Litunya v Republic (Criminal Appeal 270 of 2019)
[2024] KECA 338 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KECA 338 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 270 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

APRIL 5, 2024

BETWEEN

CLEOPHAS LITUNYA ALIAS PAPA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Ruth N. Sitati, J.) dated 2nd December 2015 in HCCRA No. 170 of 2014)

JUDGMENT

1. The appellant, Cleophas Litunya Alias PAPA, was tried and convicted by the Senior Principal Magistrate court at Butere of the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*, and a second count of assault causing actual bodily harm contrary to Section 251 of the *Penal Code*. He was sentenced to serve 20 years' imprisonment and 2 years' imprisonment respectively, and the sentences ordered to run concurrently.

2. Being aggrieved the appellant preferred an appeal to the High Court against both conviction and sentence. The High Court found that there was sufficient evidence to sustain the appellant's conviction and upheld the sentence by the trial magistrate, finding it in accordance with the law. The High Court, therefore, dismissed the appeal in its entirety.

3. The appellant has now lodged an appeal before us in which he is appealing against sentence only. He is urging that the period he spent in custody during trial before his conviction be taken into account in computing the sentence. He also informs us that he was a first offender and that he is very remorseful.

4. The respondent has filed written submissions through Ms. Busienei, Senior Principal Prosecuting Counsel of the Office of the Director of Public Prosecutions. She submitted that the courts have declared the mandatory minimum sentences in the *Sexual Offences Act* as unconstitutional. In support of this proposition, she cited Maingi & 5 others v Director of Public Prosecutions and another (Petition

E017 of 2021) [2022] KEHC 13118 (KLR); and Nyeri Criminal Appeal No. 84 of 2015 Joshua Gichuki Mwangi v R (unreported).

5. She argued that the law provides for a minimum sentence of 20 years' imprisonment under Section 8(3) of the *Sexual Offences Act* and that in sentencing the appellant to a term of 20 years' imprisonment, the sentence was sound as it was not the maximum sentence. Ms. Busienei did not oppose the application of Section 333(2) of the Criminal Procedure Code, which obligates the Court to take into account, in computing the sentence, the period spent in custody by the appellant during his trial.

6. During the plenary hearing of the appeal, both the appellant and the respondent reiterated what they had stated in their written submissions.

7. We have carefully considered this appeal. Being a second appeal our jurisdiction under Section 361 of the *Criminal Procedure Code* is limited to matters of law only. Severity of sentence is for the purpose of that Section defined as a matter of fact. That is to say that the appeal can only fall within our jurisdiction if it is shown that the sentence of the appellant raises an issue of law.

8. In sentencing the appellant, the trial magistrate noted that the law under which the appellant was charged provides for a mandatory minimum sentence of 20 years. The learned Judge of the High Court also noted that the trial magistrate had been guided by the provisions of Section 8(1) and 8(3) of the *Sexual Offences Act*.

9. We are alive to the authorities that were referred to us by Ms. Busienei. We wish to clarify that the authorities do not declare the minimum mandatory sentences unconstitutional, but declare the mandatory nature of the sentences unconstitutional, as they run counter to the trial courts discretion to impose an appropriate sentence, taking into account the circumstances before it.

10. It has been said time and again that sentencing is an exercise of discretion by the trial court. For instance, in *Bernard Kimani Gacheru vs. Republic [2002]* eKLR this Court restated that:

> " 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 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."

11. In the matter at hand, the trial magistrate while sentencing the appellant indicated that she had no option but to abide by the minimum mandatory sentence that was provided by the law. This means that although she indicated that she had considered the mitigation of the appellant, she felt obligated to apply the minimum sentence and, therefore, did not exercise her discretion. The learned Judge of the High Court did not address the exercise of discretion by the trial magistrate. We therefore find that the issue of sentence is open to us for consideration.

12. The circumstances that led to the appellant's conviction are the subject of concurrent findings by the two lower courts. The appellant pounced on the minor complainant, carried her to his house, and notwithstanding the spirited resistance by the complainant, beat her up, tore her panties and proceeded to defile her. The complainant screamed and this attracted the attention of two witnesses who ran to the appellant's house. Unfortunately, the appellant escaped through the backdoor, having achieved his nefarious purpose. The complainant was able to name the appellant as her assailant as she

knew him through an alias name “Papa”. Her evidence was corroborated by the two witnesses who heard her scream and came to her assistance. The evidence was also consistent with the evidence of the clinical officer who produced treatment notes and the P3 form which showed that the complainant was examined at Yala Sub County Hospital. Her face was swollen and tender on the left side; her virginity had been broken, and that there was opening of the vaginal introitus, and blood on the external genitalia. The complainant’s age was confirmed as 15 years through a birth dedication card that was produced in evidence.

13. Much as the appellant is seeking sympathy from us, there were serious aggravating circumstances. The appellant violently and forcefully defiled the complainant notwithstanding her spirited resistance. He even physically assaulted her and caused her actual bodily harm in an effort to subdue her. His action was deplorable. The complainant has been left with an emotional scar that may remain with her for a long time.

14. In the circumstances a deterrent sentence was deserved. Had the trial magistrate properly exercise her discretion, we do not see her coming to a term of imprisonment that was less than 20 years’ imprisonment. For these reasons, we do not find any merit in the appellant’s appeal against sentence. It is accordingly dismissed. The record shows that the appellant has been in custody since 7th January, 2014 when he was first arraigned in court. We direct that Section 333(2) of the *Criminal Procedure Code* be applied and the appellant’s sentences of 20 years and 2 years respectively be effective from 7th January, 2014. The trial magistrate having ordered the sentences to run concurrently, the same should also be applied.

Those shall be orders of the Court.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF APRIL, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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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