Onyango v Republic (Criminal Appeal 206 of 2018)
[2024] KECA 497 (KLR) (26 April 2024) (Judgment)

Neutral citation: [2024] KECA 497 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 206 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

APRIL 26, 2024

BETWEEN

JAMES ONYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment and conviction of the High Court of Kenya at Kakamega (Majanja, J.) dated 6{{^th}} April, 2018 in HCCRC No. 1 of 2016)

JUDGMENT

1. James Onyango, the appellant herein was charged and convicted in the lower court of the offence of defilement contrary to section 8(1) & (2) of the *Sexual Offences Act*, an incident which occurred on 18th October 2013 at around 4pm, in Mumias County. The case against him was that he intentionally and unlawfully caused his penis to penetrate the vagina of SO[1], a child aged 8 years. The [1] Initials used to protect the identity of the minor appellant was tried and convicted of the offence, found guilty and sentenced to life imprisonment.

2. The appellant dissatisfied and aggrieved with both conviction and sentence appealed to the High Court, which affirmed and upheld the decision of the subordinate court with the learned judge stating that:

> " ...I find that the prosecution proved penetration of a child by the appellant. Since she was aged 8 years, section 8(2) of the Act provides for a mandatory sentence of life imprisonment. Accordingly, the conviction and sentence are affirmed."

3. Being dissatisfied with that outcome, the appellant now filed this appeal on conviction and sentence. He subsequently filed an amended memorandum of appeal on sentence only; stating that the learned first appellate court judge erred in matters of law when he dismissed the appeal, and in failing to note

that the sentence of life imprisonment denied the appellant the chance for re-integration back to the society.

4. The appellant's contention is that despite his plea in mitigation, the appellate court affirmed the sentence meted out by the trial court on account of the mandatory life imprisonment penalty under section 8(2) of the *Sexual Offences Act* which he dared not deviate from. The appellant implores us to find that in imposing the life imprisonment penalty, the trial magistrate did not consider the circumstances of the case In addition, citing section 333 (2) of the *Criminal Procedure Code*, the appellant prays that upon considering the appropriate determinate sentence, this Court do take into account that he has been in custody from the date of arrest to-date, and order that his sentence should run from the date of arrest. The appellant refers to the case of *Ahamad Abolfathi Mohammed & another v Republic* (2018) eKLR, where the court held that:

> " By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they spent in custody before they were sentenced."

5. In support for his plea on setting aside the sentence, the appellant draws from the decision in *Thomas Mwambu Menyi v R* [2017] eKLR[65] which recognised that although the penalty of life imprisonment was lawful, "...Nonetheless, the manner section 8(2) of the *Sexual Offences Act* is couched portend and has been understood by many judicial commentators to portend a mandatory sentence. Such fettering of judicial discretion in sentencing is inconsistent with the Constitution. But, I proclaim a new approach; a new yardstick...I will therefore, read the word "shall" in section 8(2) of the *Sexual Offences Act* to mean "may" in order to bring the section into conformity with the Constitution.... [68]. The possibility of fetter-real or perceived- on the discretion of the trial court in sentencing under this provision is likely. [We note that this is not the correct citation nor does this case appear to be reported in the Kenya Law Reports].

6. In conceding the appeal, Miss Busienei on behalf of the State acknowledges the appellant's grievance regarding the sentence meted out due to the indeterminate nature of life imprisonment as was observed by the Supreme Court in *Francis Kariokor Muruatetu & Another v Republic* [2017] eKLR that Parliament ought to define what constitutes a life sentence. In addition, counsel points out that, this Court (differently constituted, while sitting in Malindi Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso vs. Republic* (unreported), has since declared life imprisonment unconstitutional. The learned State Counsel points out that the reasoning of the Court in Julius Manyeso followed that of the Supreme Court in Francis Muruatetu, yet the subject matter of the cases differed; and that the mandatory life sentence and the mandatory death sentence from the respective cases are distinguishable; thus the life sentence ought to still be applicable in the current appeal. She however has a rider, that if this Court is inclined to follow the findings in Julius Manyeso, then we ought to be guided by the objectives of sentencing under page 15, paragraph 4. 1 of the 2016 Judiciary of Kenya Sentencing Policy Guidelines which addresses the role of criminal justice actors in sentencing.

7. Miss Busienei's contention is that the heinous nature of the offence in this case ought to be deterred and denounced, so as to advance the protection of minors from such barbaric acts; she thus proposes that in the event that this Court is inclined to interfere with the life sentence, the appellant should face a sentence of not less than 40 years.

8. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. As a second appeal we are mindful that we are only confined to points of law. The grounds of appeal all relate to sentencing where the two previous courts, having considered that the appellant chased after the minor; caught up with her, placed her on the ground, removed her pants and his trousers; and inserted his penis into her vagina. The defilement was confirmed through the medical evidence

presented. The defence, which was rejected by both the trial court and High Court as unbelievable, was that he was being framed up because he had demanded his dues from his employer, who was the minor's grandmother.

9. The appellant has only pursued the appeal on sentencing, on the grounds that the sentence was excessive, harsh, unconstitutional and unlawful. The crux of the appellant's argument is that, from a plethora of emerging jurisprudence, the mandatory minimum nature of the sentence imposed on him is no longer considered constitutionally permissible. He asks us to set aside the mandatory life sentence imposed on him and either order for his release, or substitute with a term sentence, and take into consideration the period spent in custody while he awaited trial until its conclusion.

10. With regard to the severity of sentence, Section 361 (1) of the *Criminal Procedure Code* provides for this Court's jurisdiction to entertain an appeal against sentence from the High Court. The emerging jurisprudence is that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if, upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited. See *Julius Kitsao Manyeso* eKLR, where the Court stated that:

> " ...a sentence that renders mitigations to be of no value is unjustifiably discriminative, unfair and repugnant to the principle of equity before the law... in addition, an indeterminate life sentence is in our view also inhumane treatment and violates the rights to dignity under Article 28."

11. The sentence imposed on the appellant of life imprisonment was the mandatory maximum sentence as provided in section 8(3) of the *Sexual Offences Act*. 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 eight years. The medical evidence reveal that he penetrated the sexual organ of the minor.

12. We echo our acknowledgement in various previous decisions that there has been a shift in the Court's jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*. Indeed, this trend is attributable, indirectly, to the Supreme Court's decision in *Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 (Muruatetu 1) which ushered a flood of decisions departing from fidelity to the minimum and mandatory sentences in sexual offences. Subsequently the jurisprudence impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* has found expression in cases such as *Maingi & 5 others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) (Odunga J.) as he then was and *Edwin Wachira & Others vs.Republic* – Mombasa Petition No. 97 of 2021, (Mativo J.) as he then was. The rationale behind this is pegged to the act that a minimum mandatory sentence takes away the jurisdiction conferred on judicial officers to exercise their discretion when meting out sentence.

13. In *Evans Nyamari Ayako v Republic* Kisumu (Court of Appeal) Criminal Appeal No. 22 of 2018, we concluded that the indeterminate nature of life imprisonment falls afoul of the provisions of Article 27 and 28 of the *Constitution*. The same decision reviewed a variety of comparative jurisdiction from several jurisdictions we concluded that:

> "...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...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."

We adopt the same reasoning to the present situation, and hereby set aside the sentence of life imprisonment that was imposed on the appellant; and substitute thereto a term sentence of 30 years' imprisonment. The upshot of the foregoing is that the appellants appeal against sentence succeeds. By dint of section 333 (2) of the *Criminal Procedure Code*, the prison term shall be effective from 18th October, 2013 when the appellant was arrested.

It is so ordered

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL, 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