Murunga v Republic (Criminal Appeal 192 of 2019)
[2024] KECA 1684 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1684 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 192 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 22, 2024

BETWEEN

PAUL ATELA MURUNGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (R. P. V. Wendoh, J.) delivered by (S.N. Riech, J.) dated 20th May, 2019 in HCCRA No. 5 of 2017)

JUDGMENT

1. The appellant, Paul Atela Murunga, was charged before the Bungoma Chief Magistrate's Court with the offence of Defilement Contrary to Section 8(1) as read with Section (3) of the *Sexual Offences Act*. The particulars being that on the diverse dates between 15th October, 2014 and 5th December, 2014 the appellant, at Angurai division within Busia County, intentionally and unlawfully caused his penis to penetrate the vagina of SAO[1] a girl aged 15 years. He faced an alternative charge of committing an indecent act with a child contrary to section 11[1] of the *Sexual Offences Act*, the particulars to place, time and venue being the same as those for the main charge.

2. The appellant pleaded not guilty to the said charge. After hearing, he was found guilty, convicted and sentenced to serve twenty (20) years imprisonment for the principal offence of defilement.

3. The appellant's appeal to the High Court against both conviction and sentence, was dismissed on grounds that the conviction was safe and the sentence was legal.

4. Dissatisfied, the appellant is now before this Court in this second appeal in which he is only appealing against the sentence. He pleads that he was a first offender, and prays that the life imprisonment be substituted with a lesser sentence as the mandatory sentence imposed upon him is unconstitutional. Nevertheless, he is now reformed and rehabilitated.

5. Briefly, the facts of the case are that S.A.O., PW1, the complainant aged 15 years old recalled that on 15th October 2014, the appellant went to their home and called her; they went to the bush and he promised to buy her a present. He undressed her and inserted his penis in her vagina. In November and December, 2014, the appellant sent for her and they did the same act and he once again promised to buy her a present. Later, the complainant's brother heard the appellant bragging that he had impregnated the complainant; and the brother informed their father who beat her up and took her to hospital. It was confirmed that she was pregnant, and the matter was reported to the police.

6. Pauline Sirengo, PW5, a Clinical Officer at Kocholia Hospital produced the P3 prepared by Dr. Ayako who had examined the complainant and found her to be pregnant. PW6, Carolyn Gakuo, the investigating officer in this matter received the complainant at the police station, escorted her for examination, and arranged for DNA by the Government Analyst.

7. Richard Kimutai, a Government Analyst received exhibits from the complainant and the appellant for purposes of determining whether they were the parents of a child C A. Richard found that there was a 99.99% chance that the appellant was the father of the child.

8. Placed on his defence, the appellant gave an unsworn statement and stated that on 29th January, 2015 while at work, a group of people came and arrested him. That he was then presented to court and was charged with the present offence.

9. At the plenary hearing, the appellant relied on his written submissions and contended that he was sentenced to a mandatory minimum sentence of 20 years imprisonment. That the mandatory sentence denied him the right to a fair trial and denied the court its discretion in sentencing.

10. The appellant submitted that he is reformed and while in prison he has maintained a high level of discipline, he has undergone various transformative programmes, and he was awarded a diploma in Bible study. Consequently, he is rehabilitated and ready to be reintegrated back to the society. The appellant urged this Court to reduce his sentence considering the 7 (seven) years he has already spent in custody.

11. The appeal is opposed by the respondent who contends that section 8[1] as read with section 8[3] of the *sexual offences act* provides for a sentence of not less than 20 years if the offence is proved beyond a reasonable doubt. That in the instant appeal, both the trial court and the 1st appellate court found that the prosecution proved their case beyond reasonable doubt. Further, that considering the age of the victim the injuries suffered and the fact that the complainant was deprived off her innocence at the age of 12 years, the sentence of 20 years imprisonment was proper.

12. Relying on the case of *Benard Kimani Gacheru vs. Republic* [2002] eKLR the respondent contended that the trial court considered all the facts of the case as well as the appellant's mitigation and the time already spent in custody as required under section 333 of the *Criminal Procedure Code*.

13. Lastly, the respondent maintain that the sentence meted out was commensurate to the offence and was within the law and urged this Court not to overturn the concurrent findings of both the trial and the 1st appellate court.

14. This being a second appeal, this Court's mandate is limited by section 361(1)(a) of the *Criminal Procedure Code* to consider issues of law only, unless it is demonstrated that the two courts below considered matters, they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole, they were plainly wrong in their decision. In that event, such omission or commission would be treated as matters of law entitling this

Court to interfere with the decision. This position was restated in in *Karani vs. R* [2010] 1 KLR 73 that:

> "This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

15. Having carefully considered the record of appeal, the submissions by both parties, the authorities cited, the law, and the Court's mandate, the main issue for determination is whether the sentence meted out against the appellant was harsh and excessive or otherwise unlawful.

16. As regards the severity of sentence, Section 361 (1) of the *Criminal Procedure Code* grants this Court jurisdiction to entertain an appeal against sentence from the High Court. The appeal must raise a point of law regarding the sentence imposed, either on the lawfulness of the sentence or the power of the court to impose the sentence.

17. The appellant was sentenced to 20 years imprisonment as provided for by Section 8(3) of the *Sexual Offences Act* which states that:

> "A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

18. The minimum sentence provided for defilement of a child aged between twelve and fifteen years under section 8(3) of the *Sexual Offences Act*, is 20 years' imprisonment. That was the sentence imposed upon the appellant. The sentence passed against the appellant is the minimum mandatory sentence provided under the law which the appellant complains of being harsh and unconstitutional.

19. The constitutionality of mandatory minimum sentences under the *Sexual Offences Act*, has been the subject of several decisions of the High Court and this Court. Recently, the Supreme Court in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* (Petition No. E018 of 2023) [2024] KESC 34 (KLR) affirmed the lawfulness of minimummandatory sentences in the *Sexual Offences Act* when it held that:

> "[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...
>
> (62) Before Kenyan courts can determine whether or not the above trends and decisions are persuasive, we reiterate that there ought to be a proper case filed, presented and fully argued before the High Court and escalated through the appropriate channels on the constitutional validity or otherwise of minimum sentences or mandatory sentences other than for the offence

of murder. This was our approach and direction in Muruatetu which must remain binding to all courts below."

20. In the instant appeal, the learned judge considered the appellant's sentence, but declined to interfere with the sentence imposed by the trial court, as it was the sentence provided under the law. In his determination, the learned judge stated as follows:

> ''The appellant also complained that the sentence is harsh and excessive. Under Section 8[3] of the *Sexual Offences Act*, upon conviction, the culprit is liable to be sentenced to not less than twenty 20 years imprisonment.''

21. In *Francis Nkunja Tharamba vs. Republic* [2012] eKLR the Court held that:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

22. Nothing was laid before this Court to show that the trial court failed to properly exercise its discretion in sentencing, or that there was justification for the first appellate court to intervene, but that it failed to do so.

23. Having re-evaluated the record of appeal, it is evident 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 8(3) of the *Sexual Offences Act*. In the premise, and guided by the holding in Supreme Court decision in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others* [*supra*], there is no basis to interfere with the sentence. The upshot is that the appeal has no merit; and is dismissed.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR