Wasike v Republic (Criminal Appeal 201 of 2019)
[2024] KECA 325 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KECA 325 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 201 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

MARCH 15, 2024

BETWEEN

WYCLIFE REMI WASIKE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Bungoma, (Sitati, J.) dated 13th May, 2019 in HCCRA No. 11 of 2016)

JUDGMENT

1. Wyclife Remi Wasike, who is the appellant before us, was tried and convicted by the Senior Resident Magistrate court at Kimilili for the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. He was sentenced to life imprisonment. His appeal to the High court against both conviction and sentence was dismissed.

2. The appellant is now before us in this second appeal in which he is appealing against sentence only. He has filed what he calls amended supplementary grounds of appeal and written submissions. In a nutshell, the appellant contends that he was sentenced to the mandatory minimum sentence of life imprisonment which was excessive as he was a first offender. Citing this Court's decision in *Julius Kitsao Manyeso v. Republic* Malindi Criminal Appeal No. 12 of 2021, he maintains that the sentence is excessive, cruel, degrading and unconstitutional because of its indeterminate nature. He informs the Court that while in prison he has gone through training and he is ready to be integrated into the society so that he can help his family and the community at large. He also urged the Court to consider his mitigation before the trial court during sentencing and to apply the provisions of section 333(2) of the *Criminal Procedure Code* which provides that time spent in custody by a prisoner before his conviction, should be taken into account in computing his sentence.

3. Mr. Oyiembo of the office of the ODPP, who appeared for the prosecution, opposed the appeal and relied on written submissions which he had filed. He maintains that the sentence that was imposed upon the appellant was proper given the gravity of the offence. He concedes that section 333 (2) of the *Criminal Procedure Code* should be applied.

4. The circumstances leading to the appellant's conviction as established by the concurrent findings of the two lower courts were that: the complainant, an eight (8) year old girl, went to the appellant's home to collect some shoes which had been taken to him for repairs. The appellant, who was standing by the door, asked the complainant to get into the house to pick the shoes. He then followed the girl into the house, locked the door behind him and, tore off the complainant's innerwear, removed his trousers and defiled the girl. He then gave the underwear back to the girl and threw her out of the house. The girl reported the matter to her mother. She was taken to the police station then escorted to Naitiri Hospital where she was examined and a P3 form filled by the clinical officer confirming that she had lacerations on the labia minora and partially tone hymen. The complainant was later examined for age assessment using dental formula and her age was assessed as 8 years.

5. In sentencing the appellant, the trial magistrate noted that she had considered his mitigation, but unfortunately, the sentence according to the statute is mandatory and he, therefore, sentenced the appellant to life imprisonment.

6. In dismissing the appeal against sentence, the learned Judge of the High Court noted that the complainant's age having been established to be 8 years old, the prescribed sentence under section 8(2) of the *Sexual Offence's Act* for conviction of an offence under section 8(1) of the *Sexual Offences Act* is life imprisonment. She noted that there was need to have the sentences under the *Sexual Offences Act* reviewed to give the sentencing court the discretion to mete out a sentence that is commensurate with the gravity of the circumstances of the case.

7. Section 361 of the *Criminal Procedure Code* provides that severity of sentence is a matter of fact, and this is not open for our consideration in a second appeal as our appeal is limited to issues of law. However, it is evident that both the trial magistrate and the learned Judge of the High Court felt hamstrung by the mandatory sentence provided under section 8(2) of the *Sexual Offences Act*. That is to say, that the trial magistrate did not exercise her discretion as required and this calls for our intervention.

8. As was stated by this Court in *Benard Kimani Gacheru v Republic* [2002] eKLR:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

9. As the trial court did not properly exercise its discretion, this Court has jurisdiction to re-examine the sentence that was imposed on the appellant. Given the circumstances that were before the trial court, including the age of the complainant, the gravity of the offence that was committed by the appellant cannot be underrated. An eight-year- old girl was subjected to sexual violation of the worst kind. We agree with Mr. Oyiembo that the appellant deserves a deterrent sentence and the life sentence provided

by the trial magistrate under section 8(2) of the *Sexual Offences Act*, though a mandatory sentence was appropriate.

10. In accordance with this Court's decision in *Evans Nyamari Ayako v R* (Kisumu Crim. Appeal No. 22 of 2018), the indeterminate nature of the sentence of life imprisonment is unconstitutional and, therefore, we substitute the sentence of life imprisonment to 30 years' imprisonment. In addition, in accordance with section 333(2) of the *Criminal Procedure Code* the sentence will take effect from 27th November 2013 when the appellant was fist arraigned in court and remanded in custody as he remained in remand until his case was finalized.

    Those shall be the orders of the Court.

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.