Ayako v Republic (Criminal Appeal 22 of 2018)
[2023] KECA 1563 (KLR) (8 December 2023) (Judgment)

Neutral citation: [2023] KECA 1563 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 22 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 8, 2023

BETWEEN

EVANS NYAMARI AYAKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii, (Okwany, J.) dated 24th May, 2017 in HCCRA No. 22 of 2015)

JUDGMENT

1. Evans Nyamari Ayako, the appellant herein, was arraigned before Ogembo Senior Principal Magistrate's Court and charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars of the offence were that on the July 10, 2011 in Nyamache District within Kisii County he caused his penis to penetrate the vagina of MMJ, a child aged 6 years. He also faced an alternative charge of an indecent assault on a child based on the same facts.

2. The appellant pleaded not guilty to both the main and alternative charges. The prosecution marshalled six (6) witnesses to prove its case. Upon close of the prosecution case, the trial Magistrate found that a prima facie case had been established and placed the appellant on his defence. The appellant gave sworn testimony and called no witness.

3. Upon consideration of the evidence on record, the trial court found the appellant guilty and convicted him as charged. He was duly sentenced to life imprisonment, being the minimum statutorily imposed sentence under section 8(2) of the *Sexual Offences Act*.

4. The appellant was aggrieved with the finding of the trial court appealed to the High Court. In summary, he raised three grounds, as argued by his counsel, before the High Court, to wit, that the age of complainant was not proved; that the appellant was not properly identified, and that the evidence was marred with glaring inconsistencies and that there was failure to call crucial witnesses. In its

judgment delivered on May 24, 2017 the High Court sitting at Nyamira (Okwany, J.) dismissed all the grounds of appeal and affirmed both the conviction and sentence.

5. The appellant filed the present appeal before this court contesting both the conviction and sentence. While his grounds of appeal traversed both aspects, during the plenary hearing, the appellant abandoned his challenge on conviction and urged us to consider only his appeal against sentence.

6. As against sentence, the appellant mainly relied, if only obliquely, on the emerging jurisprudence of this court regarding the statutory minimum sentences in the *Sexual Offences Act*. He urged us to reduce his sentence of life imprisonment to a term sentence taking into consideration the mitigating factors in the case.

7. The respondent, through learned counsel, Mr. Okango, conceded to this aspect of the appeal. Relying on the High Court decision in *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [20221 KEHC 13118 (KLR) in which Odunga, J. (as he then was) first addressed the issue of the mandatory nature of sentences in the *Sexual Offences Act*, holding them to be unconstitutional. The respondent also noted this court's subsequent decisions affirming the position in Nyeri Criminal Appeal No. 84 of 2015 *Joshua Gichuki Mwangi v R* (unreported); and most particularly in Malindi Criminal Appeal No. 12 of 2021, *Julius Kitsao Manyeso v Republic* (Judgement 7/7/2023) (unreported) in which this Court (differently constituted), while determining an appeal under similar legal provisions like this one, held that the life sentence was unconstitutional.

8. The respondent, thus, urged us to reduce the death sentenced imposed to thirty (30) years given the aggravating circumstances in the case.

9. We have considered the circumstances in which this offence was committed. First, we note the very tender age of the survivor – merely 6 years old. Second, the appellant was both violent (he forcefully held the minor by the hand and strangled her on the throat as he defiled her) and used menaces (he threatened to kill her). Third, the physical harm to the survivor was extensive necessitating surgery on the survivor's genitalia under general anaesthesia to repair the damage. Fourth, the appellant showed no remorse at sentencing. The only truly extenuating circumstance in the case is that the appellant was a first offender.

10. We are persuaded that in the circumstances of this case the maximum sentence imposed was justified. The only concern we have is whether an indefinite life imprisonment sentence is constitutional and can be justified given the emerging norms of human decency and human rights reflected in our emerging jurisprudence. This emerging jurisprudence is a product of a purposive reading of articles 27 and 28 of our *Constitution* as applied to sentencing. In interpreting these provisions, this Court, in the *Julius Kitsao Manyeso Case* (*supra*) stated as follows:

> ...we are of the view that the reasoning in *Francis Karioko Muruatetu & Another v Republic* [2017 eKLR equally applies to the imposition of a mandatory indeterminate life sentence, namely that such a sentence denies a convict facing life imprisonment the opportunity to be heard in mitigation when those facing lesser sentences are allowed to be heard in mitigation. This is an unjustifiable discrimination, unfair and repugnant to the principle of equality before the law under article 27 of the *Constitution*. In addition, an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in *Vinter & Others vs The United Kingdom* (Application nos. 66069/09, 130/10 and 3896/10) 120161 Ill ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including

those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved."

11. On our part, we are in agreement that an indeterminate life sentence falls afoul the provisions of articles 27 and 28 of our *Constitution* purposively interpreted. We also find that there is an emerging consensus that the evolving standards of human decency and human rights to which Kenya has agreed to adhere to by virtue of articles 2(5) and 2(6) of the *Constitution* that indeterminate life imprisonment is a cruel and degrading punishment which violates our constitutional values. Our conclusion is based on the consistent trend in many states towards abolition of life imprisonment or its re-definition to a term sentence.

12. A survey of many national courts (for example, Namibia, Germany, South Africa, Mauritius, Spain and Zimbabwe) and regional courts (for example, the European Court of Human Rights) shows that they have, in the recent past, held that indeterminate life imprisonment is antithetical to human rights (See, D van Zyl Smit '*Life imprisonment as the ultimate penalty in international law: A human rights perspective*' (1999) 9 Criminal Law Forum 26-45. Many academic writers in Human Rights have similarly concluded that life imprisonment without a realistic possibility of parole deprives the offender of any prospect of reforming and re-entering society and is tantamount to a "living death sentence", "death by incarceration", "virtual death sentence", "prolonged death penalty", "delayed death penalty", "death sentence without an execution date" and "the other death penalty".[1]

13. A review of the comparative jurisprudence from courts from many jurisdictions in the past decade or so, shows that there is a common acceptance that life imprisonment without the possibility of parole is antithetical to human rights and is considered cruel and degrading punishment because it takes away the realistic hope of release for those who have been sentenced to life imprisonment. Many of these jurisdictions have held that life imprisonment can be saved where there is a possibility of release through parole or where life imprisonment has been limited to a number of years. For example, the South African Constitutional Court in *State v Bull & Another* 2002 (1) SA 535 (SCA) at 552 (para. 23) noted that

> "the possibility of parole saves a whole life sentence from being cruel, inhuman and degrading punishment."

Similarly, the Mauritanian Judicial Committee of the Privy Council also held that

> "a whole life sentence must allow for the prisoner to appreciate from the outset the possibility and timing of his sentence being reviewed." (*de Boucherville v The State of Mauritius* [2008] UKPC 37.)

14. Indeed, a jurisprudential trend is eminently palpable where many countries have explicitly substituted life imprisonment to a term sentence either through legislation or through judicial interpretation of the Bill of Rights of the different countries. A few illustrations would suffice. Earlier this year, Malaysia amended its *Penal Code* by varying life imprisonment with a specific number of years. Life imprisonment is now substituted with imprisonment for a term of not less than thirty years but not

[1] See, for example, I. Grant, C. Choi and D. Parkes ' *The Meaning of Life: A Study of the Use of Parole Ineligibility for Murder Sentencing*' [2020] 52 Ottawa L. Rev. 133, at p. 172, citing A. Liebling, "*Moral performance, inhuman and degrading treatment and prison pain*" [2011], 13 Punishm. & Soc. 530 at p. 536 & J. S. Henry "*Death-in-Prison Sentences: Overutilized and Underscrutinized*" in C. J. Ogletree, Jr. and A. Sarat (eds), Life without Parole: America's New Death Penalty? [2012] at p. 66; See also,Johnson and S. McGunigall-Smith, "*Life Without Parole, America's Other Death Penalty*" [2008], 88 Prison J. 328, at pp. 332-36.)

exceeding forty years. Section 6 of the amending law (*Abolition of Mandatory Death Penalty Act* 2023 (Act 846)) provides as follows:

> section 121 of the code is amended by substituting for the words 'imprisonment for life' the words 'imprisonment for a term of not less than thirty years but not exceeding forty years.

15. In the same vein, this year, Malaysia enacted the *Revision of sentence of death and imprisonment for natural life (Temporal jurisdiction of the federal court) Act* 2023. The purpose of the Act is to grant the Federal Court jurisdiction to review sentences of inmates sentenced to death or life imprisonment in the following terms:

> Upon reviewing the application, the federal court shall substitute the sentence of imprisonment for natural life with imprisonment for a term of not less than thirty years but not exceeding forty years. (section 4 (4) of the Act.)

16. Similarly, *Pakistan's Penal Code* now contains the most expressive provision defining life imprisonment in terms of the number of years. section 57 of the Penal code provides that:

> Fractions of terms of punishment: In calculating fractions of terms of punishment, imprisonment for life shall be reckoned as equivalent to imprisonment for twenty-five years.

17. On the other hand, Norway's Penal law provides that the longest prison sentence that can be imposed is 21 years, except with respect to the crime of genocide, crimes against humanity and war crimes, for which the maximum sentence is increased to 30 years. . section 43 of *Straffeloven (Norway) Penal code* provides as follows

> Section 43 Duration of preventive detention
>
> In a sentence of preventive detention, a time frame is set that normally should not exceed 15 years, and that may not exceed 21 years. For offences with a penalty limit of imprisonment for a term of up to 30 years, the court may set a time frame not exceeding 30 years. If the convicted person was under 18 years of age at the time of the act, the time frame normally should not exceed 10 years, and may not exceed 15 years. On application of the prosecuting authority, the court may by judgment extend the set frame by up to five years at a time. An extension application must be filed with the district court no later than three months before the end of the period of preventive detention.

18. The Germany's Federal Constitutional Court considered the constitutionality of the sentence of life imprisonment for murder in *Life Imprisonment Case* [1977], 45 BVerfGE 187 (See D. P. Kommers and R. A. Miller,*The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed. 2012), at pp. 363-68.) The Court noted that whereas a sentence of life imprisonment is not in itself unconstitutional, imprisonment without any "concrete and realistically attainable" chance to regain freedom at some later point in time is contrary to human dignity (p. 366). Since this decision, prisoners sentenced to life imprisonment are entitled to parole after serving 15 years by dint of the *German Penal Code* (See § 57a IV StGB (German Penal Code).

19. Closer home, in *Makoni v Prisons Commissioner*,CCZ 8/16 Constitutional Application No CCZ 48/15) [2016] ZWCC 8 (13 July 2016), the Zimbabwe Constitutional Court held that life sentence imposed on 'convicted prisoner without the possibility of parole or release on licence constitutes a violation of human dignity and amounts to cruel, inhuman or degrading treatment or punishment in breach of sections 51 and 53 of the (Zimbabwean) *Constitution*'. The court proceeded to declare part XX of the *Prisons Act* as unconstitutional.

20. Subsequently, the Zimbabwean parliament passed the *Prisons and Correctional Service Act* 2023. Section 146 of the *Act* extends parole to prisoners sentenced to life imprisonment. The provision provides thus:

> 146 Release of inmates sentenced to life imprisonment
>
> (1) An inmate who has been sentenced to life imprisonment can be released from the prison or correctional facility only on such conditions as to full parole or probation

21. In General Notice 673 of 2023 under Clemency order 1 of 2020, the Zimbabwean president remitted life imprisonment to 25 years. The Notice provided thus Remission of sentence for prisoners serving life imprisonment 8. Full remission of sentence is hereby granted to all prisoners who have served life imprisonment for at least twenty-five (25) years. This include—

> (i) prisoners sentenced to life imprisonment;
>
> (ii) prisoners whose sentences were commuted from death to life imprisonment; and
>
> (iii) prisoners whose sentences were altered to life imprisonment on appeal or review. The 25-year period shall include any period spent under the sentence of death.

22. Therefore, in Zimbabwe, at present, a prisoner who has served 25 years' imprisonment is entitled to parole.

23. Finally, in South Africa, while courts have refused to declare the life imprisonment as unconstitutional, they have held that the life imprisonment is only saved because of the possibility of parole as well as the right accorded to prisoners to approach the court when the executive does not act on their application for parole under the correctional services Act (See *S v Bull* 2002 1 SA 535 (SCA) 695c.; and also *S v Qeqe and another*, 1990 (2) SACR 654 (CkA) at 659 where Diemont JA remarked that:

> [D]oes a "life sentence" mean that the appellants must remain incarcerated in prisons until they die? The answer is no. It has been widely accepted for many years [in the former Ciskei] that a life sentence will not exceed 25 years and that even 25 years is an exceptionally long sentence... [section] 18(1)(b) of the *Police and Prisons Act* 36 of 1983 (Ck) provided that any person sentenced under the provisions of any law to imprisonment for life, shall be detained in a prison for a period not less than 10 years and not more than 25 years.'

24. Recently, while rejecting the concept of informal life sentences, the Supreme Court of Appeal of South Africa in *S v Nkosi & others* 2003 (1) SACR 91 (SCA) where trial court had sentenced the appellants to terms of imprisonment of 120 years, 65 years, 65 years and 45 years respectively, stated at para 9 as follows:

> Thus, under the law as it presently stands, when what one may call a Methuselah sentence is imposed (i.e. a sentence in respect of which the prisoner would require something approximating to the longevity of Methuselah if it is to be served in full) the prisoner will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment which is proscribed by s 12(1)(e) of the *Constitution of the Republic of South Africa* Act 108 of 1996.
>
> The courts are discouraged from imposing excessively long sentences of imprisonment in order to avoid having a prisoner being released on parole. A prisoner serving a sentence of life imprisonment will be considered for parole after serving at least 20 years of the sentence,

> or at least 15 years thereof if over 65 years, according to the current policy of the Department of Correctional Services. A sentence exceeding the probable life span of a prisoner means that he [or she] will have no chance of being released on the expiry of the sentence and also no chance of being released on parole after serving one half of the sentence. Such a sentence will amount to cruel, inhuman and degrading punishment.

25. This qualitative survey of how different jurisdictions have treated life imprisonment in the recent past provides objective indicia of the emerging consensus that life imprisonment is seen as being antithetical to the constitutional value of human dignity and as being inhuman and degrading because of its indefiniteness and the definitional impossibility that the inmate would ever be released. This emerging consensus of the civilized world community, while not controlling our outcome, provides respected and significant confirmation for our own conclusion that life imprisonment is cruel and degrading treatment owing to its indefiniteness.

26. On our part, considering this comparative jurisprudence and the prevailing socio-economic conditions in Kenya, we come to the considered conclusion that life imprisonment in Kenya does not mean the natural life of the convict. Instead, we now hold, life imprisonment translates to thirty years' imprisonment.

27. In the circumstances of this case, given the objective severity of the offence committed by the appellant as analysed above, we hereby allow the appeal on sentence to the extent of ordering that the sentence of life imprisonment imposed shall translate to 30 years imprisonment. The record shows that the appellant was in custody since he was arraigned in court on July 18, 2011. By dint of section 333(2) of the *Criminal Procedure Code*, the imprisonment term of 30 years shall be computed to begin running from that date.

28. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 8TH DAY OF DECEMBER, 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