Musyoka v Republic (Criminal Appeal 163 of 2017)
[2023] KECA 1628 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1628 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 163 OF 2017

W KARANJA, J MOHAMMED & AO MUCHELULE, JJA

OCTOBER 27, 2023

BETWEEN

JOSEPH MATI MUSYOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal against the Judgment of the High Court at Kerugoya (L.W. Gitari, J.) dated 5th October 2017 in HCCRA NO. 50 OF 2014)

JUDGMENT

1. The appellant was on September 18, 2014 convicted by the Principal Magistrate at Gichugu of defilement of a girl aged 10 years under section 8(1) as read with section 8 (2) of the *Sexual Offences Act*, and was sentenced to life imprisonment. His appeal against conviction and sentence was on October 5, 2017 dismissed by the learned L.W. Gitari, J. at the High Court at Kerugoya. He appealed to this Court challenging the conviction and sentence. However, during the hearing of the appeal he abandoned the appeal against conviction. He was in person while learned counsel, Mr. Naulikha represented the State. The appellant submitted that, because of the life imprisonment, he was suffering and pleaded for a lesser sentence.

2. According to learned counsel, the sentence meted out to the appellant was neither harsh nor excessive, given the age of the girl and the nature and circumstances of the office.

3. The evidence on which the appellant was convicted was that on October 3, 2013 the girl was at about 8.00pm watching TV in her mother's house. Her mother (PW 3) was in the kitchen in the same compound. The appellant, a neighbor, entered the house where the girl was and forcefully removed her clothes. He removed his trousers. He laid the girl on the sofa set and, while threatening to kill her if she reported the incident, penetrated her *genitalia* using his penis. A boy (PW 2), aged 13, came to the house and found the appellant on top of the girl. He did not report to the girl's mother (PW 3)

until on the following date. PW 3 confirmed with the girl about what happened. She took the girl to the police station to report and then for medical examination and treatment at Kirinyaga Sub-District Hospital. The girl suffered bruised internal vagina and her hymen had been broken.

4. Our role on a second appeal against sentence is limited to issues of law, and the sentence can only be an issue if it is illegal or so manifestly high or low that no reasonable court could possibly impose it (see *Kenneth Kimani Kamunya –v- Republic* [2006]eKLR). The severity of the sentence alone is a question of fact, not one of law. It has to be demonstrated by the appellant in his appeal that the learned Judge erred in principle when she imposed the sentence of life imprisonment.

5. Under section 8(2) of the *Sexual Offences Act*, the sentence prescribed for a man who defiles a girl under the age of eleven (11)years or less is imprisonment for life.

6. When the appellant was convicted by the trial court, he was asked to mitigate. He stated thus:

> " I pray that the court to look into my plight. I had an accident and my body is ailing.
>
> I have people who depend on me like my mother who is 80 years old. I am my family's sole breadwinner."

He was a first offender. The court in sentencing him, stated as follows:-

> " I really sympathise with the offender because the law prescribes a mandatory sentence for offences of this nature."

7. In *Francis Karioko Muruatetu & Another –v- Republic*, S.C. Petition No. 16 of 2015 the Supreme Court was dealing with the offence of murder under section 204 of the *Penal Code* when it held that the mandatory death sentence for the offence was unconstitutional. The Court later clarified that it was not dealing with any other offence. In the instant case, we are dealing with defilement whose punishment under section 8(2) is life imprisonment. This Court in *Dismas Wafula Kilwake –v- Republic* [2019]eKLR held that the same rationale should be applied in a defilement case and observed that:-

> "In appropriate cases therefore, the court should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by the section 8 to impose the provided sentences if the circumstances do not demand."

It was concluded that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing.

8. We agree with this reasoning, and hold that, in so far as the trial court and the High Court felt that, despite the circumstances of the case, they were beholden by section 8(2) to impose life imprisonment, they fell into fundamental error in sentencing. This is because they had the discretion to consider a lesser sentence if the circumstances of the case called for it. We have to interfere with the sentence.

9. We have considered the facts of the case and what the appellant stated in mitigation. The offence was a serious one, more so given the age of the girl. But the sentence imposed was manifestly excessive. We consider that the imprisonment for 25 years will meet the interests of justice in this case. We consequently set aside the sentence of life imprisonment and in its place the appellant shall serve 25 years in jail. To that extent, the appeal is allowed.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF OCTOBER, 2023

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

A.O. MUCHELULE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR