Barno v Republic (Criminal Appeal E061 of 2022)
[2024] KECA 1437 (KLR) (11 October 2024) (Judgment)

Neutral citation: [2024] KECA 1437 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL E061 OF 2022

FA OCHIENG, LA ACHODE & WK KORIR, JJA

OCTOBER 11, 2024

BETWEEN

DAVID SINGOEI BARNO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the Judgment of the High Court at Eldoret (Omondi J) dated 23rd July 2019 in HCCR APP. No 125 of 2014)

JUDGMENT

1. Before this Court is a memorandum of appeal dated 2nd August, 2019 brought by David Singoei Barno, the appellant. The appeal is against the sentence imposed against him on 2nd November, 2011, following his conviction for the offence of defilement contrary to Section 8 (1) as read with (2) of the *Sexual Offences Act* no 3 of 2006, (SOA). The Republic is the Respondent.

2. The appellant has set out grounds of appeal in which he alleges that the learned Judge erred in law and fact, by failing to observe the rule of law and the declaration of human rights in *the Constitution* when passing the sentence of life imprisonment. Further that the learned Judge acted upon wrong principles and overlooked some material factors in passing the sentence. Therefore, the sentence ought to be interfered with due to the error of principle as it is unreasonable and unjust.

3. This appeal originates from the conviction and sentence by the Chief Magistrate's court at Eldoret in Criminal Case No.4073 of 2011. The appellant had been charged with the defilement of a 9 year old girl, contrary to Section 8 (1) as read with (2) SOA. The particulars were that on 2nd November 2011 at Lenguise location in the then Wareng County the appellant unlawfully and intentionally caused the penetration of his genital organ into the genital organ of OC a girl aged 9 years.

4. From the evidence of the mother and the Child Health Card the minor's age was established to be 9 years at the time of the commission of the offence. A medical expert confirmed that she suffered from a mental disability that rendered her unable to testify in court. The clinical officer who examined her for purposes of filling the P3 Form concluded that there was penile- virginal penetration due to the presence of spermatozoa in her urine and a torn hymen. The appellant was identified as the perpetrator of the offence by PW2, a sister to the minor, who found him in the act and locked him inside the room, and PW3 who responded to the minor's screams also found the appellant inside the locked house with her.

5. In his defence the appellant stated that the family of the minor had failed to pay him his wages hence, they accused him of this offence to avoid their obligation.

6. In a judgement dated 11th July 2014, the Resident Magistrate, Hon. P. W. Mbulika found that the appellant's defence did not exonerate him from the offence. She determined that the evidence proved beyond reasonable doubt that the appellant had defiled the 9 year old girl and sentenced him to life imprisonment.

7. That judgement did not please the appellant. He appealed to the High court at Eldoret on grounds that: the prosecution evidence was not to the standard required to sustain a safe conviction: the minor was not of sound mind to state for herself what transpired during the ordeal: and, that the trial Magistrate failed to consider the fact that there was a grudge between the appellant and the minor's family.

8. Omondi J (as she then was), re-evaluated the evidence and in a judgment delivered on 23rd July 2019, found that the medical evidence clearly disclosed interference with the minor's genitalia. She also found that the age of the minor had been adequately proved by the evidence of the mother, as well as the Child's Health Card. Considering the seriousness of the offence, the age of the victim at the material time, the learned Judge concluded that the appeal lacked merit. She found no reason to interfere with the sentence imposed by the trial court and dismissed the appeal.

9. The appellant was still dissatisfied with the judgement of the superior court hence, this second appeal to the Court of Appeal. He filed a memorandum of appeal dated, 2nd August 2019. Subsequently, he also filed written submissions dated 22nd April 2021 stating that this appeal is for mitigation purposes only, to seek a lenient sentence.

10. In his submissions the appellant refers this Court to the often- cited Supreme Court case of Francis Karioko Muruatetu & Another vs. Republic (2017) eKLR, and argues that the mandatory nature of the sentence is unconstitutional. He submits that the essential rationale for sentencing is rehabilitation and that Muruatetu (Supra) acknowledged that there is "possibility of reform and re-adaptation of offenders." He emphasizes that the provisions of the Sentencing Guidelines Policy 2015 state that the core objective of custodial sentence is reformation and rehabilitation. He avers that while in the correctional facility, he embraced rehabilitative programs offered and armed with the knowledge, experience and information acquired in these areas, he is reformed and is ready to be productive in nation building.

11. The appellant is urging this Court to consider that he is a first offender and also take into account the time spent in prison while undergoing trial, in accordance with the provisions of the Criminal Procedure Code. He points us to the Court of Appeal case of Ahamad Abolfathi Mohhamed & Another vs. Republic (2016) eKLR, to buttress this point. He also cites the High Court case of Dennis Kibaara vs. Republic (2019) eKLR and the Court of Appeal case of Paul Ngei vs Republic (2019)

eKLR where the courts applied their discretion to substitute the appellant's mandatory minimum sentences with shorter ones.

12. The Senior Assistant Director of Public Prosecution, Jalson Makori, filed submissions dated 17th March, 2023 on behalf of the respondent. Counsel submits that this being a second appeal, the jurisdiction of the Court is confined to consideration of questions of Law as provided under Section 361 of the Criminal Procedure Code. That the offence committed was contrary to Section 8 of the SOA which attracts a sentence of life imprisonment for a child who is below the age of 11 years. He is urging the Court to reflect on the seriousness of the offence committed, guided by precedent in R vs. Scott (2005) NSWCCA 152, Howie J Grove and Barr JJ.

13. Counsel submits that the child suffered a traumatic experience that will cause her shame and great mental trauma. He is urging this Court not to disturb the findings of the lower court on conviction or on sentence. In his view, the societal desire to get rid of sexual perversions has been expressed formally through the *Sexual Offences Act* and precedents such as James Okumu Wasike vs Republic (2020) eKLR.

14. When the matter came up for plenary hearing on 5th March 2024, the appellant appeared in person and confirmed that he did not wish to pursue the appeal on conviction. He only wished to argue the appeal against sentence. The learned State counsel, Mr Majale appeared for the respondent and relied on the filed submissions.

15. We have considered the grounds of appeal, the rival submissions and the law to determine whether or not, to interfere with the sentence that was imposed by the lower court and affirmed by the superior court.

16. Being a second appeal the Court is restricted under Section 362(1) (a) of the Penal Code to considering matters of law only. The principles guiding interference with sentencing by the appellate Court were properly set out in S vs Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

17. In Bernard Kimani Gacheru vs. Republic (2002) eKLR the Court of Appeal restated that:

> "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 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."

18. The Sentencing Policy Guidelines enumerate the objective the courts seek to achieve in sentencing to include; retribution, deterrence, rehabilitation, restorative justice, community protection and denunciation. The appellant has provided within his submissions a list of programs that he has engaged in during his time in custody in a bid to prove that he is rehabilitated.

19. We are however, cognizant that the law is always evolving. In the recent past courts have interpreted the holding in Muruatetu (supra) to mean that they could lean towards interfering with sentences whose mandatory nature appeared to fetter the discretion of the sentencing court. More recently however, on 12th July 2024, the Supreme Court in Petition No. E018 OF 2023, Republic vs Joshua Gichuki Mwangi, allowed an appeal to the extent of setting aside the judgment of the Court of Appeal, which declared the mandatory minimum sentences for sexual offences unconstitutional, for limiting the discretion of the court. The Supreme Court set aside the sentence of 15 years imprisonment substituted by the Court of Appeal, and ordered the respondent to complete the 20-year sentence from the date of imposition by the trial court.

20. In the judgment the Supreme Court reiterated that its decision in Muruatetu (supra) did not invalidate mandatory sentences, or minimum sentences in the Penal Code or the SOA or any other Act. The Court referred to the relevant paragraph in the Directions in Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curie) [2021] KESC 31 (KLR) wherein it pronounced itself on the application of its decision in Muruatetu (supra), to other statutes prescribing mandatory or minimum sentences as follows:

> "Reading this paragraph and the judgment as a whole, at no point is reference made to any provision of any other statute. The reference throughout the judgment is only made to section 204 of the Penal Code and it is the mandatory nature of the death sentence under that section that was said to deprive the 'courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases."

21. On the separation of the powers of the arms of government, the Supreme Court went on to hold that:

> "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 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."

22. On whether in departing from the decision in Muruatetu the Court of Appeal violated the principle of stare decisis, the Supreme Court stated as follows:

> " We therefore find that in this matter the Court of Appeal did offend the principle of stare decisis. Notably, we observe that the Court of Appeal determined that the ratio decidendi in the Muruatetu case on the unconstitutionality of mandatory sentences could be applied mutatis mutandis to the mandatory nature of minimum sentences provided for in the *Sexual Offences Act*. In doing so, and with respect, the Court of Appeal failed to abide by the clear principles provided in both the Muruatetu case and the Muruatetu Directions in this instance."

23. The Supreme Court distinguished between mandatory sentences which leave no discretion for the Judge to individualize punishment, and minimum sentences which set the floor rather than the ceiling.

24. Having re-evaluated the record of appeal we find that the sentence imposed by the trial court against the appellant and affirmed by the first appellate court was lawful, and in accordance with the provisions of Section 8 (1) as read with (2) SOA. In the premise and guided by the holding in Supreme Court decision we decline to interfere with the sentence.

It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 11TH DAY OF OCTOBER 2024.

F. OCHIENG

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR