



**Maingi v Republic (Criminal Appeal E112 of 2023)
[2024] KECA 423 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 423 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL E112 OF 2023
MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA
APRIL 26, 2024**

BETWEEN

MUTISO MAINGI APPELLANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. The appellant, Mutiso Maingi, has filed this appeal challenging the decision of the High Court of Kenya at Machakos (D.K. Kemei, J.) where his first appeal on conviction and sentence was dismissed.
2. The appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act*. The particulars of the offence were that on 5th September, 2016, at Kathiani sub-county Machakos county, the appellant intentionally caused his penis to penetrate the vagina of SNM, a child aged 10 years. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and place, the appellant intentionally touched the vagina of SNM, a child aged 10 years, with his penis.
3. On arraignment before the trial court, the appellant pleaded not guilty to the offences that he was charged with. Upon trial, the appellant was convicted of the offence of defilement and was sentenced to serve life imprisonment.
4. Aggrieved by those findings, the appellant preferred an appeal to the High Court. Upon re-evaluating the evidence, the learned Judge dismissed the appeal and upheld both the conviction and sentence. It is those findings that have galvanized the filing of the present appeal.
5. This being a second appeal, our mandate is confined to a consideration of matters of law by dint of section 361 of the *Criminal Procedure Code*. In addition, this Court will interfere with concurrent findings of fact by the two courts below only if they are not supported by the evidence, or unless based



- on misdirection or errors of law. (See *Omolo & 2 others vs. Republic* [1991] KLR 328 and *Karungo vs. Republic* [1982] KLR 213). The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did (See *Reuben Karari C/O Karanja vs. R* (1956) 17 EACA
6. The appellant filed a memorandum of appeal as well as an amended memorandum of appeal that were both undated. In summary, the appellant disputed the findings of the High Court for the following reasons: that the proceedings at trial did not comply with Articles 25 (c) and 50 (2) (b) (j) of the *Constitution* and section 211 of the *Criminal Procedure Code*; that the prosecution failed to discharge its burden of proof being beyond reasonable doubt since the evidence that was adduced was contradictory and insufficient; and that his defence was not considered. In the premised circumstances, the appellant prayed that the appeal be allowed by quashing the conviction and the sentence be set aside.
 7. When the appeal was heard on 6th December, 2023 through the GoTo virtual link platform, the appellant and respondent highlighted their respective written submissions. The appellant abandoned all the grounds of appeal save the issue of sentencing. He relied on his written submissions as well as his rebuttal submissions to exposit that the sentence meted out was harsh and excessive, taking into account the fact that he was 57 years of age at trial, the principle of human dignity and equality as enshrined in the *Constitution*, and the objects of sentencing as captured in the sentencing policy guidelines. He opined that this Court ought to interfere with the sentence by allowing him to be released from jail since he had already been rehabilitated.
 8. The respondent on its part relied on its written submissions dated 4th December, 2023 to submit that it had discharged its burden of proof to the required standard. Consequently, the appellant was properly convicted and lawfully sentenced. It prayed that the appeal be dismissed.
 9. As stated, the appellant chose to argue his appeal on sentence only. That notwithstanding, we find it prudent to set out the abridged facts of the case and the trial court's findings as set out in the record.
 10. The complainant, PW1, was on the fateful day, at 1800hours, sent by her mother, PW3, to buy flour from the shop in Kauti market. When on the way, the appellant grabbed her from behind, threatened her, covered her mouth with a coat and dragged her to a nearby farm. He proceeded to undress her and then sexually assaulted her. PW1 recognized the appellant as a casual labourer who had previously worked at their homestead sometime in 2011.
 11. In the course of the ordeal, the appellant was caught red handed by PW2, a form IV student and neighbour who was heading home from school. When questioned as to what he was doing, the appellant responded that he was attending to a long call of nature. Irrate as to PW2's inquisitorial nature, the appellant approached him with intent to beat him but in that commotion, PW1 managed to run home. She found PW3, the mother and informed her what had transpired.
 12. PW1 and PW3 went back to the crime scene where they found the appellant in the company of PW2. The mother of the complainant asked the appellant what he had done to her daughter, to which he responded: "It was the work of the devil."
 13. The appellant was arrested by members of the public and escorted to the chief's office. PW5, CI George Kipkoros, accompanied by PW6, PC Timothy Sweta, went to the chief's office after receiving a distress call from the chief. They then took the appellant to Kathiani police station, conducted investigations and recorded witness statements. The appellant was subsequently arraigned in court to answer to the charges brought against him.
 14. PW1 was examined by PW4, Dr. Donah Magoma Deri, a medical officer working at Kathiani Sub-County Hospital, on 5th September, 2016. Externally, she observed that PW1's clothes and limbs



were dirty and torn. She exhibited dry stains on the external part of her vagina. Her hymen was perforated and she was bleeding from the inside of her vagina. She then administered treatment to the complainant. PW4 also examined the appellant. According to her observations, the appellant was wearing mud stained trousers and shoes. He was also wearing a dry-stained yellow pair of shorts.

15. At the close of the prosecution's case, the trial court found that the prosecution has established a prima facie case against the appellant. He was put on his defence. His unsworn testimony was that on 5th September, 2016, he was on his way to the market from work when he was falsely accused of chasing children and defiling a minor. A big crowd began to batter him. He maintained his innocence denying that he had committed the offence.
16. As already stated, the appellant abandoned all grounds of appeal except the contention that the sentence that was imposed on him was harsh, excessive and unconstitutional, and this is the sole issue for our determination.
17. We note that upon his conviction, the trial court gave the appellant an opportunity to mitigate before the sentence was meted out. He prayed for leniency, adding that he was an orphan, was 50 years old, beseeched the court for forgiveness, but maintained that he did not commit the offence. After considering his mitigation, the learned magistrate treated the appellant as a first offender and held as follows:

“The accused has every right to maintain his innocent (sic). However, the evidence before me is overwhelming. He is convicted. He is not remorseful. He preyed on a young innocent child, a child fit to be his own grandchild. He is a danger to society. He is dangerous (sic) sexual offender. We can only imagine what he would have done had he not been caught. What would he have done with the child after the act? The accuser (sic) deserves no mercies from this court. Our children must be protected from his ill. He must be separated and cast away from right thinking members of the society. He shall serve life imprisonment...”

18. The appellant submitted that the sentence imposed on him failed to consider that he was advanced in age, infringed on his right to dignity as enshrined in Article 28 of the *Constitution* and failed to meet the objective retributive test. For those reasons, he was deserving of being set at liberty.
19. The circumstances under which this Court can interfere with a sentence were set out by the court in *S. vs. Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court... However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate.”

20. Back home, this Court in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR set down the applicable principles thus:

“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 states is shown to exist.”

21. We have considered the facts and circumstances of the case, and the reasoning of the trial court leading up to the sentence. We also note that section 8 (2) of the *Sexual Offences Act* provides that a person convicted under the section shall be sentenced to imprisonment for life.
22. The appellant has challenged his sentence of life imprisonment on the basis that it is harsh and excessive. He submits that the sentencing objective must promote restorative justice and the values of rehabilitation. Section 361 of the Criminal Procedure Code provides that the severity of the sentence is a matter of fact, not law, and is therefore outside the remit of this Court. The question, however, is whether, even if it were not a matter of fact, we would be moved, on the facts of this case, to interfere with the sentence imposed on the appellant. The appellant was convicted of the offence of defilement of a child of 10 years. This was an innocent young girl who was preyed upon on her way to the market. She was savagely grabbed from behind, dragged to a farm, threatened and defiled by the appellant, a farm hand who had previously worked for her parents. The young girl will live with this trauma for the rest of her life.
23. In his mitigation, the appellant maintained his innocence, only stating that he was framed. He further urged this court to take consideration of the fact that he was a 50-year-old orphan and sought forgiveness. We are aware of the emerging jurisprudence, following the Supreme Court decision in *Francis Karioko Muruatetu & Another vs. Republic* [2017] eKLR, that provisions of the law that exclude or fetter the discretion of a court in sentencing are inconsistent with the *Constitution*. In line with that reasoning, several benches of this Court have held that sentences prescribed in sections 8(2), (3) and (4) of the *Sexual Offences Act*, which prescribe a mandatory minimum sentence, should also be considered unconstitutional as they deprive courts of discretion in sentencing. However, the issue is yet to be settled, and in our view, the minimum sentences under the *Sexual Offences Act* are indicative of the seriousness with which society takes sexual offences, especially when such offences are perpetrated against the most vulnerable, as in this case.
24. We cannot describe the sentencing policy better than to quote with approval, the words of Mativo, J. (as he then was) in Petition No. 97 of 2021-*Edwin Wachira & Others vs. Republic* when he stated:

“ 26. The core value is to ensure that courts impose a ‘just and appropriate’ sentence. This requires a judge sentencing an offender to ensure that the ‘aggregation of the sentences appropriate for each offence is a just and appropriate measure of the total criminality involved.’ The “just and appropriate sentence” arrived at considering the peculiar circumstances of the case can only be arrived if the sentence is fixed and pre-determined regardless of the peculiar circumstances. Some defilement cases are preceded or accompanied by extreme violence and sometimes leave life threatening impairments or even death. Offenders in such cases deserve no mercy. Stiffer or even maximum sentences must be deployed in such cases. Other cases involve very young and innocent girls or boys, mentally or physically challenged victims or extremely aged and helpless persons. Offenders in such cases deserve no mercy. Others cases involve persons



who have been entrusted with young children, and they abuse the trust. Such persons deserve no mercy.” (emphasis ours)

25. The appellant committed a seriously heinous offence that this court frowns upon. He defiled a minor aged 10 years of age. He prayed for leniency as he was of advanced age and was not remorseful. How can the issue of advanced age be a mitigating factor? How can a person who qualifies to be a grandfather of a child plead age as a mitigating factor? Being an adult is the reason that one should protect a child and not use force to satisfy one’s sexual desires. That is the kind of person that should be kept away from the society. In the circumstances, we find that, indeed, the trial court correctly applied the law and cannot be faulted. We find that the sentence is lawful and see no reason to interfere with it. Consequently, we conclude that the present appeal has no merit, and it is hereby dismissed and the sentence is upheld.

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

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

