Obure v Republic (Criminal Appeal 237 of 2019)
[2024] KECA 1838 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1838 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 237 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

STEPHEN OBARA OBURE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Kisii (J.A. Okwany, J.) dated 25th October 2018 in HCCRA No. 1 of 2015)

JUDGMENT

1. The appellant, Stephen Obara Obure, was charged before Ogembo Senior Principal Magistrate's Courts in Nairobi, with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on 27th June, 2012 at [particulars withheld] sub-location in Gucha District within Kisii County, the appellant intentionally and unlawfully, committed an act that caused penetration of his penis to the anus of KMO a boy aged 9 years.

2. The appellant pleaded not guilty to the charges and the matter proceeded to trial, where the prosecution called 5 witnesses. The appellant was, thereafter, placed on his defence, and upon considering the evidence, the trial magistrate found him guilty convicted him, and sentenced him to life imprisonment.

3. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. On considering the appeal, the High Court (Okwany, J.) agreed with the findings of the trial court and upheld both the conviction and sentence, thus dismissing the appeal in its entirety.

4. Dissatisfied, the appellant preferred the present appeal on sentence only.

5. Briefly, the facts of the prosecution case are that the appellant is the complainant's biological father. On 27th June, 2012, KMO[1], the complainant herein, was sleeping in his grandmother's house together with his younger brothers at about 10:00 p.m. when his father, who was also sleeping in a different room in the same house, called him to go to sleep in his bed. His father told him to remove his clothes and asked him to kneel after which the appellant also removed his clothes and inserted his penis in his anus and then went back to sleep. At about 5 a.m., the appellant called him again to go to bed but he ran outside and hid inside a sugar cane farm where he stayed until morning when he decided to report the incident to the assistant chief, but along the way, he met an old man who took him to a pastor at a nearby church. The pastor was informed of the defilement; and he washed the complainant and gave him food to eat. The complainant then went to school where the teachers examined him after which they called the village elder who was also informed of the attack. The appellant was then arrested by elders who took him to the police at Mosesi while the complainant was taken to Gucha Level 4 Hospital where he was examined and treated.

6. Wycliffe Atambo, the medical officer, testified that KMO was treated at Gucha Level 4 Hospital as outpatient No 11720/012 with a history of having been sodomized by his father. He produced the P3 form indicating that the patient was aged 9 years and had sustained laceration of the anus and that a swab turned positive meaning that there were sperms inside the complainant's anus.

7. Placed on his defence, the appellant gave an unsworn statement and denied committing the offence and blamed his arrest on the differences he had with his wife, who he accused of having an affair with the person who gave her a letter following the alleged defilement of the complainant.

8. In support of the appeal, the appellant contends that the circumstance of this case did not warrant the sentence of life imprisonment which is harsh and excessive. That the said sentence does not serve the objectives of the Judiciary Sentencing Policy Guidelines as provided for under paragraph *4*:1.

9. The appellant says he is remorseful, has reformed, and is ready to be integrated back into society; that, while in custody, he underwent rehabilitative programs as evidenced by the attached certificates; that owing to the emerging jurisprudence which has declared the indeterminate mandatory sentences unconstitutional, the appellant prays for a term sentence. In support. The appellant relies on the case of Julius Kitsao Manyeso and the case of Evans Nyamari Ayako vs. Republic Criminal Appeal No. 22 of 2018.

10. He also urges us to take into account the time he has already spent in custody. In support, the appellant cites the case of Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR.

11. In opposing the appeal, the respondent submits that the ingredients of the offence were proved; in that the complainant's age was proved through the production of the birth certificate indicating that he was 9 years old at the time of the incident; that the evidence of penetration was narrated graphically by the minor; and corroborated by Wycliffe Atambo, PW4, a Clinical Officer at Gucha Level 4 hospital who examined the complainant and confirmed penetration.

12. On the identity of the appellant, it is contended that the appellant is the victim's father, a person well-known to him and that, therefore, he had no difficulty recognizing the appellant since the father slept in the other room and he called him to go sleep in his bed.

13. Regarding the sentence, the respondent contends that the appellant was sentenced to life imprisonment as provided for under Section 8(2) of the *Sexual Offences Act*. Despite the emerging jurisprudence on Mandatory Minimum and Maximum sentences, the Appellant in the instant case is the victim's father who breached and betrayed the trust the victim had placed in him as a father. Therefore, he should not benefit from the emerging jurisprudence.

14. This is a second appeal and the Court's duty as provided for under Section 361(1) of the Criminal Procedure Code is to consider only matters of law. In the case of Karani vs. Republic [2010] 1 KLR 73 the court stated thus:

> " 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 of life imprisonment meted against the appellant ought to be interfered with.

16. As regards the severity of the sentence, Section 361 (1) of the Criminal Procedure Code identifies such an issue as a matter of fact and therefore curtails this Court's jurisdiction to entertain a second appeal on such a ground as it is not an issue of law. 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 life imprisonment as provided for by Section 8(2) of the *Sexual Offences Act* which provides that:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

18. At the time when the appellant's appeal was heard and the appellant convicted and sentenced, the prevailing jurisprudence in Kenya was with regard to the Supreme Court's liberal approach decision regarding the constitutionality of the mandatory minimum sentence in the murder charge involving Francis Karioko Muruatetu and Another vs. Republic [2017] eKLR, and which was applied in setting aside mandatory minimum sentences in other offences.

19. However, under Section 361 of the Criminal Procedure Code, severity of sentence is a matter of fact and is not to be entertained by the Court. In any event, this Court in the case of Bernard Kimani Gacheru vs. Republic [2002] eKLR set out the circumstances under which the Court can interfere with the sentence 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 states is shown to exist."

20. In the present case, the appellant was convicted under section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The statutory minimum sentence under that sub-section is life imprisonment,

as such the sentence was not illegal. This position is fortified by the recent pronouncements of 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."

21. The trial court having imposed the minimum sentence provided by law on the appellant, the sentence was lawful, and neither harsh nor excessive.

22. We acknowledge that the appellant has raised an issue regarding constitutionality of an indeterminate life sentence, citing the decision in Evans Nyamari vs. R 2023, KECA 1563 (KLR), where we considered this issue at length and also looked at the situation in several comparable jurisdictions, before making a pronouncement that life imprisonment would be computed to mean 30 years. However, this issue was neither raised nor addressed at the 1st appeal in the High Court, and we cannot begin to delve into it at this stage. As stated by the Supreme Court in Republic vs. Mwangi (supra), such an issue must be raised and fully argued in the High Court, before it can be escalated to this Court.

23. The upshot is that the appeal has no merit, and is dismissed.

DATED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2024.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR