



Ogogo v Republic (Criminal Appeal 1 of 2019) [2024] KECA 785 (KLR) (5 July 2024) (Judgment)

Neutral citation: [2024] KECA 785 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 1 OF 2019
HM OKWENGU, HA OMONDI & JM NGUGI, JJA
JULY 5, 2024**

BETWEEN

JAMES OCHIENG OGOGO APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an appeal from the Judgment of the High Court of Kenya at Siaya,
(R.E. Aburili, J.) dated 19th December 2018 in HCCRA No. 77 of 2017)*

JUDGMENT

1. The appellant, James Ochien’g Ogogo, was convicted in Bondo PMCRC No. 11 of 2016 of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual offences Act*. On 28th day of December 2015 within Siaya County intentionally caused his penis to penetrate the vagina of LAN¹, a child of 13 years. The appellant¹ Initials used to protect the identity of the minor denied the charge, was tried, convicted, and sentenced to 20 years imprisonment.
2. The appellant, dissatisfied and aggrieved with both conviction and sentence appealed to the High Court (Aburili, J.), which affirmed and upheld the decision of the subordinate court both on conviction and sentence.
3. The appellant is now before us in this second appeal in which he has appealed against sentence. In his memorandum of appeal, he is challenging the judgment of the High Court contending that the learned Judge upheld an unlawful sentence and lists his amended grounds of appeal as follows:

that the first appellate court failed in law by upholding a sentence already declared unconstitutional and which was meted through an unfair trial process; both the trial and the appellate courts erred in law by convicting and sentencing; and upholding of the same respectively, basing findings on evidence marred with lots of inconsistencies and contradictions; both the trial and the first appellate courts erred in law by convicting and



sentencing and upholding the same on the appellant by acting on wrong principles; the first appellate court erred in law by upholding a sentence which goes against the purposes of sentencing.

4. This being a second appeal, our jurisdiction is limited under section 361(1) of the Criminal Procedure Code to matters of law only. In this regard the appellant has raised issues in his appeal against sentence, related to the legality of the sentence that was imposed upon him. The test to be applied on a second appeal is set in *Karingo & 2 Others v Republic* [1982] eKLR.
5. The evidence before the court was that at about 2.30 am, LAN was interrupted in her sleep with the realization that someone was on top of her. She was with EA, PW2 and EA who were sleeping next to her on one mattress on the floor, and in the same house. LAN was the one nearest to the door; and it dawned on her that the intruder had removed her pants and inserted his penis into her vagina and defiled her while strangling her. LAN screamed, and her elder sister got up; lit a torch, and she was able to identify the intruder as Ochieng, the appellant; she realized she was bleeding from the vagina. Her screams attracted people including her grandmother. Ultimately, she was then taken for medical attention.
6. EA, PW2, the complainant's sister, confirmed that on the night in question around 2.30 a.m someone got into their house; and shortly she heard LAN scream, she lit a torch and was able to identify the appellant (who was known to her as Ochien'g), lying on top of LAN. After the scream the appellant took off and PW2 gave chase shouting his name, and that was when their grandmother came around. When she returned to the house she found LAN nose bleeding and her clothes also had blood stains.
7. Their grandmother, THN, PW3 confirmed hearing the screams of LAN & PW2 from the kitchen; she also heard PW2 say that Ochieng was killing PW1. She went to check what was going on and found PW2 with a torch. LAN was crying, nose bleeding and holding her private parts saying the accused had defiled her. PW3 then took the girl to hospital and later on reported the matter to the police.
8. PW4, Vincent Onyango Akello, a Clinical officer at Madiany Hospital observed that PW1 had lacerations on the vaginal orifice and on both labiae. He also observed that the hymen was absent and there was presence of fresh vaginal blood, leading him to the conclusion that there was evidence of forceful vaginal penetration.
9. The appellant was eventually arrested and charged. The skirt PW1 wore on the night of attack, was produced as an exhibit. The appellant had initially come up with a story line regarding personal vendetta by PW3, although later, he said that the two families were attempting some form of settlement.
10. The appellant only pursued the appeal on sentencing, on the grounds that the sentence was excessive, harsh, unconstitutional and unlawful. On sentence, the learned Judge stated thus:

“... what the trial court meted out was the minimum sentence provided in section 8(3) of the *Sexual Offences Act*. Accordingly, the sentence though not challenged was lawful and appropriate in the circumstances as the trial court took into account mitigation, by the appellant. In addition, the appellant took advantage of a 12-year-old child and destroyed her inherent dignity. He violated her body. Sexual offences traumatize the victims for a long period of time. The appellant gratified his appetite for sex. He was a sex pest. He had an opportunity to have sex with consenting adults, but chose to violate the young child. The appellant did not deserve any mercy from the court, as there can be no excuse for defiling a child. Accordingly, the sentence of the lower court is hereby upheld”



11. The respondent, while acknowledging that in meting out the sentence both courts did not exercise judicial discretion, proposes that the sentence be substituted to a 15 year term.
12. With regard to the severity of sentence, the emerging jurisprudence is that this Court will uphold a sentence prescribed by the *Sexual Offences Act* if, upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited. The High Court in *Maingi & 5 Others v. Director of Public Prosecutions & Another* (Petition E017 of 2021) [2022 KEHC 13118 (KLR), declared mandatory minimum sentences in the *Sexual Offences Act*, as unconstitutional for taking away the trial court’s discretion in sentencing - no pronouncement to the contrary, by way of appeal, has been made in this regard. That decision was further fortified by this Court’s decision in *Julius Kitsao Manyeso v. Republic* (Malindi Criminal Appeal No. 12 of 2021), [2023] KECA 827 (KLR), in which this Court declared the indeterminate nature of life sentence as unconstitutional.
13. The sentence imposed on the appellant of 20 years imprisonment was the mandatory minimum sentence as provided in section 8(3) of the *Sexual Offences Act* that:
 - (3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
14. We concur that the discretion of the two courts below, to mete out a sentence to the appellant that was commensurate with the circumstances of the case was accordingly curtailed by the minimum mandatory sentence. We, therefore, find that the sentence imposed is unconstitutional to the extent that it was a mandatory minimum sentence. In considering what would constitute as appropriate sentence, we take into account the age of the offender; the fact that he was a first offender, as well as the period the appellant spent in remand before sentence, drawing from the provisions of section 333(2) of the Criminal Procedure Code which provides:
 - (2) Subject to the provisions of section 38 of the *Penal Code* (Cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this *Code*.
 Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody’

We are persuaded that 15 years imprisonment is more appropriate under the circumstances.
15. We, thus, set aside the minimum mandatory 20 years sentence imposed; and substitute it with a term sentence of 15 years with effect from 4th August 2017 when the trial court passed the initial sentence. The upshot of the foregoing is that the appellants appeal against sentence succeeds.

DATED AND DELIVERED AT KISUMU THIS 5TH DAY OF JULY, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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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

