



ES v Republic (Criminal Appeal 17 of 2018) [2024] KECA 451 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 451 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 17 OF 2018
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
APRIL 12, 2024**

BETWEEN

ES APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgement of the High Court of Kenya at Kakamega by (D.S. Majanja, J) dated the 30th August 2017 in HCRA No. 22 of 2017)

JUDGMENT

1. The appellant, ES, was tried and convicted of the offence of defilement of an 8-year-old girl contrary to Section 8(1) and 8(2) of the *Sexual Offences Act*. He was sentenced to serve life imprisonment. His appeal to the High Court was dismissed.
2. He is now before us in a second appeal. He had initially filed a memorandum of appeal dated 31st May, 2022, in which he was appealing against both his conviction and sentence, but he later filed a supplementary memo of appeal indicating that his appeal was against sentence only.
3. During the plenary hearing, he confirmed that he was pursuing the appeal against sentence only. He argued that the sentence was harsh and unjust as he was a first offender and a young man, and is now remorseful and repentant. He argued that the sentence imposed against him was not in line with the sentencing policy guidelines, and pleaded that the Court considers his mitigating circumstances as he is a father of three school-going children with a wife who is unemployed. He also urged that the period that he had spent in custody during his trial should be taken into account in computing his sentence.
4. The respondent opposed the appeal through written submissions that were filed by Mr. Kwame Chacha, a Prosecution Counsel in the office of the Director of Public Prosecutions (ODPP). Mr. Chacha supported the appellant's conviction but urged that the sentence imposed on the appellant being a mandatory sentence, the trial court did not have the opportunity to consider his mitigation, and that the appellant was rightly aggrieved by the life sentence imposed upon him given its indeterminate



nature. He urged the Court to follow the case of Julius Kitsao Manyeso -vs- Republic, which declared mandatory life sentence unconstitutional. He denounced the dreadful nature of the offence committed by the appellant and urged that a sentence of 40 years' imprisonment be substituted for the life sentence.

5. This, being a second appeal, our jurisdiction in hearing an appeal is limited under section 361(1) of the *Criminal Procedure Code* to matters of law only. In particular, we cannot hear an appeal against sentence anchored on the severity of the sentence alone, but the appeal must raise a point of law regarding the sentence imposed, either on the lawfulness of the sentence or the power of the court to impose the sentence.
6. We are alive to the fact that the sentence that was imposed upon the appellant is a mandatory sentence provided under Section 8(2) of the *Sexual Offences Act*. The mandatory nature of such sentences has been held to be unconstitutional as it denies the trial court its discretion to impose an appropriate sentence taking into account the circumstances in which the offences was committed and the mitigating factors put forward by the offender. (See *Mainingi & 5 others v Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR) supra and *Edwin Wachira & Others v Republic* – Mombasa Petition No. 97 of 2021, (Mativo J. as he then was). The appellant who was in person did not raise this issue, but it is an issue of law that impacts the legality of the sentence that was imposed upon the appellant and we cannot ignore it.
7. We note that in sentencing the appellant, the trial magistrate stated that he had taken his mitigation into account. It is also evident that the circumstances in which the offence was committed were despicable. The appellant's wife fell ill and was admitted in hospital for 8 days. The appellant who was left with the complainant who is a step daughter, whose age was assessed at 8 to 9 years old, took advantage of his wife's absence and defiled the complainant 3 times, leaving her with bruises, a broken hymen and infection. The appellant was treated as a first offender, nevertheless, he behaved as an animal, taking away the innocence of a little girl that he had a legal and moral duty to protect. As a result of the appellant's actions the complainant was left with a permanent physiological and psychological scar. Notwithstanding the mandatory nature of the sentence that was imposed upon the appellant, the sentence was not excessive but was deserved given the circumstances before the trial court.
8. Learned counsel Kwame Chacha for the respondent, has rightfully conceded that the indeterminate nature of the life imprisonment sentence that was imposed upon the appellant, renders it unconstitutional. This Court, in *Evans Nyamari Ayako vs Republic*, reviewed jurisprudence from various jurisdiction and agreed with this conclusion holding in part as follows:

“ 11. On our part, we are in agreement that an indeterminate life sentence falls afoul the provisions of Articles 27 and 28 of our *Constitution* purposively interpreted. We also find that there is an emerging consensus that the evolving standards of human decency and human rights to which Kenya has agreed to adhere to by virtue of Articles 2(5) and 2(6) of the *Constitution* that indeterminate life imprisonment is a cruel and degrading punishment which violates our constitutional values. Our conclusion is based on the consistent trend in many states towards abolition of life imprisonment or its re-definition to a term sentence.

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25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of 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.
26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, 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."

9. For the above reasons, we affirm the appellant's conviction, but allow the appellant's appeal against sentence, to the extent of translating the life sentence that was imposed upon him to a term sentence of 30 years' imprisonment.

Those shall be the orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 12TH 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

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

