Wekesa v Republic (Criminal Appeal 50 of 2019)
[2023] KECA 1405 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1405 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 50 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

JACOB WAFULA WEKESA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Bungoma, (Sitati, J.) dated 26th February, 2019 in HCCRA No. 64 of 2015)

JUDGMENT

1. Jacob Wafula Wekesa, the appellant herein, was charged with defilement contrary to section 8(1) as read with section 8 (3) of the *Sexual Offences Act* in Criminal Case No., 668 of 2014 at the Bungoma Chief Magistrate's Court. The particulars of the offence were that on diverse dates between 28th December, 2013 and 22nd March, 2014, he unlawfully and intentionally caused his penis to penetrate the vagina of SNT, a child aged 15 years.

2. The appellant pleaded not guilty necessitating a trial in which the prosecution marshalled seven witnesses. The appellant gave an unsworn statement and did not call any witness.

3. At the conclusion of the trial, the court convicted the appellant and sentenced him to 20 years imprisonment.

4. Dissatisfied with the conviction and sentence, the appellant lodged an appeal at the High Court sitting in Bungoma. After hearing the appeal, the learned Judge (Sitati J). delivered a judgment dated 26th February, 2019 dismissing the appeal and affirming both the conviction and sentence.

5. The appellant is before this Court on a second appeal. He has, however, whittled down his grievance to a single one: he challenges the sentence imposed upon him as excessive and unconstitutional because it was imposed by the trial court, and upheld by the High Court, as a mandatory minimum

sentence under the *Sexual Offences Act*. The trial court, the appellant says, did not exercise discretion in sentencing him since the learned magistrate felt that her hands were tied by the mandatory minimum in the *Sexual Offences Act*. The High Court failed to correct this error, he adds.

6. The appeal is opposed. Ms. Mwaniki, learned State counsel, submitted that the *Sexual Offences Act* at section 8(3) provides that a person who commits an offence of defilement with a child between the age of twelve years and fifteen years, is liable upon conviction, to imprisonment for a term not less than twenty years. The trial court, she says, considered his mitigation, but found that the offence under which he was charged provides for a minimum jail term. That minimum sentence, learned counsel argued, is justified by the long-lasting effects on the victims of sexual offences who continue to suffer physically, psychologically and emotionally. This creates a need to protect the victims and the vulnerable in the society and; further act as a deterrence to other would-be perpetrators by providing stiff penalties. The respondent argues that this Court has previously endorsed the minimum sentences in the *Sexual Offences Act* in cases such as *Ngao v Republic* (Criminal Appeal 5 of 2020) [2021] KECA 154 (KLR) and *Lawrence v Republic* (Criminal Appeal 48 of 2017) [2021] KECA 172 (KLR).

7. In considering this appeal, we are mindful of our limited jurisdiction as a second appellate court in criminal matters. That jurisdiction is stipulated in section 361 of the Criminal Procedure Code. That section limits our jurisdiction to consideration of matters of law only; and severity of sentence is explicitly stipulated to be a matter of fact. This circumscribed jurisdictional remit was expressed by this Court in *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].

8. The appellant is right that there has been a shift in our 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).

9. The gist of this emerging jurisprudence is that the trial court is not divested of its discretion to fashion an appropriate sentence even in convictions for sexual offences under the *Sexual Offences Act*.

10. In the present case, it is readily obvious that the trial court felt hamstrung by the mandatory minimum sentence. In imposing the 20-year sentence, the learned trial magistrate stated as follows:

> "I have considered accused's mitigation and the fact that he is a 1st offender. I, however, find that the offence under which he has been charged provide for a minimum jail term."

11. Although the appellant appealed against both the conviction and sentence, the High Court judge did not make any reference to the sentence in affirming both the conviction and sentence.

12. Taking the recent jurisprudential trend into consideration, we are constrained to set aside the 20-year sentence imposed on the appellant in this case. In light of the circumstances in which the offence was committed, the trial court ought to have exercised its discretion in imposing a sentence other than the mandatory minimum.

13. The evidence shows that even though we are unable to tell the age of the appellant from the record, he was quite youthful. While the appellant was of majority age and bore the greater burden in the relationship, this was an illicit boyfriend-girlfriend relationship: the complainant ran away with the appellant and lived with him for more than two months. Considering that the complainant was only 15 years old, the appellant certainly should have known better; and whatever sentence this Court imposes must be one which explicitly denounces his actions and communicates the objective seriousness of the offence. However, all factors considered and balancing the objective seriousness of the offence with the extenuating factors in this case, the 20-year imprisonment sentence imposed in these circumstances is manifestly disproportionate to the culpability of the appellant.

14. For the above reasons, we allow the appeal against sentence and set aside the sentence of imprisonment of 20 years; and substitute thereto a term of fifteen (15) years' imprisonment which shall run from 24th March, 2014 since the appellant has been in custody since then.

15. Orders accordingly.

DATED AND DELIVERED AT KISUMU 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

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.