Gimandu v Republic (Criminal Appeal E037 of 2023)
[2024] KECA 422 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 422 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL E037 OF 2023

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

APRIL 26, 2024

BETWEEN

PAUL GIMANDU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nairobi (Kimaru, J.) dated 2nd June, 2016 in HCCRA No. 322 of 2012)

JUDGMENT

1. The appellant, Paul Gimandu, was apprehended and arraigned before the Principal Magistrates' Court at Githunguri on a charge of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* (SOA). The particulars of the offence were that on 10th of January 2011, at [particuars withheld] village in Kiambu County, he unlawfully committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of M. N alias N (minor), a girl aged 8 years.

2. In the alternative, the prosecution preferred a charge against the appellant of an indecent act with a female child contrary to section 11 (1) of the *SOA*, the particulars being that on the same day and place, he committed an indecent act with the minor by intentionally causing contact between his genital organ (penis) and the genital organ (vagina) of the minor.

3. The appellant denied both counts and a trial ensued in which the prosecution called seven witnesses in support of its case. Evidence was adduced that on 10th January 2011, when the minor got home from school with her brother, PW4, she went to the appellant's house to get her mathematics book which the appellant's daughter had borrowed. PW4 on the other hand proceeded to the tea plantations to get the house keys from their mother, PW1. The appellant was their next door neighbour. He also worked for the same employer as their mother. The minor testified that when she entered the appellant's house, she found him there. The appellant allegedly held her hand and took her to his bed. He removed her

panty. He also removed his trousers and underwear and put his "thing for urinating" inside her private parts, causing the minor to cry because of the pain that she felt. Amidst the ordeal, her 10-year-old brother, PW4 appeared. On seeing him, the appellant quickly dressed up and went to milk cows.

4. PW4 quickly ran back to the farm to inform his mother, PW1. When they returned home, they found the minor sitting outside their house. PW1 asked her what had happened and she narrated the incident. PW1 checked her private parts and found that she had some whitish substance mixed with blood in her vaginal area. PW1 took the minor to hospital and a report was made to the police. A medical examination of the minor revealed that there was semen on her external genitalia and laceration on the vulva with active vaginal bleeding. The vulva was also swollen and tender to touch. The age of the minor was assessed and she was found to be 9½ years old.

5. The appellant was, on the basis of the foregoing evidence, placed on his defence. He made an unsworn statement denying the charge. He claimed that the reason why he was arrested was because he refused sexual advances from PW1.

6. At the end of the trial, the learned magistrate (R.A.A.Otieno), found the offence of defilement proved beyond reasonable doubt. She proceeded to convict the appellant and sentence him to life imprisonment.

7. Aggrieved by the conviction and sentence, the appellant appealed to the High Court at Nairobi. The appeal was heard by Kimaru, J. (as he then was) who, by a judgment dated 2nd June, 2016 dismissed it and affirmed both conviction and sentence.

8. Still aggrieved, the appellant preferred an appeal to this Court raising these four grounds of complainant in a self-crafted memorandum of appeal;

    1. That the High Court erred in law by failing to consider the inconsistencies and contradictions in the evidence on record.

    2. That the High Court made an error in law by holding that there was no basis for interfering with the judgment of the trial court whereas the law demanded its own independent opinion as a first appellate court.

    3. That the High Court made an error in law by failing to observe that section 169 (1) of the *CPC* was not complied with.

    4. That the conviction was based on evidence that was not proved beyond reasonable doubt.

9. At the hearing of the appeal, however, the appellant did not urge those grounds, which he abandoned, choosing to address us on sentence only. He urged that we should mete out a term sentence of 20 years considering that he had been in custody for 13 years.

10. For the prosecution, Mr. Okeyo, the Senior Assistant Director of Public Prosecutions, contested the appeal on sentence asserting that the life sentence imposed is mandatory. However, upon our drawing his attention to the current jurisprudence of this Court and the High Court, directing that in accordance with the Supreme Court's pronouncement in *Francis Karioko Muruatetu & Anor v. Republic* [2017] eKLR, courts can exercise discretion on an individualized case-by-case basis in determining the appropriate and just sentence, he abandoned the mandatory argument.

11. On the single question of sentence, we address it only as regards its legality since, in a second appeal, our jurisdiction is circumscribed by Section 361 of the *Criminal Procedure Code* and confined to matters of law only, with severity of sentence statutorily stated to be a question of fact.

12. Bearing in mind the *Muruatetu* (*supra*) decision and the sequel thereto in which the Apex Court gave certain directions, the High Court and this Court have pronounced themselves on the unconstitutionality of mandatory minimum sentences in the *SOA* in several cases including, *Maingi & 5 Others v. Director of Public Prosecutions & Another* (petition E017 of 2021) [2022] KEHC 13118 (KLR) and *Joshua Gichuki v. Republic*, Criminal Appeal No. 84 of 2015. In the circumstances, and in view of the Sentencing Policy Guidelines, we are inclined to interfere with the sentence imposed by the Principal Magistrate's Court and upheld by the High Court. We do so considering both the aggravating factors and the appellant's mitigation.

13. As a result, this appeal partly succeeds to the extent that, we set aside the sentence to life imprisonment and substitute therefor with a term of twenty-five (25) years imprisonment to run from the date the appellant was first sentenced.

DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL, 2024.

P. O. KIAGE

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JUDGE OF APPEAL

ALI-ARONI

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR