Mwamu v Republic (Criminal Appeal 70 of 2019)
[2024] KECA 1678 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1678 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 70 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 22, 2024

BETWEEN

CHARLES POLO MWAMU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Kisumu (F. Ochieng, J) delivered on 27th March, 2019 in HCCRA. No 71 of 2018)

JUDGMENT

1. Charles Polo Mwamu, the appellant herein, was charged before the Senior Principal Magistrate's Court at Nyando, with the offence of defilement contrary to Section 8(1), as read with Section 8(4) of the *Sexual Offences Act*. It was alleged that he had defiled one, E.A. (name withheld) a girl aged 17 years old.

2. The appellant pleaded not guilty to the charge and a trial ensued, during which six witnesses testified for the prosecution and the appellant gave an unsworn statement and called one witness. At the conclusion of the trial, the appellant was found guilty of the charge and sentenced to fifteen years imprisonment. The appellant being dissatisfied with the judgment of the trial court, appealed to the High Court against conviction and sentence. Upon hearing the appeal, the High Court dismissed the appeal.

3. The appellant being dissatisfied with the judgment of the High Court, appealed to this Court against conviction and sentence, raising four grounds in his memorandum of appeal. The appellant subsequently changed his mind and indicated his wish to withdraw the appeal against conviction, and pursue the appeal against sentence only, relying on his spiritual transformation, rehabilitation and remorse.

4. During the virtual hearing of the appeal, the appellant, who was present on the platform from Kisumu Maximum Prison, reiterated that his appeal was against sentence only. He relied on the written submissions which he had prepared.

5. In the submissions, the appellant appreciated the wrong that he had committed, and expressed his remorse; pleaded that he has served at least a third of the sentence that was imposed upon him; that during his stay in prison, he has engaged on vocational training in technical skills and has attained grade II in welding; and prayed that he be integrated back in the society. He urged the Court to reconsider the sentence that was imposed upon him, as it was harsh and excessive. He also claimed that during his incarceration he has suffered ailments that have rendered his health status very weak.

6. The respondent opposed the appeal through written submissions that were duly prepared by Mr. Patrick Okango, Senior Principal Prosecution Counsel, in the Office of the Director of Public Prosecutions (ODPP), who also appeared for the respondent during the hearing.

7. In regard to sentence, the respondent opposed the appeal maintaining, that the circumstances in which the offence was committed, do not justify any interference with the sentence. This is because the victim of the defilement was mentally challenged and therefore a vulnerable person, and the appellant took advantage of her vulnerability to commit the heinous offence. The respondent urged that the sentence of fifteen years imprisonment was neither harsh nor excessive and therefore the appeal should be dismissed as lacking merit.

8. We have considered this appeal which as the appellant has confirmed is against sentence only. The appellant was sentenced to fifteen years imprisonment for defiling E.A., a 17 years old girl, who was confirmed to be mentally challenged. Both the trial court and the first appellate court found that there was sufficient evidence that the minor complainant was defiled, and that it was the appellant who defiled her.

9. Under Section 8(4) of the *Sexual Offences Act*, a person who commits an offence of defilement with a child between the age of 16 and 18 years, is liable upon conviction to imprisonment for a term of not less than 15 years. This means that the appellant was sentenced to the minimum sentence provided for the offence of which he was charged.

10. In Bernard Kimani Gacheru -vs- Republic [2002] eKLR, this Court stated as follows:

> " 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 stated is shown to exist."

11. Given the circumstances in which the appellant committed the offence, we do not find any justification for us to interfere with the sentence which was imposed by the trial court and upheld by the first appellate court.

12. In addition, the Supreme Court in Republic -vs- Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (amicus curiae) (Petition E018 of 2023) [2024] KESC 34 KLR, was categorical that:

> " 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."

13. The trial court having imposed the minimum sentence provided by law on the appellant, the sentence was lawful, and neither harsh nor excessive. Nor do we have jurisdiction as an appellate court to interfere with the sentence our appellate remit on second appeal, being limited under section 361 of the Criminal Procedure Code to matters of law, and sentence having been identified in the same section as a matter of fact.

14. Finally, upon perusing the record of appeal, we have noted that the appellant was given a bond of Kshs. 100,000/- with one surety, but apparently, he was unable to meet the terms of the bond. He, therefore, remained in custody throughout his trial. In accordance with the proviso to Section 333(2) of the Criminal Procedure Code, we order that the sentence of the appellant shall take account of the period that he spent in custody from 27th June, 2014.

15. The upshot of the above is that this appeal fails. It is accordingly dismissed except for the application of section 333(2).

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