Leiyan v Republic (Criminal Appeal 62 of 2017)
[2024] KECA 930 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 930 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 62 OF 2017

FA OCHIENG, GWN MACHARIA & WK KORIR, JJA

JULY 26, 2024

BETWEEN

DANIEL NKUJU LEIYAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Nakuru (R.P.V. Wendoh, J.) dated 20th December 2012 in HCCRA No. 285 of 2011)

JUDGMENT

1. The appellant, Daniel Njuku Leiyan, is before us appealing against sentence. He is serving life imprisonment for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. The offence was committed against SK who at the time was 6 years old. His appeal before the High Court was on sentence and the High Court affirmed the sentence as passed by the trial court.

2. This appeal came up for hearing on the virtual platform on 12th March 2024. The appellant appeared in person while the Senior Assistant Director of Public Prosecutions, Mr. Omutelema, appeared for the respondent. The appellant relied on his undated written submissions and made a brief oral response to the respondent's submissions at the hearing. The appellant submitted that life imprisonment was harsh in the circumstances of his case. He argued that the sentence of life imprisonment was not legal in light of recent judicial pronouncements. Turning to issue of mitigation, the appellant submitted that he was a first offender, a family man and that his family had suffered as a result of his incarceration. He also stated that he had undergone various trainings in prison and had been rehabilitated. He asked us to set him free stating that the 14 years he has already served was sufficient punishment.

3. In response, Mr. Omutelema relied on his written submissions dated 11th March 2024 and also made brief oral highlights. Counsel stated that the respondent was agreeable with the imposition of a definite sentence in place of the life sentence. He, however, opposed the appellant's plea that the sentence be

reduced to the period already served asserting that the circumstances of this case called for a prison term that would be equivalent to life imprisonment. In stating so, counsel pointed out that the minor was 6 years old, and therefore, a vulnerable person. According to counsel, the appellant had breached the duty of trust and a sentence of 30 years imprisonment would be appropriate.

4. This being a second appeal, our jurisdiction is confined to matters of law. As per section 361(1)(a) of the Criminal Procedure Code, severity of sentence is a matter of fact. In accordance with section 361(1)(b) of the Criminal Procedure Code, this Court can only entertain an appeal against sentence where there was an enhancement of the sentence by the High Court or the subordinate court did not have jurisdiction to impose the sentence. Caselaw also hold it that sentencing is essentially a matter that falls within the discretion of the trial court and as was stated in Bernard Kimani Gacheru v. Republic [2002] eKLR, an appellate court can only interfere where the "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".

5. In addition, the Supreme Court recently affirmed the lawfulness of life imprisonment when it held in Petition No. E018 of 2023, Republic v. Joshua Gichuki Mwangi and others that:

> "We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in- depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed."

6. In the circumstances, we find that the appellant has not established any grounds upon which we can interfere with his sentence. As such, we find his appeal to be without merit. It is dismissed.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024

F. OCHIENG

.....

JUDGE OF APPEAL

G.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