Molel v Republic (Criminal Appeal 188 of 2017)
[2024] KECA 1681 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1681 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 188 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

NOVEMBER 22, 2024

BETWEEN

SAITOTI MOLEL ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kakamega (Majanja, J. and Sitati, J.) dated 13th October, 2017 in HCCRA No. 30 of 2016)

JUDGMENT

1. The appellant, Saitoti Molel, was the accused person in the trial before the Senior Resident Magistrate's Court in Hamisi in Criminal Case No. 438 of 2015. He was 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 26th April, 2015, in Hamisi District within Vihiga County, the appellant intentionally caused his penis to penetrate the vagina of PK, a child aged thirteen (13) years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars as to the place, time and identity of the victim of the alternative count were the same as that in the main charge.

3. The appellant pleaded not guilty to the charge and the case proceeded to full hearing. The prosecution marshalled its case by calling a total of four (4) witnesses and closed its case. The trial court found that the prosecution had established a prima facie case and placed the appellant on his defence. In his defence, the appellant gave sworn testimony and called no witnesses.

4. At the conclusion of the trial, the learned trial magistrate in a judgement dated and delivered on 4th January, 2016, convicted the appellant and sentenced him to serve twenty (20) years imprisonment, the minimum sentence under section 8(3) of the *Sexual Offences Act* under which he was charged.

5. Aggrieved by the trial court's decision, the appellant filed an appeal against the conviction and sentence before the High Court via Kakamega High Court, Criminal Appeal No. 30 of 2016.

6. The High Court (D.S. Majanja, J. and R.N. Sitati, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated and delivered on 13th October, 2017.

7. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal challenging both conviction and sentence. Acting pro se, he raised four (4) grounds in his Memorandum of Appeal, which attacked both conviction and sentence.

8. Both the appellant and the respondent filed written submissions. When the case came up for hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango, appeared for the respondent.

9. Although the appellant had filed submissions on all the four grounds attacking both conviction and sentence, during the hearing of the appeal on 21st June, 2023, the appellant, was categorical that he wished to pursue his appeal against sentence only. We allowed him to withdraw his appeal against conviction and conducted a hearing on the appeal against sentence.

10. The appellant prayed for leniency and submitted that he has been in prison for seven (7) years. He based his appeal on the then nascent but prevailing jurisprudence which held that the mandatory minimum sentences imposed by the *Sexual Offences Act* were unconstitutional and not binding on sentencing courts.

11. Mr. Okango submitted in conceding the appeal on sentence to the extent that the mandatory minimum sentence of twenty (20) years be set aside. He proposed a sentence of fifteen (15) years imprisonment.

12. 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).

13. 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 the famous Bernard Kimani Gacheru v 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."

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

15. In the present case, in pleading for leniency, the appellant's only pivot is the unconstitutionality of the sentencing provisions of the *Sexual Offences Act*. At the time the appeal was argued, the jurisprudential position that had gained foothold in most superior courts – including this Court – was that the mandatory minimum sentences 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).

16. 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 categorically 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.

17. 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."

18. Following the doctrine of stare decisis as divined by Article 163(7) of *the Constitution*, 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.

19. 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 twenty (20) years imprisonment. Consequently,

and regrettably, following the Supreme Court's binding decision, this leaves us with only one option regarding the appeal before us: it must be dismissed in its entirely, and we hereby do so. However, we have noted that the record shows that the appellant was in custody since he was arraigned in court on 28th April, 2015. By dint of Section 333(2) of the Criminal Procedure Code, the imprisonment term shall be computed to begin running from that date.

20. Orders accordingly.

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

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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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