Wafula v Republic (Criminal Appeal 39 of 2020)
[2024] KECA 1818 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1818 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 39 OF 2020

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

CLEOPHAS BARASA WAFULA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma (Ali-Aroni, J.) dated 17th May 2016 in HCCRA No. 101 of 2013)

JUDGMENT

1. Cleophas Barasa Wafula, the appellant before us, was charged with the offence of defilement contrary to Section 8(1) as read with Section (2) of the *Sexual Offences Act*. The particulars of the offence were that on 2nd August, 2013, at (particulars withheld) village within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of M.N.K. (name withheld), a girl aged 4 years.

2. He pleaded guilty to the charge and was convicted on his own plea of guilty, after admitting the facts as put to him. Following his mitigation, he was sentenced to serve life imprisonment. He appealed to the High Court against his conviction and sentence, but his appeal was dismissed.

3. He is now before us with a memorandum of appeal in which he has raised nine grounds, appealing against both conviction and sentence. However, during the hearing of his appeal, he informed the Court that he was appealing against sentence only. In this regard, his grounds were: that the mandatory nature of the sentence that was imposed upon him, was unconstitutional; and that the Court should consider that he is a first offender, reformed, rehabilitated and he is remorseful.

4. The appellant also filed written submissions in which he reiterated that the sentence of life imprisonment which was imposed upon him, was unconstitutional, and the Court should consider whether Articles 27 and 28 of the *Constitution* were adhered to, and whether the sentence was

in accordance with the *Sentencing Policy Guidelines 2015*. He argued that his dignity ought to be respected and protected, and that the sentence should be lenient and proportionate.

5. The appellant referred the Court to *Julius Kitsau -vs- R*. [2023] Criminal Appeal No. 12 of 2021 (Malindi Court of Appeal), in which life sentence was declared unconstitutional. He asked the Court to follow *Evans Wanjala Wanyonyi -vs- R*. Criminal Appeal No. 312 of 2018; *Dismas Wafula Kilwake -vs- R* [2019] eKLR; and the High Court decisions in *Philip Maingi Mweke & others -vs- R* [2022] KEHC; and *Edwin Wachira & others -vs- R*., Petition No. 97 of 2021 (Machakos). He urged the Court to release him so that he joins his family.

6. Learned Counsel, Ms. Mwaniki, who appeared for the respondent, relied on written submission that were prepared by Prosecution Counsel, P.J. Kibet, of the Office of Director of Public Prosecutions (ODPP). In regard to sentence, it was argued that the *Sexual Offences Act* provides for the sentence of life imprisonment, and the trial court had discretion to impose that sentence considering the age of the victim. Counsel relied on *Bernard Kimani Gacheru -vs- Republic* [2002] eKLR.

7. We have considered the appeal and the contending written and oral submissions that were made before us. This being a second appeal, under Section 361(1) of the *Criminal Procedure Code*, our jurisdiction is limited to consideration of matters of law only. Severity of sentence is clearly outside our mandate as it is identified in that provision as a matter of fact.

8. The appellant before us has questioned the exercise of discretion by the trial court in sentencing him, and the mandatory nature of the sentence that was imposed upon him. The appellant is, therefore, not just questioning the severity of the sentence imposed upon him, but has raised are issues of law that calls for determination by this Court.

9. In regard to the discretion in sentencing, as stated by the Court of Appeal in *Bernard Kimani Gacheru -vs- Republic* (*supra*).

> " 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 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."

10. According to the facts that were admitted by the appellant, he defiled a four-year-old girl, whom he had pulled into a sugar plantation. Under Section 8(2) of the *Sexual Offences Act*, where a victim of defilement is under eleven years, the sentence provided is a mandatory sentence of life imprisonment. This has constrained the discretion of the trial court. As stated by the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 others (Amicus Curiae)* (Petition E018 of 2023) [2024] KESC 34 (KLR):

> " 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 court to impose a harsher sentence."

11. Whereas the appellant is right that there was jurisprudence from this Court to the effect that mandatory sentences are unconstitutional, that trajectory has been dislodged by the Supreme Court in *Republic v Mwangi* (*supra*), to the extent that mandatory sentences are clearly provided for in the *Sexual Offences Act*, and the trial court has no option, but to impose it. Moreover, the appellant defiled a four-year-old child causing her physical and psychological trauma that may affect the child for a long time.

12. We come to the conclusion that this appeal has no merit. Accordingly we dismiss the appeal in its totality and confirm the appellant's conviction and sentence. It is so ordered.

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