Wangechi v Republic (Criminal Appeal 43 of 2016)
[2024] KECA 836 (KLR) (21 June 2024) (Judgment)

Neutral citation: [2024] KECA 836 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 43 OF 2016

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JUNE 21, 2024

BETWEEN

JOSEPH WARUI WANGECHI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from conviction and sentence of the High Court of Kenya at Nakuru (M. Odero, J.) dated 24th October 2016) in HC.CR.C. No. 148 of 2011)

JUDGMENT

1. This is a second appeal as preferred by Joseph Warui Wangechi (the appellant). At the onset, we wish to state that the charge sheet uploaded online as provided to this Court is incomplete. It only outlines the alternative charge which Paul Wahome Kirombe (the 2nd accused in the trial court) was charged with. In exercising our mandate diligently, we called for the physical file, but the same proved to be of no help as the charge sheet uploaded is a replica of what is reflected in the court file. Therefore, our analysis of the offences which the appellant was charged with, are derived from the proceedings in both the trial and first appellate courts for it seems that the two courts had the advantage of perusing the complete charge sheet. We are minded that in applying the tenets of Article 159 (2) (d) of the *Constitution*, the lack of the complete charge sheet is just but a mere technicality which does not occasion a miscarriage of justice to the appellant.

2. The appellant, as the first accused was jointly charged with another before the Principal's Magistrate's Court at Nyahururu with the offence of gang rape contrary to Section 10 of the *Sexual Offences Act*. The particulars of the offence were that on1st June 2011 at (Particulars withheld) village in Laikipia West District within the Rift Valley Province intentionally and unlawfully caused his penis to penetrate the anus of S.A.D. a child aged 4 years. In the alternative, each of the accused persons was charged with the offence of indecent act with a child contrary to Section 11 (a) of the *Sexual Offences Act* in that

they respectively caused their male genital organs, namely penis to come into contact with the anus of S.A.D. a child aged 4 years.

3. The background giving rise to this appeal are that on 1st June 2011 at about 6.30 p.m., S.A.D, a child aged 4 years and a pupil at (Particulars withheld) Child Support Centre was playing outside her parents' home when the appellant and his co-accused approached her. They took her to a nearby bush and gang raped her, and thereafter defiled her against the order of nature through the anus. They then escorted her to a nearby home. Her uncle came to pick her and she was taken to Rumuruti District Hospital before the incident was reported to Rumuruti Police Station. Investigations were commenced which led to the arrest of the appellant and his accused on 3rd June 2011.

4. Upon being arraigned before the trial court, the appellant pleaded guilty to the main charge of gang rape while his co- accused, Paul Wahome Kirombe pleaded not guilty. The appellant was accordingly convicted on his own plea of guilty. In mitigation, the appellant asked the court to forgive him as he was only 19 years of age. The learned trial Magistrate (Hon. A. B. Mongare (SRM)) after considering the appellant's mitigation sentenced him to life imprisonment. He rendered himself thus:

> " Evidence of recent defilement + (sic) sodomy. From the doctor's evidence, the fact by the prosecutors and the evidence presented in court, I am convinced that the subject underwent serious pain and trauma. The 1st accused person pleads for leniency. The *Sexual Offences Act* gives the minimum sentence to be passed based on the age of the victim. Exhibit 3 shows that complainant was about 4 ½ years. My hands are hence tied. I sentence him to imprisonment for life. Right of appeal explained."

5. Being dissatisfied with the decision of the learned trial Magistrate, the appellant appealed to the High Court on both his conviction and sentence. He raised 4 grounds of appeal which we have condensed into three namely, that he pleaded guilty due to lack of understanding; that he was a juvenile at the time of the offence; and that he was misled by his co– accused and the police officers to plead guilty.

6. Upon considering the appeal, (M. Odero, J.) in her judgment of 24th October 2016, was satisfied that the appellant's plea of guilty was unequivocal. On the sentence meted out by the trial Magistrate, the learned Judge held that the trial Magistrate erred in declaring that the minimum mandatory sentence was life sentence whereas what the law provides for is a minimum sentence of 15 years. The learned Judge instead held that what the trial court intended to impose was the maximum sentence of life imprisonment, which in the circumstances of the case was appropriate and merited. The appellant's appeal was dismissed.

7. Being further dissatisfied with the decision of the High Court, the appellant is now before this Court on a second appeal. He has raised four grounds of appeal each in a memorandum of appeal dated 8th November 2016 and undated supplementary grounds of appeal which can be summarised into two broad grounds. First, that the learned Judge erred in failing to find that the plea was not unequivocal in that the language that was used in court was not clear and no charge or caution was read to him, and thus he was prejudiced. Second, that the learned Judge erred in upholding the life sentence which, to the trial court is couched in mandatory terms contrary to the recent developments in law, the *Sentencing Policy Guidelines*, 2015 (should read 2016) and Article 50 (2) (q) of the *Constitution*.

8. Both the appellant and the prosecution filed their submissions dated 11th December 2023 and 12th February 2024 respectively.

9. At the hearing, the appellant appeared in person while learned counsel, Senior Assistant Director of Public Prosecutions Mr. Omutelema, appeared for the respondent.

10. The appellant submitted that he was no longer appealing against his conviction but on the sentence alone. He prayed that the life sentence be reduced to twenty years. Mr. Omutelema on the other hand, opposed the appeal and urged us to consider that the circumstances under which the offence was committed were aggravating. In this regard, he submitted that the offence involved a child of four years, which left her (the child) with both physical and mental trauma. It was thus his view that both courts below were right in meting out and upholding the sentence against the appellant.

11. We have considered the record of appeal, the oral and written submissions of both the appellant and the respondent and the law. The main issue which commends for determination is on the merit of the life sentence meted out on the appellant.

12. Undoubtedly, this was a heinous crime of gang rape that was orchestrated against a 4-year old child. A child of 4 years is a helpless person who can but only trust people surrounding him or her for love and protection. However, what S.A.D was subjected to will forever leave both physical and psychological scars regardless of the fact that 13 years have since lapsed since the date of the incidence.

13. The conviction was hinged on section 10 of the *Sexual Offences Act* which provides as follows:

> " Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."

14. As rightly observed by the learned Judge, what the learned trial Magistrate intended to pass was life imprisonment which is the maximum sentence provided under section 10 as opposed to 15 years which is the minimum sentence therein. We also underscore that under this provision, a trial court is at liberty to impose any sentence between the minimum 15 years and the maximum life imprisonment. We then grapple with this pertinent question; was the life sentence deserved based on the circumstances of the case?

15. In principle, sentencing is a discretionary exercise by the trial court. An appellate court such as this one, will not unnecessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. An appellate court can also interfere with the sentence if it is shown that the sentence passed was either too harsh or too lenient as to occasion an injustice. This Court in *Bernard Kimani Gacheru vs. Republic* (2002) eKLR stated thus:

> " 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 feels that the sentence is heavy and that 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 stated is shown to exist."

16. The nature of the sentence imposed upon the appellant was indeterminate. The *Sentencing Policy Guidelines*, 2023 underscore that one of the principles underpinning the sentencing process to be considered by a court is respect for human rights and fundamental freedoms. Addressing itself on

the nature and impact of indeterminate life sentences, this Court in *Manyeso vs. Republic* (Criminal Appeal 12 of 2021) (2023) KECA 827 (KLR) (7 July 2023) (Judgment) held as follows:

> "...mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the *Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter and others v The United Kingdom* (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

17. Life imprisonment, which is indeterminate in nature, has been found to be unconstitutional, an issue the appellant has urged us to address. Understandably, at the time of his appeal before the High Court, the decisions surrounding life imprisonment had never been canvassed before our courts. These are recent developments and we are inclined to interfere with the sentence of life imprisonment meted upon the appellant based on our foregoing observation.

18. In mitigation, the appellant pleaded that he was a first offender and was 19 years of age then. We are certainly alive to the fact that a 4-year old child was raped and the ramifications of the appellant's actions on the child's life cannot be gainsaid. The objectives of sentencing are geared towards retribution, deterrence, rehabilitation, promotion of restorative justice, community protection, reconciliation and reintegration of the offender. We are of the view that even as the appellant should be given an opportunity to rehabilitate, a deterrent sentence is necessary as a lesson that he must shoulder the burden of his irresponsibility.

19. Accordingly, in doing our very best to delicately balance the interests of both the victim and the appellant, we set aside the life imprisonment sentence and substitute it therefor with a 35 years' imprisonment term. The term shall run from the date of arrest which is 3rd June 2011.

20. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 21ST DAY OF JUNE, 2024.

F. OCHIENG

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JUDGE OF APPEAL

F. W. NGENYE–MACHARIA

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR