



**Mungai & another v Republic (Criminal Appeal 15 of 2018)
[2024] KECA 1272 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KECA 1272 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CRIMINAL APPEAL 15 OF 2018
FA OCHIENG, JM MATIVO & WK KORIR, JJA
SEPTEMBER 20, 2024**

BETWEEN

MURIITHI NGARI 1ST APPELLANT

TOM MUNGAI 2ND APPELLANT

AND

REPUBLIC RESPONDENT

*(An appeal from the judgment of the High Court of Kenya at Nakuru
(M. Odero, J.) dated 23rd March 2018 in HC.CRA. No. 93 of 2015)*

JUDGMENT

1. The 1st appellant, Muriithi Ngari, and the 2nd appellant, Tom Mungai, were, at the trial, faced with separate charges of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*. For the 1st appellant, the particulars of the charge stated that on 14th November 2014 in Gilgil District within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of VWM, a girl aged 10 years. As for the 2nd appellant, the particulars of the charge stated that on 16th November 2014 in Gilgil District within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of VWM, a girl aged 10 years. Arising from the particulars of the relevant main count, each appellant faced an alternative charge of an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*.
2. Each appellant denied the charges facing him. However, at the conclusion of the trial each appellant was convicted on the main count and sentenced to life imprisonment. They were dissatisfied with the judgment of the trial court and moved to the High Court on a first appeal. However, their appeals were found to be without merit and dismissed. The appellants subsequently moved to this Court on a second appeal challenging the judgment of the High Court on both conviction and sentence. At the virtual hearing of the appeal on 16th April 2024, it came to light that the 2nd appellant had passed



away in prison while serving sentence. The appeal of the 2nd appellant having abated, this judgment will therefore be limited to the appeal of the 1st appellant. There being one appellant, we shall henceforth simply refer to the 1st appellant as the appellant.

3. From the memorandum of appeal filed alongside the notice of appeal, the appellant was challenging both conviction and sentence. However, in the memorandum of appeal dated 17th February 2024 Mr. Matoke, learned counsel for the appellant, limited the appeal to sentence:

- i. That the life sentence imposed on the 1st appellant contravened his right to a fair trial under Article 25(c) of the Constitution as read with Sections 216 and 329 of the Criminal Procedure Code, Chapter 75, Laws of Kenya.
- ii. That the life sentence imposed on the 1st appellant contravened his right under Article 57(c) of the 2010 Constitution of Kenya.
- iii. That the life imprisonment imposed on the 1st appellant contravenes the objective of sentencing under the sentencing policy guidelines.
- iv. That the learned Judge erred in law in her appreciation of the law applicable in sentencing and mitigation.”

4. At the hearing, learned counsel Mr. Matoke appeared for the appellant while learned counsel Mr. Omutelema was present for the respondent. They both indicated to the Court that they would be entirely relying on the filed submissions.

5. Counsel for the appellant through the submissions dated 17th February 2024 restricted his arguments to the legality of life imprisonment and whether the life sentence was appropriate in the circumstances of the case. Although counsel appreciated the legality of the life imprisonment legislated under section 8(2) of the Sexual Offences Act and the fact that this Court has no jurisdiction to deal with the severity of sentence, he urged us to find that sections 216 and 329 of the Criminal Procedure Code recognize mitigation as part the trial process and that the appellant was denied the right to a fair trial because he was not accorded an opportunity to mitigate. To buttress this submission, counsel relied on Jared Koita Injiri v. Republic [2019] eKLR where the Court set aside the life sentence on the ground that the appellant’s mitigation was not considered.

Counsel stated that the appellant who was 80 years at the time of sentencing by the trial court is now 95 years old. Counsel referred to Ali Abdalla Mwanza v. Republic [2018] eKLR to urge that the advanced age of an accused person should be considered in determining the sentence. Reference was also made to paragraph 20.28 of the Sentencing Policy Guidelines in support of the argument that the appellant’s advanced age entitles him a shorter term of imprisonment not exceeding 10 years. Counsel consequently urged us to allow the appeal and reduce the appellant’s sentence to the period already served.

6. In opposing the appeal, counsel for the respondent relied on the submissions dated 14th March 2024. On conviction, counsel restated the evidence on record and submitted that the offence of defilement was proved against the appellants. Turning to the issue of the sentence, counsel submitted that the sentence of life imprisonment was the minimum sentence provided under the law for the offence for which the appellant was convicted. Counsel urged that the circumstances of this offence called for life imprisonment and that the sentence should remain undisturbed.
7. This being an appeal against sentence, we observe that sentencing is a matter that falls within the discretion of the trial court and an appellate court should not substitute its views for those of the trial



court unless there are concrete grounds for doing so. In that regard, it was held in *Abamad Abolfathi Mohammed & Another v. Republic* [2018] eKLR that:

- a. “As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive.”
8. The stated position of the law was recently restated by the Supreme Court in Petition No. E018 of 2023, *Republic v. Joshua Gichuki Mwangi & others* where it held that:
- a.
 - “(48) Before further delving into the question of constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the Criminal Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court...
 - b.
 - “(49) Thus, the Court of Appeal’s jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent’s appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal’s jurisdiction.”
9. In this case, the appellant’s contention is that the sentence was passed in mandatory terms without considering his mitigation. A perusal of the record will show that the appellant’s argument is not factual. In sentencing the appellant on 9th April 2015, the trial magistrate stated that:
- a. “I have taken into consideration the mitigation of the accused persons herein. I have also in mind the nature of the offence committed herein and the age of the subject against whom the offence was committed. The accused persons herein are old people over the age of 80 years old who qualify to be grandparents of the subject herein and whom the society looks upon to protect the younger children. The accused persons took advantage of their position and went ahead and committed the offence against a young and defenseless child who looked upon them for protection. This type of happenings should be deterred by the Court as to protect younger children.
 - b. I find it necessary to mete a deterrent sentence so as to deter the minded old men who prey on young children and destroy their future. For the reasons above, each accused person is sentenced to imprisonment for life.”
10. On the part of the High Court, the learned Judge in the judgment delivered on 23rd March 2018 held that:



- a. “Both appellants were allowed an opportunity to mitigate after which the trial Court sentenced each appellant to life imprisonment. Section 8(2) of the *Sexual Offences Act* provides for a mandatory sentence of life imprisonment where one is convicted of the offence of defiling a child aged eleven (11) years or below. Therefore the sentence imposed upon the two appellants was lawful and I do confirm those sentences.”
11. It is important to appreciate that contrary to the submissions by the counsel for the appellant, the learned trial magistrate considered the appellant’s mitigation and the sentence of life imprisonment was not imposed in its mandatory nature. The learned magistrate also acknowledged that the appellant was of advanced age.
12. Indeed, the issue that the life sentence was imposed without considering the appellant’s mitigation was never taken up before the first appellate court. We reproduce the appellants’ amended grounds of appeal before that court as follows:
- “(a) The trial magistrate erred in law and in fact by failing to find that no penetration was proved;
- (b) The trial magistrate erred both in law and in fact by failing to evaluate the prosecution’s contradictory evidence to the benefit of the appellants;
- (c) The trial magistrate failed to accord the appellants a fair trial;
- (d) The trial magistrate was biased in convicting and sentencing the appellants.”
13. The appellant’s appeal before this Court is therefore a new appeal altogether and cannot be said to be an appeal arising out of the decision of the first appellate court. The issues raised by the appellant do not therefore fall for our determination.
14. The trial court and the first appellate court were also correct on the legality of the sentence of life imprisonment. That position finds support in the statement of the Supreme Court in *Republic v. Joshua Gichuki Mwangi & others* (supra) that:
- a.
- “(66) 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.”
15. For the stated reasons we find the appellant’s appeal against sentence to be without merit and we accordingly dismiss it.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024



F. OCHIENG

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

