



**Nakitare v Republic (Criminal Appeal 37 of 2015)
[2023] KECA 681 (KLR) (9 June 2023) (Judgment)**

Neutral citation: [2023] KECA 681 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CRIMINAL APPEAL 37 OF 2015
PO KIAGE, F TUIYOT'T & WK KORIR, JJA
JUNE 9, 2023**

BETWEEN

RONALD SIMIYU NAKITARE APPELLANT

AND

REPUBLIC RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma (H.A. Omondi, J.) delivered and dated 27th November 2014 in HC CR Appeal No. 149 of 2012)

JUDGMENT

REASONS FOR THE DECISION OF THE COURT

1. Ronald Simiyu Nakitare (the appellant) is a free man; not because he did not access a forbidden fruit but because justice proffers leniency to those who acknowledge their wrong deeds. On February 14, 2023, St Valentine's Day, justice reciprocated its love for the appellant and his liberty was restored awaiting the reasons that we issue today. On that day when this matter came up for hearing, the court gave a decision pursuant to rule 34(7) of the Court of Appeal Rules, 2022 reducing the appellant's sentence to the period already served and reserved the reasons for that decision for this date.
2. The appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act. The offence was committed against LSW aged 14 years. The offence took place in [particulars withheld] within Bungoma County between the 12th and September 14, 2012. When the appellant was presented to the Senior Resident Magistrate's Court at Kimilili, he pleaded guilty to the offence and was sentenced to 20 years imprisonment. His appeal to the High Court was found to be without merit and dismissed in a judgment delivered on November 27, 2014. This prompted him to file the present appeal where he is only appealing against sentence.
3. This matter was initially listed for virtual hearing on February 13, 2023. However, due to technological challenges, the matter was adjourned to and heard on February 14, 2023. Both the appellant and Mr



Okango, the learned prosecution counsel for the respondent, had filed their submissions which they sought to rely on.

4. The appellant's contention was that his sentence was passed without proof of the complainant's age notwithstanding the importance of the age of the victim in sentencing under the *Sexual Offences Act*. He also submitted that the trial court failed to exercise its discretion and consequently failed to give due consideration to the mitigating circumstances of this case thereby passing a harsh sentence. The appellant further stated that the relationship between him and the complainant was that of a "boyfriend and girlfriend" and that no force was used in the process. He additionally pointed out that he was aged 20 years at the time of the commission of the offence. The appellant argued that the failure by the trial court to exercise its discretion subjected him to suffer the mandatory sentence urging this Court to intervene in light of recent judicial pronouncements regarding mandatory sentences under the *Sexual Offences Act*.

To buttress this point, he relied on the High Court decision in *Philip Mueke Maingi & 2 others vs Republic* [2022] eKLR and urged us to consider the circumstances of this case and find that the period he has served in incarceration is sufficient punishment as he has learnt his lesson.

5. Mr Okango quite properly conceded the appeal on sentence. Counsel urged the court that the mitigating circumstances of this case, as well as judicial authorities cited in the respondent's submissions, supported the reduction of the appellant's sentence to the period already served which was about 10 years. He referred to the cases of *Philip Mueke Maingi & 2 others v Republic* [2022] eKLR and *Joshua Gichuki Mwangi vs Republic* [2021] eKLR.
6. Counsel submitted that the mandate of this court on a second appeal is confined to matters of law only. Concisely, that under section 361 of the *Criminal Procedure Code*, severity of a sentence is regarded as a factual matter and does not therefore fall under our remit. Further, that an appellant seeking to have this court's audience on sentence must establish that either the sentence was enhanced by the High Court, or that the subordinate court had no power to pass that sentence. On this, we were referred to the decision of this court in *Simon Karanja Kiarie vs Republic* [2014] eKLR.
7. In view of the submissions of the parties, what is required of us therefore is to first ascertain whether the appeal before us is structured in a way that brings it within the confined parameters of our jurisdiction in as far as appeals against sentence are concerned. In conducting this preliminary inquiry, we are guided by section 361 of the *Criminal Procedure Code*. It is not in dispute that the High Court did not enhance the appellant's sentence. There is also no argument before this court that the trial court exceeded the jurisdiction donated to it by section 7 of the *Criminal Procedure Code*. However, upon review of the appeal before us, it is evident that the appellant challenges the sentence on the ground that the trial court and the first appellate court respectively passed and upheld the 20 years' jail term in its mandatory aspect. It is also a plea that we review the sentence in view of jurisprudence that has come after the judgements of the two courts below on mandatory sentences prescribed under the *Sexual Offences Act*. In our view, this argument renders the appeal a question of law which then grants the appellant an audience before this court.
8. Having determined that we have jurisdiction, our next line of inquiry is in respect to the sentence passed. The trial court in passing the sentence stated as follows:

"The accused is not remorseful. I sentence him to serve 20 years in jail as provided under S 8(3) of the Act."



As for the High Court, the record reads as follows:

“The appellant claimed before this court that he is 18 years, however, he told the court that he was born in 1992-meaning at the date of conviction, he was 20 years old- too young to serve the better part of his life in jail, but unfortunately over 18 years, and with the mandatory sentence under Sexual Offences Act, there is little the court can do in terms of exercising discretion on the sentence.”

9. Upon giving due consideration to the extracts above, it is not in doubt that both the trial court and the first appellate court proceeded on the understanding that they lacked the sentencing discretion under section 8(3) of the *Sexual Offences Act*; and that they had no option but to pass the prescribed mandatory sentence. On this, we cannot fault them for proceeding in such a manner as that was the jurisprudential position at the time they rendered their decisions. However, this appeal coming up in 2022 must find favour in light of recent judicial pronouncements with regard to the mandatory nature of sentences under the *Sexual Offences Act*.
10. The following judicial pronouncements perhaps form the fort upon which our intervention is called for. In *Dismas Wafula Kilwake vs Republic* [2019] eKLR, this court stated that:

“...the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.

This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence...”

11. Similarly, in *Joshua Gichuki Mwangi vs Republic*, Nyeri Criminal Appeal No 84 of 2015, this Court stated that:

“We emphasise that this court is alive to the fact that some accused persons are obviously deserving of no less than the minimum sentences as provided for in the SOA due to the heinous nature of the crimes committed. And they will continue to be appropriately punished...”

On the other hand, there are definitely others deserving of leniency and this is the leeway we are asserting that ought to be at the disposal of courts...

... We acknowledge the power of the Legislature to enact laws as enshrined in the Constitution. However, the imposition of mandatory sentences by the Legislature conflicts with the principle of separation of powers, in view of the fact that the legislature cannot arrogate itself the power to determine what constitutes appropriate sentences for specific cases yet it does not adjudicate particular cases hence cannot appreciate the intricacies faced by judges in their mandate to dispense justice. Circumstances and facts of cases are as diverse as the various cases and merely charging them under a particular provision of laws does not homogenize them and justify a general sentence.



This being a judicial function, it is impermissible for the Legislature to eliminate judicial discretion and seek to compel judges to mete out sentences that in some instances may be grossly disproportionate to what would otherwise be an appropriate sentence. This goes against the independence of the Judiciary as enshrined in article 160 of the Constitution. Further, the Judiciary has a mandate under article 159 (2) (a) and (e) of the Constitution to exercise judicial authority in a manner that justice shall be done to all and to protect the purpose and principles of the Constitution. This includes the provision of article 25 which provides that the right to a fair trial is among the bill of rights that shall not be limited... In the end, courts have a duty to dispense justice not only to the complainants but also to accused persons.”

12. It is necessary to appreciate that the decision in *Dismas Wafula Kilwake (supra)* came before the clarification by the Supreme Court in *Muruatetu & another v Republic; Katiba Institute & 4 others (Amicus Curiae)* (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions) that its decision in *Francis Karioko Muruatetu & another v Republic* [2017] eKLR was confined to the then mandatory death sentence for the offence of murder as provided under section 204 of the *Penal Code* and any challenge to the constitutional validity in respect of other capital offences “should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached.” In regard to the mandatory nature of the sentences under the *Sexual Offences Act, 2006*, the challenge by the Supreme Court was taken up by the petitioners in *Maingi & 5 others vs Director of Public Prosecutions & another* [2022] KEHC 13118 (KLR) where Odunga J (as he then was) expressed himself as follows:

“(111) My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under article 28 of the Constitution. In other words, since the provisions of the Sexual Offences Act came into force earlier than the Constitution, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under article 28 of the Constitution as appreciated in the Muruatetu 1 case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.”

13. There is therefore a judicial decision in place that has found the mandatory nature of the sentences under the *Sexual Offences Act* to be unconstitutional. From the foregoing authorities and at the risk of being repetitive, we reiterate the view that judicial discretion is one of the tools available to the courts to enable them to deliver justice by rendering proportionate punishment commensurate to the circumstances of each particular case. A blanket sentence, denial of discretion and disregard of the circumstances of the case in question is but a whimsical and arbitrary dispensation of justice. A sentence ought to take the circumstances of the particular case into consideration as convictions arise from different circumstances; some heinous while some not too aggravated.
14. Having said the foregoing, we have no doubt that our intervention in this appeal is called for. In this case, the appellant was sentenced to 20 years imprisonment. We reiterate that there is nothing unconstitutional about this sentence as the same is provided for under section 8(3) of the *Sexual*



Offences Act. It is the fact that the sentence was meted out against the appellant in its mandatory nature that has called for our intervention.

15. Paragraph 23.9 of the Sentencing Policy Guidelines issued by the Kenyan Judiciary in 2016, provides guidance on how to conduct a balancing act between the aggravating and mitigating circumstances during sentencing. Therefore, in discharging our mandate, we must take into consideration both the aggravating and mitigating factors. The appellant did not say a word in his mitigation. The prosecutor indicated that the appellant had no previous record and we take it that he was a first offender. The trial court on its part noted that the appellant was not remorseful. We observe that the failure to mitigate cannot of itself serve as evidence of lack of remorse. Sometimes those who appear in our courts are overwhelmed by their circumstances and are lost for words. We additionally note that previously the minimum sentences provided for some crimes dissuaded accused persons from proffering mitigation for the simple reason that mitigation would not reduce the fixed sentences. The lack of mitigation on record should therefore not be treated to the disadvantage of the appellant.
16. In reviewing the appellant's sentence, we take cognizance of the fact that the Sentencing Policy Guidelines require courts in passing sentence to take into account the fact that an accused person has pleaded guilty. In this case, the appellant pleaded guilty on his first appearance. We further note that the complainant lived with the appellant for a few days, in what the appellant terms as "boyfriend and girlfriend relationship". Additionally, the appellant was aged 20 years old at the time of commission of the offence. The complainant was said to be 14 years old. Although a crime was committed the age difference between the appellant and the victim was not vast. In our view, there were no aggravating circumstances warranting 20 years imprisonment on such a lad. A lesser period of sentence would have sufficed. In the circumstances, and considering that the appellant had been in prison for about 10 years, we found that the period already served was sufficient and corresponded with the objectives of sentencing. Counsel for the respondent is saluted for seeing sense in the appeal and readily conceding to it.
17. In the end, we find the appeal to have merit. For the record and for avoidance of doubt we confirm the conviction. We, however, allow the appeal against sentence and set aside the 20 years' imprisonment. The sentence is reduced to the period already served in prison as we deem it sufficient punishment for the appellant. This explains why we set the appellant free on the date of the hearing of his appeal, a befitting gift on Valentine's Day, as we deemed it unjust for him to spend another day in jail.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023

P. KIAGE

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

