ANN v Republic (Criminal Appeal 28 of 2018)
[2024] KECA 1691 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1691 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 28 OF 2018

PO KIAGE, A ALI-ARONI & LA ACHODE, JJA

NOVEMBER 22, 2024

BETWEEN

ANN .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Machakos (P. Nyamweya, J.) dated 3rd February, 2016 in HCCRA No. 124 of 2010)

JUDGMENT

1. On 15th December 2009 M. N, a 10-year-old minor (PW1), was at home in Mbooni East District with her father, the appellant, and two other children. Her mother had left at around 10 am to do casual work. The appellant called her to the house and told her to close the window as he closed the door. He then asked her to lie on his bed and remove her pants. She lay on the bed and the appellant defiled her. While the incident was on-going, the minor's cousin, PW2, passed by to see the minor's mother, PW3, when she noticed that the house was locked from the inside. Her child, who was outside, told her that the minor and her father were inside the house. PW2 became suspicious, so she decided to inform PW3 about what she had witnessed. When PW3 returned at about 1pm, together with PW2, they called the minor to a nearby maize plantation and asked her to explain what had transpired. The minor told them that the appellant had slept with her. PW3 examined her vagina and noticed that it appeared big and swollen. It also had a bit of blood. The minor explained that it was the 5th time that the appellant had defiled her but that she had never revealed it to anyone because he had threatened to kill her if she did so. PW3 reported the matter to the Assistant Chief, who referred them to Kalawa Police Post. The police sent them to Makueni District Hospital, where the minor was examined and it was found that she had been defiled.

2. The appellant was arrested and charged before the Principal Magistrate's Court at Makueni for the offence of incest. As the prosecution case was proceeding, and on the conclusion of the testimony of the

minor's mother, PW3, the appellant pleaded guilty to the charge of incest. Upon the trial Magistrate considering his mitigation, he sentenced him to 40 years' imprisonment.

3. Aggrieved by that decision, the appellant filed an appeal against sentence before the High Court at Machakos. The same was heard by Nyamweya, J. (as she then was) who by a judgment dated 3rd February 2016 dismissed the appeal and upheld the sentence of 40 years' imprisonment.

4. Still aggrieved, the appellant lodged the instant appeal, initially raising four grounds of appeal. However, at the hearing of the appeal, he did not urge those grounds, which he abandoned, choosing to address us on sentence only.

5. We address the question of sentence only as regards its legality since, in a second appeal, our jurisdiction is circumscribed by Section 361(1) of the Criminal Procedure Code and confined to matters of law only, with the severity of sentence statutorily stated to be a question of fact.

6. The appellant's complaint is that the sentence imposed is too harsh considering that he is a first offender. He also expressed remorse.

7. For the respondent, Ms. Vitsengwa, the learned Prosecution Counsel urged that the sentence meted out should not be interfered with because, the sentence that is prescribed by law for the offence is life imprisonment, and hence the sentence of 40 years' imprisonment imposed on the appellant was lenient. We probed counsel whether it mattered not that the appellant was remorseful. Counsel's view was that while expression of remorse made a difference, the appellant should have presented material from the prisons attesting to his character and whether he had reformed. We pointed out to counsel that remorse and reform are two different things. We also sought counsel's opinion on whether, in view of the Sentencing Guidelines, it was significant that the appellant pleaded guilty and maintained that plea even after being warned of the consequences. Ms. Vitsengwa's somewhat oblique response was that the trial judge considered his mitigation.

8. In the often-cited Supreme Court case of Francis Karioko Muruatetu & AnoR Vs. Republic [2017] eKLR, the Court instructed that sentencing is a judicial function that enables the courts to exercise discretion, on principle, on an individualized case-by-case basis with a view to imposing appropriate and just sentences.

9. Bearing in mind the said decision and the sequel thereto in which the Supreme Court gave specific directions, as well as the Sentencing Policy Guidelines 2023, which enjoin us to consider both the aggravating factors and the mitigating factors in sentencing, we were minded to interfere with the sentence imposed by the Principal Magistrate's Court and upheld by the High Court. The Sentencing Guidelines enumerate 'remorsefulness of the offender' as a mitigating factor that is relevant in a resentencing hearing. The Guidelines also allow for reduction of sentence where there is a plea of guilty, in the following terms;

    4. 3 Accused Persons Pleading Guilty

        1. Although a guilty person is entitled not to admit the offence and to put the prosecution to proof of its case, an acceptance of guilt, reflected in a guilty plea:

            i. Normally reduces the impact of the crime upon the victims;

            ii. Saves victims and witnesses from having to testify; and

            iii. Is in the public interest in that it saves public time and money on investigations and trial.

2. In order to maximise these benefits, and to provide an incentive to those who are guilty to indicate a guilty plea as early as possible, this guideline suggests that a reduction in sentence should always follow upon a guilty plea."

10. It is not apparent from the record that the two courts below gave due consideration to the two relevant factors and we think this provides the basis for our interference with the sentence as a matter of law.

11. However, being cognizant of the Supreme Court's recent decision in Republic Vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR) in the effect that courts do not have jurisdiction to interfere with the minimum mandatory sentences set in the *Sexual Offences Act*, and given that such decision is binding upon us, we place our own conditions aside, and deter to that position.

12. In the result, the challenge to sentence also fails and the appeal stands dismissed in entirety.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024.

P. O. KIAGE

JUDGE OF APPEAL

ALI-ARONI

JUDGE OF APPEAL

L. ACHODE

JUDGE OF APPEAL

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

Signed

Deputy Registrar