Okuto v Republic (Criminal Appeal 135 of 2019)
[2024] KECA 1468 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KECA 1468 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 135 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

OCTOBER 25, 2024

BETWEEN

GEORGE OMONDI OKUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kisumu (Ochieng, J.) dated 21st May, 2019 in HCCRA No. 88 of 2018)

JUDGMENT

1. The appellant was arraigned before the Principal Magistrate Court at Winam and charged with the offence of defilement contrary to Section 8(1) as read with section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on the 12th day of October 2013 at Kisumu County within Nyanza province, he intentionally and unlawfully caused his genital organ (penis) to penetrate the genital organ (vagina) of J.A. O. (name withheld), a child of 17 years.

2. Having denied the charges, the prosecution called five (5) witnesses in the ensuing trial. The appellant was placed on his defence which he conducted by giving sworn testimony and calling three (3) witnesses.

3. At the conclusion of the hearing, the trial court concluded that the charge had been proved beyond reasonable doubt and convicted the appellant in a judgment delivered on 28th March, 2018. The trial court, then, sentenced the appellant to 15 years imprisonment.

4. The appellant was aggrieved by the conviction and sentence and appealed to the High Court. In a judgment delivered on 21st May 2019, the High Court (Ochieng, J., as he then was), dismissed the appeal against conviction and upheld the sentence.

5. Further aggrieved by the decision of the High Court, the appellant has proffered this second appeal before this Court.

6. In his Memorandum of Appeal, the appellant raised nine (9) grounds, summarised as follows: that the evidence of PW1 was uncorroborated; that there was no government report on the spermatozoa to prove it was his; that the ingredients of defilement were not proved; that there was no fair trial due to courts being biased and prejudiced to the appellant; evidence was contradictory and incredible; and that the mandatory sentence lacked discretion.

7. The appeal was scheduled for hearing on 29th April, 2024. During the plenary hearing, the appellant appeared in person. Mr. Okango and Ms. Muema from the Office of the Director of Public Prosecutions appeared for the respondent. Both parties had filed their written submissions. However, speaking in Luo (and translated to the Court), the appellant withdrew his appeal against conviction and urged the Court to only consider his appeal against sentence. As such, we will only proceed with the appeal against sentence.

8. In his written submissions, the appellant assails the sentence on account of the fact that it was prescribed by statute as a minimum sentence. He complains that the trial court only imposed it because it was the minimum sentence, but without considering his individual circumstances as pleaded in his mitigation. Those circumstances, he says, are that he was a first offender, he was remorseful; and he had a young family to take care of. Before us, the appellant persisted in his plea for mercy and leniency, so that he could go home and take care of his children, who, he says, have had to drop out of school in his absence. He says he is now fully rehabilitated and, to demonstrate this, has argues that he has even attended several courses while in prison.

9. In reply, Mr. Okang'o relied on the written submissions but pointed out that in the present case, there are weighty aggravating factors which should militate against reducing the sentence of fifteen years imprisonment imposed on the appellant. The aggravating factors were that the appellant, a bishop in his church, used subterfuge (pretence that he was going to pray for the complainant) and abused his position of trust.

10. This is a second appeal. As a second appellate court, our remit is circumscribed. We are limited to consideration of matters of law only by dint of section 361 of the Criminal Procedure Code. Given this remit, this Court will not interfere with concurrent findings of fact arrived at in the two courts below unless based on no evidence. (See Chemogong vs. R [1984] KLR 61; Ogeto vs. R [2004] KLR 14 and Koingo - V - R (1982] KLR 213). The test to be applied on second appeal is whether there was any evidence on which the trial court could reasonably find as it did. (See Reuben Karari S/o Karanja vs. R [1956] 1 E.A.C.A. 146).

11. In the present case, as pointed out above, the appellant's appeal is against sentence only. Section 361 of the Criminal Procedure Code is unequivocal that a second appeal to this Court on severity of sentence is a matter of fact and is not to be entertained by the Court. The circumstances under which this Court can interfere with sentence and the applicable principles were set out by the court in Republic [2002] eKLR thus:

> "It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that 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. Even if, the Appellate Court feels that the sentence is heavy

and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."

12. Consequently, this Court can only interfere with sentence if it is demonstrated that there has been a material misdirection with regard to the sentence.

13. In the present case, the appellant attacked the sentence on the proposition that the sentence was wrongfully imposed, and was illegal on account of the fact that the sentence was prescribed by statute as a minimum sentence from which there could be no derogation. This, the appellant argued, was unconstitutional. He sought to set aside that sentence, and for the Court to impose a proper (more lenient one) that takes into consideration his individual circumstances.

14. At the time the appeal was argued (29th April, 2024), the jurisprudential position that had gained foothold in most superior courts – including this Court – was that the minimum standards prescribed in the *Sexual Offences Act* are unconstitutional. That jurisprudential trajectory traces its pedigree to the famous Supreme Court decision in Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015 (Muruatetu 1). It 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 vs. Director of Public Prosecutions & Another (supra) (Odunga J. as he then was) and Edwin Wachira & Others vs. Republic – Mombasa Petition No. 97 of 2021, Mativo J. (as he then was).

15. However, in a recent decision, to wit, Republic v Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR)(delivered on 12th July, 2024), the Supreme Court has held that the mandatory minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the minimum statutory minimum sentences in sexual offences.

16. The apex Court held:

> "56. Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognised term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
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> 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the Penal Code as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the Penal Code. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

17. Following the doctrine of stare decisis, this decision by the Supreme Court is binding on this Court and overrules the recent decisions of this Court holding otherwise. Whatever our views, we are bound by this decision.

18. In the present case, the appellant was convicted under section 8(3) of the *Sexual Offences Act*. The statutory minimum sentence under that sub-section is fifteen (15) years imprisonment. Consequently, and regrettably, this leaves us with only one option regarding the appeal before us: it must be dismissed in its entirely, and we hereby do so.

19. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR