Musania alias Remmy Musania v Republic (Criminal Appeal 9 of 2019) [2023] KECA 1446 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1446 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 9 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

IDD MUSANIA ALIAS REMMY MUSANIA .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Bungoma (Aroni, J.) dated 18th August, 2016 in HCCRA No. 89 of 2013)

JUDGMENT

1. The appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* in Webuye Senior Resident Magistrate's Court Criminal Case No. 335 of 2012. The particulars were that on 23rd April, 2012, he unlawfully and intentionally caused his penis to penetrate the vagina of SR, a child aged 3½ years.

2. After the appellant pleaded not guilty to the charge, a fully-fledged trial ensued at the conclusion of which he was convicted and sentenced to life imprisonment. Dissatisfied with both the conviction and sentence, the appellant appealed to the High Court which, in a judgment dated 18th August, 2016 by Ali-Aroni, J. (as she then was), dismissed his appeal and upheld his conviction and sentence.

3. The appellant has filed the present second appeal to this Court.

   In his self-crafted Memorandum of Appeal, he has set down seven grounds of appeal. While some of the grounds seem to impugn his conviction, during the plenary hearing of the appeal, the appellant was categorical that his appeal is only against sentence.

4. Even in allowing only the appellant's appeal against sentence to proceed, we are mindful of our remit as a second appeal court. Our jurisdiction is limited by dint of Section 361(a) of the *Criminal Procedure Code to* deal with matters of law only and not to delve into matters of fact which have been dealt with

by the trial court and reevaluated by the first appellate court. For purposes of this section, severity of sentence is defined as a matter of fact. See *Samuel Warui Karimi vs. Republic* [2016] eKLR.

5. The gist of the appellant's appeal against sentence is that the mandatory nature of the sentence imposed on him is no longer considered constitutionally permissible following our recent jurisprudence on mandatory minimum sentences. He asks us to set aside the life imprisonment sentence imposed on him and substitute it with a term sentence.

6. The respondent opposes the appeal urging that given the circumstances of this case, the sentence imposed was warranted. The state counsel pointed out that the trial court considered the appellant's mitigation and rightly described the offence committed herein as heinous and inhuman considering that the victim was the appellant's own child who would be traumatized for the rest of her life. Moreover, the respondent points out, the child was only 3½ years old at the time of the sexual assault.

7. The appellant is right about the thrust of our emerging jurisprudence on mandatory minimum sentences and indeterminate life sentences. First, we acknowledge that there has been a shift in the Court's jurisprudence on mandatory minimum sentences in the *Sexual Offences Act*. The trend is attributable, if only indirectly, to the Supreme Court's decision in *Karioko Muruatetu & Another v Republic*, Petition No. 15 of 2015 (Muruatetu 1). This jurisprudence has found expression in High Court decisions impugning the constitutionality of mandatory minimum sentences in the *Sexual Offences Act* in cases 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). Second, this Court, differently constituted, in *Julius Kitsao Manyeso vs Republic* Malindi Criminal Appeal No. 12 of 2021 (Nyamweya, Lesiit & Odunga, JJAs) held that mandatory life imprisonment is unconstitutional due to its indeterminate nature which renders it inhumane and violative of the right to dignity of the person.

8. Taking this trend into consideration, we hereby set aside the sentence of life imprisonment imposed on the appellant in this case. Instead, we take into consideration the circumstances surrounding the offence; the offender and the victim. In doing so, we agree with the trial court that the offence was, indeed, heinous and was perpetrated in a predatory and depraved manner by a father on his own child of very tender years. Evidence was led about the extensive damage to the genitalia of the victim owing to the barbaric sexual assault.

9. Considering all these aggravating factors and noting that the only truly extenuating factor is that the appellant is a first offender, we think that a stiff sentence of thirty (30) years is the proper and just sentence for the defilement perpetrated by the appellant in this case.

10. The upshot is that the appeal against sentence marginally succeeds to the limited extent that the sentence of life imprisonment imposed on the appellant is set aside. Instead, we hereby impose a sentence of thirty (30) years imprisonment on the appellant. The sentence will run from 24th April, 2012 since the appellant has been in custody since then.

11. Orders accordingly.

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

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.