LKM v Republic (Criminal Appeal 49 of 2019)
[2023] KECA 1418 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1418 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 49 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

LKM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal from the Judgment of the High Court of Kenya at Bungoma (S.N. Riechi, J) Dated 13th February, 2019 in HCCR NO. 124 OF 2016)

JUDGMENT

1. The Appellant, LKM was charged in Kimilili Senior Principal Magistrate Court Case No 8 of 2014, with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No 3 of 2006. The prosecution's case was that between August 17, 2014 and August 21, 2014, the appellant unlawfully and intentionally caused his penis to penetrate the vagina of SC[1], a child aged 16 years. He faced an alternative charge of committing an indecent act with a child c/s 11(1) of the *Sexual Offences Act*. He denied the charges; was subsequently tried and convicted. In mitigation he complained to the trial court that he had suffered in remand; and pleaded with the court to take into consideration the period he had spent in custody. He was subsequently sentenced to serve 15 years' imprisonment on the main charge.

2. Aggrieved by the outcome both on conviction and sentence, the appellant lodged his appeal in Bungoma HCCR No 124 of 2016, on grounds that his constitutional right to a fair trial was violated as he was not provided with witness statements; the age of the victim was not proved, essential witnesses were not called; and his alibi defence was not considered. In a judgment dated 1February 3, 2019, Riechi, J, dismissed his appeal and upheld his conviction on a finding that the ingredients of the offence, namely: age of the victim, penetration and identity of the perpetrator had been proved, his right to a fair trial had not been violated; and the 15 year sentence imposed was legal.

3. The appellant has filed the present second appeal which is only against the sentence meted out; and based on grounds that both the trial magistrate and the first appellate Judge erred in law by meting an unconstitutional sentence, which was arrived at through an unfair trial process; both the trial magistrate and the first appellate court erred by failing to invoke section 333(2) of the *Criminal Procedure Code* on the sentence despite the appellant having been in custody during the entire trial process; and both the trial magistrate and the first appellate Judge erred in law by meting and upholding the sentences respectively, by acting on wrong principles.

4. The crux of the appellant's argument is that, from a plethora of emerging jurisprudence, the mandatory minimum nature of the sentence imposed on him is no longer considered constitutionally permissible. He asks us to set aside the minimum 15 years sentence imposed on him and substitute to the period already served.

5. In opposing the appeal, the respondent, represented by Miss Mwaniki from the ODPP, points out that the trial court considered the appellant's plea in mitigation, but found that the offence under which he was charged provides for a minimum jail term, pointing out under section 8(4) of the *Sexual Offences Act* a person who commits an offence of defilement with a child between the age of sixteen years and eighteen years is liable upon conviction to imprisonment for a term not less than fifteen years [emphasis ours].

6. It is thus argued that there was no basis upon which to allege that there was discrimination against the appellant, as the sentence was valid and consistent with the laid down provisions of the law. We are urged to take into consideration the fact that offences under the *Sexual Offences Act* are serious; often leaving an indelible physical, psychological and emotional impact, especially where the victim is a minor. That, this therefore creates the need to protect the victims and the vulnerable in the society; and the stiff nature of the sentence is justifiable since it serves as a deterrence to other would- be perpetrators.

   In this regard, the respondent cites the decisions in *Ngao v Republic* (Criminal Appeal 5 of 2020) [2021] KECA 154 KLR) and *Lawrence v Republic* (Criminal Appeal 48 0f 2017) [2021] KECA 172 (KLR) to argue that this Court has upheld the sentences set out in section 8 of the *Sexual Offences Act* as being legal.

7. As for the lament that there was lack of compliance with Section 329 of the *Criminal Procedure Code*, the respondent submits that, this is unfounded as the record shows that the appellant was allowed to present his plea in mitigation, which was duly considered by the trial Magistrate. However, the respondent acknowledges that the provisions of section 332 (2) of the *Criminal Procedure Code*, requires that in imposing a sentence, the trial court ought to take into account the time a convicted person has spent in custody while awaiting trial, pointing out that the appellant was arraigned in court on 25 August 2014 and sentenced on 19 April 2016, but counsel leaves it to this Court to determine whether this counts for anything.

8. This is a second appeal, which is only on sentence. The Appellant has set down three grounds of appeal, namely that: both the trial magistrate and the first appellate Judge erred in law by meting out an unconstitutional sentence; both the trial magistrate and the first appellate court erred in law by not invoking section 333(2) of the *Criminal Procedure Code* on the sentence despite the appellant having been in custody during the entire trial process; and both the trial magistrate and the first appellate Judge erred in law by meting and upholding the sentences respectively by acting on wrong principles. He, thus, challenges the mandatory nature of minimum sentences of the *Sexual Offences Act*.

9. Our duty as a second appellate court, under section 361 of the Criminal Procedure Code limits us to addressing matters of law only, and not to delve into matters of fact which have been dealt with by the

trial court; and subsequently re-evaluated by the first appellate court. This duty has been reiterated in the case of *David Njoroge Macharia -vs- Republic* (2011) eKLR thus:

> "...That being so, only matters of law fall for consideration - see section 361 of the Criminal Procedure Code. For purposes of this section, severity of sentence is defined as a matter of fact... As this Court has stated many times before, it will not normally interfere with concurrent finding 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" [we underline for emphasis].

10. The appellant is persuaded that this Court can interfere with the mandatory minimum sentence which was meted out on the strength of a legislative enactment, leading to a conflict in separation of powers. He submits that such sentences have since been declared unconstitutional, if meted out as the only available options as was expressed in *Julius Kitsao Manyeso v R*; Malindi Cr. Appeal No12 of 2021 at paragraph 21 with the observation that;

> "a sentence that renders mitigations to be of no value is unjustifiably discriminative, unfair and repugnant to the principle of equity before the law... in addition, an indeterminate life sentence is in our view also inhumane treatment and violates the rights to dignity under Article 28."

11. In an attempt to help us gain an insight of the circumstance that led to his being charged for the offence, the appellant acknowledges that, at the time, the complainant had not attained the age of consenting, although she had followed her young heart, and accepted to a have a relationship with him as a boy-friend; and that as a matter of fact, she had moved in to live with him, believing she had found one who was ready to marry her.

12. It is with this in mind, that the appellant urges us to take note that he was in prison for one and half years; and that when sentence was pronounced, it was not clear whether the sentence would run from the date of arrest or the date of conviction. He urges us to consider the positive and very determined approach he has taken even while incarcerated taking advantage of the academic opportunities offered in the correctional facility, in an attempt to gain life changing skills. He points out to us that he has changed tremendously over the past 9 years that he has been in custody, having sat for the national Kenya Certificate of Primary Education (KCPE) in the year 2017 and was the best student scoring 339 marks. He is at present a form four candidate (indeed we confirm that he just finished writing a paper in his KCSE exam an hour before the hearing of the appeal).

13. In terms of rehabilitation and transformation, the appellant draws to our attention that, he is also the school president within the prison; as well as a religious man having undertaken various rigorous theological trainings; ready to re-integrate, and no longer a threat to the public. It is on account of this that he contends that it would thus be inhuman treatment if he were to remain imprisoned longer than the period he has already served.

14. We echo our acknowledgement in various previous decisions that there has been a shift in the Court's jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*. Indeed, this trend is attributable, indirectly, to the Supreme Court's decision in *Karioko Muruatetu & Another v Republic*, Petition No 15 of 2015 (Muruatetu 1) which ushered a flood of decisions departing from fidelity to the minimum and mandatory sentences in sexual offences. Subsequently the jurisprudence impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases has found expression in such as *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017

of 2021) [2022] KEHC 13118 (KLR) (Odunga J. as he then was) and Edwin Wachira & Others v Republic – Mombasa Petition No 97 of 2021, Mativo J. (as he then was). The rationale behind this is pegged to the act that a minimum mandatory sentence takes away the jurisdiction conferred on judicial officers to exercise their discretion when meting out sentence.

15. It is thus clear to us that in meting out the 15 year sentence, and having it affirmed by the first appellate court, there was no explanation given as to why the appellant had to serve the minimum, other than that this was the minimum legal sentence provided in the law. This is closely followed by the question as to whether the appellant was given a chance to tender his plea in mitigation, and whether such omission occasioned prejudice against the appellant. Section 323 of the *Criminal Procedure Code* provides that:

> " If the judge convicts the accused person, or if the accused person pleads guilty, the Registrar or other officer of the court shall ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings".

16. Our perusal of the record confirms that the appellant was given an opportunity to tender his mitigation, which counted for nothing in light of the minimum 15 years sentence which was lurking in the shadows. This then ushers in section 333 (2) of the *Criminal Procedure Code* which provides that:

> 2)) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

17. There is no denial that in pronouncing the sentence, and later affirming it as legal, there was no indication by either of the two courts, the date on which the sentences would commence; or whether the period the appellant had spent in remand while awaiting trial had been considered. We, therefore, find that there was an error in law; and in application of the principles of sentencing. Further, that there is need to interfere with the mandatory minimum sentence meted out under the Act as the same has been declared unconstitutional. Taking all these factors into consideration, including the rehabilitation the appellant has undergone, we find it reasonable and just to set aside the sentence; and substitute it with a 10-year imprisonment, which shall be computed from May 14, 2015, being the date of the appellant's arraignment. The appeal on sentence thus succeeds.

DATED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF NOVEMBER 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL