Kiboi v Republic (Criminal Appeal E261 of 2019) [2024] KECA 549 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KECA 549 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL E261 OF 2019

HM OKWENGU, JM MATIVO & JM NGUGI, JJA

MAY 23, 2024

BETWEEN

AMOS KIPSISEI KIBOI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal against the judgement of the High Court at Bungoma (Aroni J., as she then was) dated 18th October 2017inHigh Court Criminal Appeal No. 19 of 2013)

JUDGMENT

1. On 26th October 2009, Amos Kipsisei Kiboi (the appellant) was arraigned before the Resident Magistrate's Court at Kimilili in Cr. Case No. 1548 of 2009 charged with the offence of defilement contrary to Section 8(1) and (2) of the *Sexual Offences Act*, 2006. After going through the trial, on 18th February 2013, the appellant was convicted of the said offence and sentenced to life imprisonment.

2. The appellant's appeal to the High Court being Bungoma High Court Criminal Appeal No. 19 of 2013, Amos Kipsisei Kiboi v Republic against both conviction and sentence was dismissed on 18th October 2017 on grounds that the conviction was safe and the sentence was legal.

3. The appellant, who is unrepresented, is now before us in this second appeal in which he is only appealing against the sentence. He pleads that he was a first offender and prays that the life imprisonment be substituted with a lighter sentence which, he says, is prescribed under Article 50(2) (p) of the *Constitution*. He contends that the mandatory sentence imposed upon him is unconstitutional. He faults the two courts below for failing to invoke sections 329 and 216 of the *Criminal Procedure Code* while sentencing him. He also contends that he was not aware of the consequences of his actions.

   Nevertheless, he is now reformed and rehabilitated.

4. During the hearing of the appeal on 14th March 2024, the appellant relied on his written submissions. The gravamen of his submissions is that excessive sentences serve neither the interest of justice nor those of the society, and they end up in "over punishing offenders". The appellant cited this Court's decision in *Julius Kitsao Manyeso v Republic*, Malindi CACRA No. 12 of 2021, (Nyamweya, Lesiit & Odunga, JJ.A.), where a sentence of life imprisonment was substituted with 40 years in jail term, for an offender who had defiled a child of tender years.

5. The appellant also submitted that he is reformed and while in prison he has maintained a high level of discipline, he has undergone various transformative programmes, and he was awarded a diploma in bible study. Consequently, the appellant maintains that he is rehabilitated and ready to be reintegrated back to the society.

6. Lastly, appellant urged this Court to consider the date of his arrest and the period he spent in remand in computing his definite sentence.

7. Mr. Oyiembo, learned Senior Assistant Director of Public Prosecution,opposed the appeal. In his written submissions, counsel maintained that takinginto account of all the facts, the sentence of life imprisonment was commensurate with the grave nature of the offence considering physical andmental injuries inflicted on the minor and their long-term effects, and the fact that the minor was deprived of innocence at a very tender age of 10 years.

8. On the unconstitutionality of the life sentence, Mr. Oyiembo proposed that the appellant be sentenced to a definite sentence of 30 years.

9. We have considered the appeal and the submissions. We are aware of the provisions of section 361(1) (a) of the *Criminal Procedure Code* which provide that severity of sentence is a matter of fact; and this Court cannot hear a second appeal on a matter of fact. Similarly, under section 361(1) (b), this Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court, unless the trial court had no power to pass the sentence in the first place.

10. We are also aware that the mandatory sentence for defilement of a child aged below 12 years under section 8 (2) of the *Sexual Offences Act*, is life imprisonment. This was the sentence meted on the appellant. The High Court described the said sentence as lawful and refused to interfere with it.

11. However, the appeal before us, though straight forward raises germane issues of law. For example, in passing the said sentence, the trial Magistrate, owing to the mandatory nature of the penalty imposed by the statute, had no room to exercise her discretion to determine an appropriate sentence considering the peculiar circumstances of the offender, the offence, and the victim before her.

    In addition, owing to the mandatory nature of the sentence, the trial Court could not consider the appellant's mitigation no matter how compelling it could have been. The right to a fair trial guaranteed under Article 50 of the *Constitution* does not end upon conviction. Sentencing is undeniably part of a fair trial process and a law that takes away the right to mitigate or a law that shuts the door to have mitigation considered cannot pass the constitutional validity test. In the same vein, sentencing is a judicial function which entails exercise of judicial discretion. It follows that a law that takes away exercise of judicial discretion cannot pass the constitutional validity test.

12. Undeniably, the exercise of judicial discretion is a matter of law. Similarly, an accused person's right to be heard in mitigation is a matter of law. Sentencing is part of the fair trial process and, therefore, an accused person is, as a matter of right, entitled to be heard in mitigation. It follows that whether the appellant's rights were violated by being deprived the opportunity to be heard in mitigation or by not having his mitigation considered before passing the sentence, is a matter of law. We have said enough

to affirm our position that the issues discussed above are matters of law and, therefore, the bar erected by section 361 (1) (a) of the *Criminal Procedure Code* cannot stop us from considering the propriety of the sentence imposed upon the appellant.

(See this Court's decision (differently constituted) in *Julius Kitsao Munyeso v Republic* [2023] KECA 827 (KLR).

13. We have looked at the record. We note that the appellant was a first offender.

    He says he is now remorseful and has undertaken various courses in bible study. We have also considered the aggravating circumstances of the offence and the fact that the victim was only 10 years old at the time of the offence. In cases where there is sufficient address on mitigation on record, this Court avoids needlessly congesting the High Court by remitting such cases for resentencing.

14. Guided by the emerging jurisprudence on mandatory minimum/maximum sentences, we are persuaded that the sentence imposed on the appellant herein is no longer tenable. Accordingly, we hereby set aside the life imprisonment sentence and substitute it with a jail term of 30 years' imprisonment to run from 6th October 2009, the date the appellant was arraigned in court.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

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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