    2. That the appellant was not accorded a fair trial in sentencing when the trial magistrate and the learned Judge felt that they lack direction in sentencing.

    3. That both courts below failed to observe that section 333 (2) of the Criminal Procedure Code was not applied to my sentence and therefore violated article 50 (2) (p) of the *Constitution*.

    4. That the mandatory minimum sentences of *sexual offences act* has been declared to be unconstitutional.

    5. That the court pleased to interfere with the sentence reduce it.

6. That both courts below erred in law when they failed to observe that I was first offender and never was a worst kind of offender.

7. That mitigation was not considered.

3. In the trial court, the appellant had been charged with, and was convicted of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars were that he defiled B.A., a girl aged 14 years old by inserting his penis into her vagina. Upon conviction, the learned magistrate sentenced him to twenty (20) years imprisonment.

4. It is clear that all the grounds of appeal the appellant has framed target the sentence imposed by the trial court and affirmed by the High Court. His complaints against the sentence before us as culled from his self- crafted submissions are really two-fold:

   a. First, that the trial court imposed the sentence of twenty-years imprisonment as a prescribed statutory minimum and did not, therefore, exercise discretion.

   b. Second, that if the trial court had exercised discretion and had not considered the statutory minimum as binding on it, it would have likely pronounced a different and more lenient sentence given the circumstances of the case.

5. The circumstances of the case which the appellant says would have militated in favour of a more lenient sentence, are that he was remorseful; that he did not act maliciously towards the victim; and that he was a first offender.

6. The appellant also urges us to consider and discount the time he was in remand during the pendency of his trial.

7. The State has opposed the appeal on the simple ground that in the DPP's view the sentence imposed was commensurate with the gravity of the offence committed given the age of the victim. The victim was fourteen years old.

8. In considering the appellant's appeal against sentence, we are mindful of our remit as a second appeal court. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact over which there are concurrent findings of the two courts below. For purposes of this section, severity of sentence is defined as a matter of fact. See *Samuel Warui Karimi vs. Republic* [2016] eKLR.

9. However, as the appellant correctly points out, this appeal falls for our consideration owing to the shift in our jurisprudence on the imposition of mandatory minimum sentences prescribed in the *Sexual Offences Act*. That shifts amounts to a matter of law and, consequently, within our remit.

10. The shift finds its provenance in the Supreme Court's decision in *Karioko Muruatetu & Another vs. Republic*, Petition No. 15 of 2015 (Muruatetu 1). This jurisprudence found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in *Maingi & 5 others vs. Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) supra and *Edwin Wachira & others vs. Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was), wherein 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.

11. In this case, the facts relevant to sentencing are as follows. The appellant was the survivor's neighbour. The survivor sold the appellant sugarcane the day before the incident and the appellant promised to pay for it later. The following morning, the appellant called the survivor to his house. She obliged, thinking that he wanted to give her the money for the sugarcane. Instead, he defiled her. It is unclear, and it was irrelevant for purposes of conviction, whether the appellant used subterfuge to achieve compliance from the survivor. The bottom line is that they had sex. A neighbour suspected what was going on and rushed to the appellant's house. The appellant was, so to speak, caught in flagrante delicto.

12. In sentencing the appellant to 20 years imprisonment, the trial court stated that:

> "I have considered the mitigation of the Accused. However....the *Sexual Offences Act*, 2006 is specific as [to] the sentence to be imposed. The Accused is sentenced to serve 20 years imprisonment."

13. Likewise, in affirming the sentence, the High Court judge observed that:

> " Under section 8(3) of the *Sexual Offences Act*, where the victim of defilement is between the age of 12 years and 15 years, one is liable, upon conviction, to imprisonment for a term of not less than 20 years imprisonment. The appellant was handed the minimum sentence under the said section and this court has no discretion to reduce it."

14. It is, therefore, quite obvious that both the trial court and the High Court felt hamstrung by the prescribed minimum sentence imposed by the *Sexual Offences Act*. As pointed out above, our jurisprudence no longer considers those statutory minimum sentences in the *Sexual Offences Act* as ironclad straitjackets unamenable to judicial discretion in appropriate cases. Instead, our jurisprudence now requires the sentencing court to consider the circumstances of the offence, offender and victim – both extenuating and aggravating – before pronouncing individualized sentence. To the extent that the two courts below were bereft of discretion to fashion an appropriate sentence, the decision on sentence is reviewable on appeal to this Court.

15. In the present case, we note that the offence is an objectively serious one given that the complainant was a school-going child. On the other hand, we also note that the appellant did not use depravity in the commission of the offence; is genuinely remorseful as reflected by his concession on conviction and preferring an appeal only against sentence. He is, also, a first offender.

16. Taking all these factors into consideration, we revise the sentence imposed to eighteen (18) years imprisonment. We note that the appellant has been in custody since 25th June, 2013 when he was first arraigned. By dint of section 333(2) of the *Criminal Procedure Code*, we order that his sentence shall be computed to run from that day.

17. 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