Ngige v Republic (Criminal Appeal 1 of 2017)
[2024] KECA 931 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 931 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 1 OF 2017

F SICHALE, FA OCHIENG & WK KORIR, JJA

JULY 26, 2024

BETWEEN

MICHAEL GATHUKU NGIGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence of the High Court at Nakuru on the 9th Day of December, 2016 before Hon. JusticeM. Odero,J)inCriminal Appeal No.319 of 2013)

JUDGMENT

1. The appellant, Michael Githuku was charged with the offence of defilement C/S 8(1) as read with S.8(3) of the *Sexual Offences Act*.

2. The particulars of the charge were that on 11th March, 2013 at Subukia Trading Centre in Subukia District within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the anus of S.N.K, a child aged 13 years. The appellant pleaded not guilty to the charge and a trial ensued. At the conclusion of trial conducted by D. K. Mikoyan, the then Ag. Senior Principal Magistrate, Nyahururu the appellant was found guilty of the charge and sentenced to 20 years' imprisonment.

3. The appellant was dissatisfied with the said outcome and his first appeal was dismissed by Odero,J in a judgment rendered on 9th December, 2016. Undeterred, the appellant filed an undated Notice of Appeal and a homemade Memorandum of Appeal raising 4 grounds of appeal challenging his conviction and sentence.

4. However, on 6th June, 2023 when the appeal came up before us for plenary hearing, the appellant abandoned his complaint against conviction. He informed us that he was only challenging the sentence of twenty (20) years' imprisonment. He did not file written submissions and opted to make a brief oral submission.

5. In his submissions, the appellant asked us to reduce his sentence of twenty (20) years as he is a sick man.

6. In opposition to the appeal against sentence Miss Kisoo who also made a brief oral response did not file written submissions as she had waited for the appellant to file his written submissions first. She however pointed out that the sentence was lawful and that it was not excessive, given the age of the victim who was a child of 13 years old.

7. In his rejoinder, the appellant asked us to call for a probation report.

8. We have considered the record, the brief highlights made before us and the law. The appeal herein is a second appeal. Our mandate in a second appeal is provided in Section 361 of the *Criminal Procedure Code*. It provides:

> "... 361 (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section:
>
> a. on a matter of fact, and severity of sentence is a matter of fact; or
>
> b. against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

9. The above provision has been enunciated in several decisions of this court. In *David Njoroge Macharia v Republic* [2011] eKLR sums up the said mandate. In the said decision, it was stated:

> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also *Chemagong v Republic* [1984] KLR 213)."
>
> As stated above, severity of sentence is a matter of fact and not law. However, the decision of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, has given an opening in that the ouster of discretion in mandatory sentences has been revisited. To that extent, the question of sentence becomes a matter of law. To what extent therefore was the sentence of twenty (20) years merited?

10. The prosecution evidence was that PW1, a 13-year-old boy was at his mother's timber yard. The appellant had been employed at the timber yard as a casual. On 11th March, 2013 at about

11. 00p.m, the appellant asked PW1 to accompany him to go and get grass for their goats. PW1 obeyed the appellant's instructions only for the appellant to trick him into getting into his house where he used PW1's belt to tie his hands onto his body, lifted him up and placed him on his bed. He then "penetrated me anally with his penis" while covering PW1's mouth. PW1 was warned not to disclose what had happened to him.

11. In his mitigation before sentence, the appellant stated: - "...I seek pardon. I am living with old parents and grandparents. I was still paying for land where they are staying".

12. The appellant was sentenced to twenty (20) years' imprisonment. In our view, the sentence meted out to the appellant was not an unlawful sentence. It is provided by the law. We also find that the appellant's

actions were heinous. He subjected a 13-year-old boy to an ordeal he will live to remember for the rest of his life.

13. Section 8(1) as read with S.8(3) of the *Sexual Offences Act* carries a minimum sentence of imprisonment for a term of not less than twenty years.

14. The trial court took into account the appellant's mitigation in awarding the sentence of twenty (20) years, which is the minimum sentence. We think this was too lenient a sentence and we see no reason to interfere with it. In our view the Judge was right in confirming the sentence.

15. We find no merit in this appeal which we hereby dismiss in its entirety.

It is so ordered.

DATED, SIGNED & DELIVERED AT NAKURU THIS 26TH DAY OF JULY, 2024.

F. SICHALE

JUDGE OF APPEAL

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F. OCHIENG

JUDGE OF APPEAL

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I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

W. KORIR

JUDGE OF APPEAL