Wafula v Republic (Criminal Appeal 263 of 2019)
[2024] KECA 372 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 372 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 263 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

APRIL 12, 2024

BETWEEN

EKEA MUCHAI WAFULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma (Omondi, J.) dated 16th June, 2017 in HCCRA No. 170 of 2015)

JUDGMENT

1. The appellant, Ekea Muchai Wafula, was charged at the Kimilili Senior Principal Magistrate's Court with the offence of defilement of a girl aged 14 years old contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, 2006. He pleaded guilty to the offence and was sentenced to twenty years imprisonment.

2. The appellant appealed to the High Court against both conviction and sentence. In a judgment dated and delivered on 16th June, 2017, the High Court (Omondi, J., as she then was) dismissed the appeal.

3. Before us on this second appeal, the appellant has confined his appeal to be against sentence only. In short, the appellant urges us to exercise discretion, which the two courts below did not, to reduce his sentence given the circumstances of the case. He argues, correctly, that at the time the two courts below pronounced his sentence, the mandatory minimum sentences in the *Sexual Offences Act* were considered iron-clad straitjackets. Were it not so, the appellant is persuaded that the sentencing court would have imposed a more lenient sentence.

4. The appeal is opposed by the State, represented by Mr. Oyiembo, learned Senior Prosecution Counsel. In his opposition, Mr. Oyiembo points out that the appellant was not a first offender – having been convicted of the offence of theft before. He also points out that the appellant remained with the victim for six days. He would prefer, therefore, that the sentence be left undisturbed.

5. We agree with the appellant that both the lower court and the High Court considered themselves bound by the statutory minimum sentence prescribed in section 8(3) of the *Sexual Offences Act*. As such, both courts felt shackled by the statutory minimum. Indeed, the learned Judge strongly expressed her contretemps at the statutorily imposed straitjacket thus:

> "Certainly, I feel extremely sorry for the appellant whose situation is typical of young men with raging hormones who fall victim to teenage/young adult romance and indulge in matters of the flesh. Unfortunately, the *Sexual Offences Act* is blind to this reality and it is with an extremely heavy heart that I confirm the sentence and dismiss the appeal as having no merit."

6. There is no doubt that this statutory fettering is a matter of law – and not just an issue of severity of sentence. Hence, it is an appropriate subject within our jurisdiction as a second appellate Court under section 361(a) of the Criminal Procedure Code. See *Samuel Warui Karimi vs. Republic* [2016] eKLR.

7. Our emerging jurisprudence has announced that the statutory fettering of sentencing courts with mandatory minimums under the *Sexual Offences Act* is unconstitutional. See, for example, Joshua Gichuki Mwangi v Republic NYR (Court of Appeal) Criminal Appeal No. 84 of 2015 (unreported); and Julius Kitsao Manyeso v Republic -Malindi (Court of Appeal) Criminal Appeal No. 12 of 2021.

8. In the present case, the complainant was fourteen (14) years old. The appellant was 19 or 20 years old at the time. Therefore, the difference in age was not too substantial. Additionally, we note that although the complainant could not consent to sex – being a minor – the offence was not committed through the use of force, menaces or subterfuge. The appellant, also, pleaded guilty at the earliest instance. Finally, the appellant was of extreme youth at the time of commission of the offence. Indeed, an age assessment had to be done to ascertain that he had already passed the age of majority.

9. All the above point to substantial extenuating circumstances. Even while considering the fact that the appellant was not a first offender (having been convicted of theft before), we find that if the two courts below had exercised discretion, they would certainly not have sentenced the appellant to the statutorily mandated 20 years' imprisonment. We consider a sentence of twelve (12) years as commensurate with the offence taking into consideration all the factors in this case.

10. The appeal, thus, succeeds to the extent that the sentence imposed by the magistrate's court and affirmed by the High Court is set aside. In its place, we substitute a sentence of twelve (12) years imprisonment. By dint of section 333(2) of the *Criminal Procedure Code*, the sentence shall be computed from 1st September, 2015 as that is the date when the appellant was first arraigned in court, having remained in custody since then.

11. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF APRIL, 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

Signed

DEPUTY REGISTRAR