Fwamba v Republic (Criminal Appeal 197 of 2019)
[2024] KECA 1815 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1815 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 197 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

CHRISTOPHER SITATI FWAMBA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal from the judgment of the High Court of Kenya at Bungoma (L. A. Achode, J.) delivered by (S.N. Riechi, J.) dated 20{{^th}} November, 2018 in HCCRA No. 109 of 2016))

JUDGMENT

1. Christopher Fwamba Sitati, the appellant, was tried before the Principal Magistrate's Court at Sirisia 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 7th and 8th July, 2015 at Bungoma County, the appellant intentionally and unlawfully caused his penis to penetrate the genital organ, namely, the vagina of D.N.M., a child aged 13 years. In the alternative, the appellant was charged with committing an indecent act with a child contrary to Section 11[1] of the *Sexual Offences Act*.

2. }The appellant pleaded not guilty to the charges. To advance its case against the appellant, the prosecution called four witnesses. At the end of the trial, the appellant was found guilty, he was convicted, and sentenced to 20 years imprisonment.

3. Being aggrieved, the appellant appealed to the High Court against his conviction and sentence. The learned Judge (Achode, J.) as she then was, having heard the appeal, dismissed it.

4. Dissatisfied, the appellant is now before this Court on a second appeal in which he has appealed against sentence only. The appellant faults the learned judge for meting out an excessive mandatory sentence.

5. Briefly, the facts of the prosecution case were that on 7th July, 2015 at around 7:00 pm the complainant left home to go to a posho mill situated at [particulars withheld] market. From the posho mill, the

appellant took her to his house behind the posho mill and defiled her. He told her to return the following day so that he could give her some money but when she returned, he defiled her again. On 31st October 2015, LMW the complainant's father, was at home when the complainant came back from school and he noticed that

}she was not looking well. He instructed his wife to take her to a midwife the following day and it was confirmed that she was pregnant. He made a report to Malakisi Police Station and with the aid of the police, the appellant was subsequently arrested at the posho mill and charged.

6. Upon examining the complainant, Anthony Waswa a Clinical Officer at Malakisi Health Centre established that the hymen was broken and a pregnancy test indicated that she was 2 months pregnant.

7. Placed on his defence, the appellant gave sworn evidence and testified that he could not recall the events of 8th July, 2015. Instead, he narrated the events of 10th January, 2016 when he was at the posho mill working and the chief came and arrested him. He was taken to Mukwa Administration Police Camp where the police informed him of the defilement charges. He asserted that the complainant was a stranger to him. The appellant called one witness Betty Naliaka who is his wife. She testified and denied that the appellant defiled anyone on the particular days in question.

8. In support of the appeal, the appellant submits that the sentence of 20 years imprisonment meted against him was against the weight of the evidence. No DNA sample was collected for testing despite the appellant requesting for the same.

9. }Citing the case of *Evans Wanjala vs. Republic Criminal Appeal No. 312 of 2018*, the appellant submits that the mandatory minimum sentences have since been declared unconstitutional, as the said sentences deny the court the discretion in sentencing, and do not meet the purpose of sentencing.

10. In response, the respondent submits that Section 8[1] as read with Section 8[3] of the *Sexual Offences Act* provides for a sentence of not less than twenty years if the offence under sections 8(1) and 8(3) is proved beyond any reasonable doubt. It is argued that in the instant case, the offence of defilement was proved beyond reasonable doubt, and owing to the age of the victim and the injuries suffered, which injuries covered both physical and the long-term emotional effect of being deprived of innocence at a very tender age of 13 years, the sentence of 20 years imprisonment is appropriate. That in sentencing the appellant, the trial court took into consideration the provisions of Section 333 of the Criminal Procedure Code.

11. The respondent urges the Court not to interfere with the concurrent findings of the lower courts as the charges were proved beyond reasonable doubt as such this appeal ought to be dismissed.

12. }This being a second appeal, the Court's jurisdiction is, indeed, limited to consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only in rare occasions that the Court can interfere with concurrent findings of fact by the two courts below. The case of Samuel Warui Karimi vs. Republic [2016] eKLR states it aptly that:

> " This is a second appeal and this Court has stated many times before, it will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. See Chemangong vs. R, [1984] KLR 611."

13. Having carefully considered this appeal, the submissions and the law, under Section 361(1) of the Criminal Procedure Code, the jurisdiction of this Court on a second appeal is limited to matters of

law only, and severity of sentence is identified as a matter of fact. This means that this Court can only deal with an appeal against sentence where it raises an issue that goes beyond severity.

14. The appellant has restricted his appeal to the issue of sentence only. He was charged under Section 8[1] as read with Section 8[3] of the *Sexual Offences Act* which provides as follows:

    8(1) A person who commits an act which causes

    }penetration with a child is guilty of an offence termed defilement.

    8(3) 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.

15. The appellant was sentenced to 20 years imprisonment as provided by the law. However, he faults both the trial court and the 1st appellate court for imposing a mandatory minimum sentence which is unconstitutional and does not conform to the sentencing objectives.

16. An appellate court will not necessarily interfere with the sentence meted out unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in Bernard Kimani Gacheru vs. Republic (2002) eKLR stated 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 stated is shown to exist."

17. In addition, 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) (12 July 2024) (Judgment) in regards to minimum sentences prescribed by section 8 of the *Sexual Offences Act* stated that:

    66) 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 a sentence provided for in the 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. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed....

    (68) }Our findings hereinabove effectively lead us to the conclusion that the judgment of the Court of Appeal delivered on 7th October, 2022 is one for setting aside. In any case, the sentence imposed by the trial court against the respondent and affirmed by the first appellate court was

lawful and remains lawful as long as Section 8 of the *Sexual Offences Act* remains valid. We reiterate that the Court of Appeal had no jurisdiction to interfere with that sentence."

18. Although the appellant argues that the mandatory minimum sentence imposed is unconstitutional, we note from the record that before the High Court, the appellant did not challenge the constitutionality of the sentence meted out by the trial court; thus, he cannot raise it at this stage. This is so because an appeal cannot arise before this Court on a matter which was not determined by the court from whose decision the current appeal arises. We thus lack a basis upon which to interfere with the sentence, a position well-articulated In Republic vs. Mwangi [supra] where the Supreme Court stated that:

> The record also shows that issue of constitutionality of the sentence was raised for the first time before the Court of Appeal and introduced by way of submissions by counsel representing the respondent. Having combed through the Record of Appeal and proceedings, we note that the constitutionality of the Respondent's sentence was also not raised either before the trial court or the High Court. The Respondent having failed to raise the issue of the constitutionality of the mandatory minimum sentence imposed on him in his appeal before the High Court, it is obvious to us that he was precluded
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> from addressing the issue on appeal before the Court of Appeal.

19. }Consequently, the sum total of our finding is that under the circumstances, the appellant has not established any grounds upon which the Court can interfere with his sentence. The appeal lacks merit and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 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