Opetu v Republic (Criminal Appeal 200 of 2019)
[2024] KECA 339 (KLR) (5 April 2024) (Judgment)

Neutral citation: [2024] KECA 339 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 200 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

APRIL 5, 2024

BETWEEN

VINIUELLA LUCIO OPETU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Sitati, J.) dated 14th May, 2019 in HCCRC No. 25 of 2018)

JUDGMENT

1. Viniuella Lucio Opetu, the appellant herein, was tried and convicted by the SRM's Court at Sirisia of the offence of defilement of a 15-year-old girl, contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. He was sentenced to serve 20 years' imprisonment. His appeal against conviction and sentence was dismissed by the High Court.

2. The appellant is now before us in a second appeal, in which he is appealing against sentence only. He relies on an amended memorandum of grounds of appeal which he has filed in person. He contends that the learned Judge erred in failing to consider that the sentence imposed against him was a mandatory minimum sentence which was not subjected to judicial evaluation, as the trial magistrate did not consider relevant factors in imposing the sentence. The appellant also complains that he was not accorded the benefit of Section 216 and 329 of the *Criminal Procedure Code*, which was a contravention of Article 27 of *the Constitution*.

3. During the plenary hearing of the appeal, the appellant reiterated that his appeal was against sentence only. He relied on written submissions that he had filed in person. His main contention is that the mandatory minimum sentence contravened his rights under Article 25(c), 27(1) & (2), and 50 of *the Constitution*, as the trial court did not consider relevant factors such as the fact that he was a first offender, nor did the court apply Section 216 and 319 of the *Criminal Procedure Code*.

4. The appellant referred the Court to the *Kenya Judiciary Sentencing Policy Guidelines* and *Yawanyale v Republic* [2018] eKLR, for the proposition that sentencing is a matter within the trial court's discretion and that mandatory minimum sentences are inconsistent with the spirit of *the Constitution*. He urged the Court to substitute the mandatory minimum sentence of 20 years that was imposed upon him with a lesser sentence, quoting from Aristotle that "justice is that specific part of morality which requires the treatment of all cases alike".

5. The appeal was opposed through written submissions that were filed by Ms. Matere, Principal Prosecution Counsel. During the hearing of the appeal, Mr. Oyiembo, a Senior Principal Prosecuting Counsel from the office of the Director of Public Prosecutions, appeared for the respondent. He relied entirely on the written submissions which were basically focused on conviction.

6. In regard to sentence, the respondent submitted that the constitutional issue raised on the minimum sentence was not raised in the High Court and was not therefore open for consideration by this Court. He conceded that according to the record the appellant was 19 years old, but contended that the issue of his age was not raised before the trial court, and was now being raised as an afterthought to evade justice. He pointed out that the circumstances in which the offence was committed was serious given the HIV positive status of the appellant.

7. We have considered this appeal bearing in mind that Section 361 of the *Criminal Procedure Code* limits our jurisdiction as a second appellate court, to matters of law only. We note that the appellant has not just raised the issue of severity of sentence which according to Section 361(1)(a) of the Criminal Procedure Code is a matter of fact, but has raised an issue of law concerning the constitutionality of the mandatory minimum sentences and the issue of the exercise of judicial discretion. Consequently, we are satisfied that the appeal against sentence is properly before us.

8. The record shows that before the appellant was sentenced he was given an opportunity to say something in mitigation, but he kept quiet. The learned Judge then proceeded to sentence him. We understand the appellant's predicament. His fate was sealed by the mandatory minimum sentence that was provided under Section 8(3) of the *Sexual Offences Act*. Therefore, it was needless to say anything as the sentence was "*fait accompli*".

9. In *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No.253 of 2003 this Court reiterated that:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R*. (1989 KLR 306)"

10. Therefore, whereas sentencing is the exercise of judicial discretion by the trial court, where the statute provides minimum mandatory sentence as is the case with Section 8(3) of the *Sexual Offences Act*, the exercise of such judicial discretion is wrongly inhibited.

11. For the above reasons, we think that this is an appropriate case for this Court to intervene and reconsider the sentence that was imposed upon the appellant. As per the concurrent findings of the two lower courts, the appellant and the minor complainant were found in a house following a complaint raised by the minor's uncle. Upon examination, it was established that the two had engaged in sexual intercourse. It would appear that the act was consensual, but this is inconsequential given the complainant's age which was established as 15 years.

12. The appellant, who is an adult, ought to have known better.

The situation is further aggravated by the fact that the appellant was HIV positive, and therefore exposed the complainant to the dangerous risk of infection. He must, therefore, bear full responsibility for what happened. Nevertheless, we believe that had the learned Judge considered the exercise of judicial discretion by the trial magistrate without being shackled by the mandatory minimum sentence, she would have found that the discretion was not properly exercised. Taking into account the appellant's youthful age, the sentence of 20 years was on the high side.

13. We, therefore, allow the appeal to the extent of substituting the sentence of 20 years' imprisonment that was imposed on the appellant with a sentence of 15 years' imprisonment. In accordance with Section 333(2) of the *Criminal Procedure Code*, the sentence shall be effective from 27th November, 2017, which was the date on which the appellant was arraigned in court and remanded in custody where he remained until he was convicted. Those shall be the 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