Nzioka v Republic (Criminal Appeal 62 of 2020)
[2023] KECA 1391 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1391 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 62 OF 2020

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

NOVEMBER 24, 2023

BETWEEN

LAWRENCE MBOLU NZIOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (R. Nyakundi J.) delivered on 28th February 2020 in Criminal Appeal no. 47 of 2019 Originally Malindi Criminal Case No. 342 of 2013.)

JUDGMENT

1. Lawrence Mbolu Nzioka, the appellant herein, has lodged this second appeal after the dismissal of his first appeal by the High Court (R. Nyakundi, J.), which he had lodged against conviction for the offence of defilement contrary to section 8(1) as read with 8(2) of the *Sexual Offences Act*, hereinafter SOA, and the sentence of life imprisonment that had been imposed by the Senior Resident Magistrate at Malindi (Hon. Y. A. Shikanda), hereinafter the 'trial Court'. The particulars of the offence were that on 20th May 2013 in Malindi District, within Kilifi County, the appellant intentionally and unlawfully caused his penis to penetrate the anus of EM a child aged 10 years old. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* no. 3 of 2006, hereinafter (SOA).

2. When the charge was read to the appellant on 4th June 2013, he entered a plea of not guilty to the charges. The prosecution called six (6) witnesses to testify in support of its case, while the appellant chose to keep quiet during the trial and not give any testimony.

Background

3. The relevant facts of the case were that EM, (name withheld), who was PW1 in the case, was in the field of [Particulars Withheld] Primary School which is near his home, waiting to see an aeroplane with K and S. The two, S and K were children younger than him. Some older boys came and found K and S touching each other's sexual organs. The older boys took S home and returned to where PW1 and K were. PW1 and K each ran away in different directions. PW1 testified that he was afraid of going home thinking he may be beaten if the parents heard what had happened in the field. He decided to go elsewhere when he met the appellant, a total stranger, and asked him if he knew where [Particulars Withheld] High School was, and he offered to show him. He told the Court that it was after 6.00 p.m. and he could see without the use of light.

4. The Complainant narrated that when they got to [Particulars Withheld] High School, the Appellant asked for his father's number, which he did not know and asked him to spend the night at his home and he would take him, PW1, to school the next day. PW1 testified that he entered the appellant's one-roomed house after he lit the candle.

5. Eventually, after the appellant took palm wine at a nearby bar with three (3) people, he took him to his brother's house where he was shown a mattress on the floor to sleep on. He said that the appellant returned later and took him to his house. They slept on a mattress but that at about 5.00 a.m., the Appellant removed PW1's clothes, then removed his underwear and did 'bad manners' through his buttocks. PW1 told the Court that even though he felt pain, he could not say anything since the appellant told him to keep quiet.

6. PW1 said that he escaped to the appellant's neighbour's house and reported the incident to him after telling the appellant that he needed to use the toilet. The neighbour took him to the village elder, where he reported, and thereafter, he was taken home. The village elder informed PW1's parents. The matter was reported to Malindi Police Station. The village elder reported to the police, who told them that PW1 should be taken to hospital. His father, PW3 and mother, not called as a witness took PW1 to Malindi General Hospital, where he was examined and treated by PW6. On examining PW1, PW6 saw bruises on the anal orifice and tenderness, a confirmation he was defiled. PW1 identified the appellant's house to the village elder, PW2.

7. PW4 David Simba Mwanzia, was a neighbour of the appellant. He told the Court that on 19th May 2013, while at his home he saw the appellant with a male child who he did not know. The appellant told him that the child was lost, that he met him at Ngala area. PW4 remained with the child as the Appellant went to get food but he came back 30 minutes later and told PW4 that he did not find food, and asked PW4 to wake the child so that they could eat elsewhere. PW4 stated the appellant took the child away to his house for the night.

8. The Investigating Officer, Sgt George Masika, testified as PW5. He stated that on 20th May 2013 at about 9.00 p.m. while on duty, he received a boy named EM who was ten (10) years old, from his father, PW3, who reported that a person he knew had sodomized the child. He testified that the child stated that on 19th May 2013, he was from Kisumu Ndogo going to [Particulars Withheld] High School and he was playing at [Particulars Withheld] School with his friends when a certain young man found them playing and threatened to report him to his parents and he ran away out of fear. He met the appellant who he requested for directions to [Particulars Withheld] High School and the appellant agreed but on the way, he took the child to a palm wine bar, and later to his house where he sodomised him.

9. PW5 visited the scene of crime where he traced the owner of the premises where the incident took place in one of the rooms. The appellant was not there at the time. On 2nd June 2013, a village elder apprehended the appellant and took him to the police station.

10. After the close of the prosecution case, the appellant opted to remain silent and to call no witnesses. The learned trial Magistrate, after he analysed the prosecution evidence, found the medical evidence of PW6 corroborated PW1's testimony. He was satisfied that the minor, PW1, was telling the truth, that his evidence was consistent and reliable. He convicted the appellant of the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* pursuant to the provisions of section 215 of the *Criminal Procedure Code*. He then sentenced him to life imprisonment.

11. The Appellant dissatisfied with the trial Court's decision, preferred an appeal to the High Court where he raised four (4) grounds of appeal namely:

    1. That the Learned trial Magistrate erred in Law and fact by finding my conviction and sentence without considering that the sentence of life imprisonment was unlawfully for the age of the complainant was not proved beyond any reasonable doubt.

    2. That the Learned trial Magistrate erred in Law and fact by convicting and sentencing me to life imprisonment without considering that the evidence made in court was contradictory.

    3. That the Learned trial Magistrate erred in Law and fact by failing to note that the Section 150

       of the CPC was not considered for the alleged mob justices alleged to have arrested me were never summoned to testify.

    4. That the Learned trial Magistrate erred in Law and fact by failing to considered my defence statement.

12. The Appellant filed his further grounds of appeal namely:

    1. That section 8(1) (2) of the *Sexual Offences Act* fetters discretion of the Court to give minimum sentence under section 216 and 329 of the *Criminal Procedure Code* (CPC).

    2. That the learned Trial Magistrate erred in law and fact by finding my conviction and sentence without considering that the prosecution did not prove the case to the required standard of law.

    3. That the Learned Trial Magistrate erred in law and fact by without considering that there were massive contradictions and discrepancies.

13. The learned Judge considered the appeal analysed and evaluated the evidence afresh. He found the trial court gave due consideration to the facts and the law, and gave a good reasoning as he determined whether the prosecution established its case beyond reasonable doubt as against the appellant. He found there was no reason to interfere with the judgment.

14. As to the sentence the learned Judge reduced the sentence imposed by the trial Court from life sentence to 30 years' imprisonment, on the basis that following several decisions since *Francis Muruteti & Another vs. Rep.* [2017] eKLR, an appellate Court could interfere with mandatory minimum, including life sentences, and pass a determinate sentence.

15. The appellant was dissatisfied with the judgment of the High Court and proffered this appeal. His memorandum of appeal raises four (4) grounds of appeal namely:

1. That the Learned Judge erred in law by upholding my conviction and by failing to consider the offence of defilement contrary to section 8(1) as read with section 8(2) was not proved beyond reasonable doubt in breach of section 109 and 110 of the *Evidence Act*.

2. That the learned Judge erred in law by upholding my conviction and by failing to consider sharp contradictions by the prosecution, specifically the first statement made by the Complainant (PW1) and the testimony she gave during the trial in breach of section 163(i) (e) of the *Evidence Act*.

3. That the Learned Trial Judge erred in law y upholding my conviction and by failing to consider both conviction and sentence were against the weight of the evidence adduced by the prosecution.

4. That the Learned Judge erred on law by upholding my convicting and by failing to consider my defence evidence.

16. When this appeal was called out for virtual hearing on 19th July 2023, the appellant appeared in person from Malindi Prison where he is serving his sentence. The Principal Prosecution Counsel Ms. Vivian Kambaga held brief for Mr. Okemwa for the State. The appellant abandoned his grounds of appeal and urged that he filed no submissions but was requesting the Court to re-consider his sentence. He explained that of the 30 years' imprisonment he was serving, he had 9 years only left. He urged this Court to consider the six children that were dependent on him and reduce the sentence further. Ms. Kambaga urged us to consider the submissions filed by Mr. Okemwa dated 1st July 2023, which addresses the issue of sentence.

17. In the submissions of Mr. Okemwa, learned Prosecution Counsel, he opposed the appeal on sentence, urging that the sentence was lawful. Counsel submitted that the learned Judge considered the principles in the case of *Ogolla s/o Owuor vs. Republic* [1954] EACA 270, and adhered to the principles in *Mbogo vs. Shah* [1968] EA 93 not to interfere with the discretion of the trial Court unless it was clearly wrong, or the court misdirected or non-directed itself. Further that the Judge observed the holding in Mbogo case, supra, that not every decision of the trial Court should be overturned or corrected unless it meets the threshold. He urged that the threshold was not met and that the appeal should be dismissed.

18. Being a second appeal our mandate is limited by section 361(1) (a) to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal. In *Karani vs. R*., [2010] 1 KLR 73 that:

> " This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law."

19. The appellant is challenging the sentence of 30 years imprisonment. We note that the sentence was a reduction from the original sentence of life imprisonment that was meted out against the appellant by the trial Court. In this regard, sentencing is at the discretion of the trial Court, and as a second appellate Court we cannot interfere with this exercise of discretion unless it is shown that the Court passed an illegal sentence.

20. The learned Judge of the High Court considered the case of Ogola s/o Owuor case (supra) where the Court gave the principle applicable when an appellate Court considers an appeal against sentence. The principle is that an appellant who challenges the exercise of discretion in sentencing must demonstrate that the sentence is harsh and manifestly excessive. The learned Judge was satisfied that the learned trial Magistrate, in determining the appropriate sentence considered the appellant's mitigation despite the fact that Parliament among others, laid emphasis on the sentence being a mandatory minimum. The learned Judge then considered the Supreme Court decision of *Francis Muruatetu & Another vs. Republic* [2017] eKLR and concluded that the case was an authority for the position that an appellate Court can interfere with mandatory sentences. He then invoked the cases of *Jared Koita Injiri vs. Republic* CR. Appeal No. 93 of 2014 and *Christopher Ochieng vs. Republic* CR. Appeal No. 202 of 2011 and altered the appellant's sentence in his favour, reducing it to thirty (30) years imprisonment from the life sentence he faced. He then directed that the said sentence be computed to commence from the date of remand, which was 4th June 2013.

21. We note that the basis of the appellant's appeal against sentence is his personal circumstances concerning difficulties experienced by his family and himself due to his incarceration. What the appellant needed to demonstrate is that the first appellant court got it all wrong or misdirected itself or that the decision is manifestly punitive and excessive in view of the facts of the case. The appellant has but faulted the first appellate Judge in exercise of his powers as a first appellate court on the issue of sentence. We find that there is no justification demonstrated why we should interfere with the decision of the Judge. Furthermore, the appellant benefited from the decision from the interpretation of *Francis Muruatetu* case, supra, on which basis the learned Judge of the High Court interfered with the discretion of the trial Magistrate and altered the sentence from life imprisonment to 30 years' imprisonment. In the circumstances, we find no merit in this appeal against sentence.

22. The result is that the appeal is dismissed.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023

S. GATEMBU KAIRU, FCIArb.,

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR