WEKESA v Republic (Criminal Appeal 168 of 2019)
[2024] KECA 867 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 867 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 168 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JULY 26, 2024

BETWEEN

ALI ABDALLA WEKESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kakamega (Njagi, J.) dated 3rd August, 2017 in HCCRA NO. 74 of 2015)

JUDGMENT

1. The appellant herein, Ali Abdalla Wekesa, was charged with the offence of defilement contrary to Section 8(1) as read with section 8 (2) of the *Sexual Offences Act* at the Senior Principal Magistrate's Court at Mumias. The particulars of the offence were that on August 24, 2014 at [Particulars Withheld] within Kakamega county, intentionally and unlawfully caused his penis to penetrate the vagina of F.A.1, a child aged 6 years. On the same facts, he faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to all the charges and the case proceeded to full hearing. The prosecution marshalled five (5) witnesses and closed its case. Upon the trial court finding that the prosecution had established a *prima facie* case, in his defence, the appellant elected to remain silent. In a judgment dated and delivered on June 29, 2006, the trial court found that the case had been proved to the required standard and convicted the appellant. It also sentenced him to life imprisonment.

3. The appellant was aggrieved by that conviction and sentence, and appealed to the High Court. In a judgment dated 3rd August, 2017, the High Court (Njagi, J.) affirmed both conviction and sentence.

[1] Initials used to protect the identity of the minor.

4. This is the appellant's second appeal. It is confined to sentence only. The singular ground listed in his amended memorandum of appeal dated May 9, 2024 and drawn by his erstwhile advocate, Ms. Ida Anyango, states:

> " The Judge erred in law by sentencing the appellant to life imprisonment regard being given to the emerging jurisprudence on the minimum mandatory sentences provided in the *Sexual Offences Act*."

5. The appellant's appeal against the sentence imposed has three prongs to it. First, the appellant argues that the mandatory minimum sentence imposed on him is unconstitutional as our recent jurisprudence has made clear. Second, the appellant argues that the life imprisonment sentence imposed on him is manifestly excessive in the circumstances – and was imposed because both the trial court and the High Court felt hamstrung to consider and balance both the mitigating and aggravating circumstances in the case.

6. Third, the appellant contends that there are significant extenuating circumstances in this case to warrant the setting aside of the life imprisonment sentence and imposing a much more reduced term-sentence. He points to three mitigating factors: that the appellant was a first offender; that he was remorseful; that he is fully rehabilitated in the ten or so years he has been in custody; and that he now suffers from terminal oesaphagal cancer.

7. The state minimally concedes to the appeal. Ms. Busienei, learned prosecution counsel, cited our decision in Kisumu Criminal Appeal No. 157 of 2017, *Frank Turo v. Republic* (Judgement 6/10/2023) in which this Court declared the indeterminate life sentence equals thirty years imprisonment. Hence, the state concedes to the setting aside of the mandatory life sentence as urged by the appellant. However, given the very tender age of the victim of the crime and the circumstances in which the crime was committed, the State urges the Court to substitute the life imprisonment sentence with a term sentence of thirty (30) years following our decision in the *Frank Turo Case*.

8. We begin by noting our limited remit as a second appellate court. Our jurisdiction is limited by dint of section 361(1)(a) of the *Criminal Procedure Code* to deal with matters of law only and not to delve into matters of fact which have been dealt with by the trial court and reevaluated by the first appellate court. See *Samuel Warui Karimi v Republic* [2016] eKLR. The severity of sentence, on its own, is regarded as a matter of fact and therefore not a legal issue open for consideration by this Court on second appeal by dint of section 361(1)(a) of the *Criminal Procedure Code*. We, therefore, cannot revisit the sentence merely because it is severe, unless we are persuaded that in its severity or manner of imposition it violated the *Constitution* or the law.

9. In the present case, the appellant was convicted of defiling a six- year old girl. He committed the offence by luring the young girl to his house. The offence was only discovered because a witness found the appellant in flagrante delicto and reported to the girl's grandmother. Upon conviction, the appellant pleaded for leniency from the trial court. In imposing the life sentence after the mitigation, and after the prosecutor had informed the trial court that the appellant was a first offender, the learned magistrate remarked that the appellant was "sentenced to life imprisonment as prescribed by the law."

10. There is no doubt that the learned magistrate considered herself constrained by the mandatory minimum sentence prescribed in section 8(2) of the *Sexual Offences Act* in imposing the life sentence. To be fair to the learned magistrate, that is how our jurisprudence stood at the time. This is also true of the learned Judge's treatment of the appeal against sentence. At the time the two courts dealt with the matter, the minimum sentence in the *Sexual Offences Act* was considered an iron-clad commandment to the trial court; one incapable of variation no matter the circumstances.

11. There is no doubt that our jurisprudence has shifted fundamentally. While the trend is indirectly attributable to the famous Supreme Court's decision in *Karioko Muruatetu & another v Republic*, Petition No. 15 of 2015 (Muruatetu 1), this jurisprudence has found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases such as *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR)(Odunga J. as he then was) and *Edwin Wachira & others v Republic* – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was). Additionally, this Court, differently constituted, in *Julius Kitsao Manyeso v Republic* Malindi Criminal Appeal No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJAs) held that mandatory life imprisonment is unconstitutional due to its indeterminate nature which renders it inhumane and violative of the right to dignity of the person.

12. Finally, in *Evans Nyamari Ayako v R* (Crim. Appeal No. 22 of 2018) decided by this bench on December 8, 2023, we held that:

> "25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.
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> 26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment."

13. We have taken into consideration this jurisprudential trajectory. We, therefore, first, set aside the sentence of life imprisonment imposed on the appellant in this case. Instead, we take into consideration the circumstances surrounding the offence; the offender and the victim. In present case, we note the very tender age of the victim which signals the objective seriousness of the offence and would call for a stiff sentence against the appellant. We also note, however, the extenuating circumstances as pointed out by Ms. Anyango:

    a. First, that the appellant was a first offender;

    b. Second, that while objectively serious given the age of the victim, the appellant did not use gratuitous violence or menaces to commit the offence;

    c. Third, that the appellant was remorseful;

    d. Fourth, that the appellant was of extreme youth at the time he committed the offence: he was twenty (20) years old;

    e. Fifth, that there is objective information tending to show that the appellant has been positively rehabilitated in the ten or so years he has been in custody; and

    f. Sixth and most importantly, the appellant suffers from terminal illness: evidence placed before us shows that he suffers from advanced oesophagael cancer. He has trouble eating solid

foods and is scheduled to start chemotherapy treatment. Additionally, due to his diminished immunity, the appellant has contracted Tuberculosis while in prison.

14. Our revised *Sentencing Policy Guidelines, 2023* states as follows at paragraph 3.3.1:

> " As with the case of offenders with disability the consideration should be whether in view of the illness or age, the sentence rendered is excessive. There are two dimensions worth considering. Firstly, whether the illness or old age would cause the offender to experience undue and unjustifiable hardship in custody and whether the conditions in custody would be termed inhuman bearing in mind the offenders' state. Secondly, whether the offender's condition is one that would cause undue burden on other offenders and/or prison officers taking care of them."

15. In paragraph 3.3.4, the *Sentencing Policy Guidelines* offers the following policy direction:

> "When imposing sentencing orders against terminally ill and elderly offenders, a court should ensure that the sentence imposed does not amount to an excessive punishment in view of the extent of illness and age, as well as in light of the offence committed. In particular, the court should ensure that the sentence imposed does not amount to cruel, inhuman or degrading treatment in view of the extent of illness or age of the offender."

16. It is important to emphasize that in treating terminal illness as a mitigating circumstance, the Court is not making a comment on the objective seriousness of the crime committed by the appellant. There is no doubt that the offence the appellant committed was heinous and horrific. Rather, it is a statement about our values as a society and our society's commitment to human dignity for all. It is the realization that due to the terminal illness of the offender, a sentence otherwise fairly imposed on another offender could amount to cruel, inhuman and degrading treatment on the terminally ill offender in view of the extent of the illness.

17. In the present case, we are of the view that in the specific circumstances of this case, the ten (10) or so years the appellant has been in custody is sufficient penance for his offence. We, therefore, offer compassionate release to him in view of his grave and advanced terminal illness. He is hereby sentenced to a term equal to the time served. He shall be released from prison forthwith unless otherwise lawfully held.

18. Orders accordingly.

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

HANNAH OKWENGU

JUDGE OF APPEAL

H. A. OMONDI

JUDGE OF APPEAL

JOEL NGUGI

JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar