Okello v Republic (Criminal Appeal 189 of 2016)
[2022] KECA 1034 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KECA 1034 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 189 OF 2016

K M'INOTI, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 23, 2022

BETWEEN

REAGAN OTIENO OKELLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from a conviction and sentence of the High Court of Kenya at Homa Bay (H. A. Omondi, J) dated 18th August, 2016 in Homa Bay HCCRA No. 11 of 2016)

JUDGMENT

[1] After a trial before the Senior Resident Magistrate's Court at Oyugis, Reagan Otieno Okello (the appellant) was convicted of the offence of defilement of a child contrary to Section 8(1) as read with Section 8 (3) of the *Sexual Offences Act*. He was then sentenced to 20 years imprisonment. This is a second appeal against both conviction and sentence.

[2] The child, SAO, was said to be aged 13 years on September 7, 2015when the sexual assault happened. The prosecution case was that on that day, at about 7.00 pm, she was sent by her sister to pick a lamp from one Mama O. On her way back home, one Isaiah and one Kevin beckoned her. Kevin pulled her into a house, took her into a bedroom and defiled her. All this while, Isaiah remained in the sitting room. Her sister MO (PW3) unexpectedly appeared and found the complainant and Kevin in bed. She pulled the complainant to the outside and beat her using a stick, apparently upset at her behaviour.

[3] It was at this point that the accused told her not to go home as she would be beaten again. That against her will, the accused pulled her to his nearby home. It was now about 8.00 pm. The accused took her into his brother's house, locked the door and defiled her several times in the course of the night. The complainant told the court that as a result, she sustained injuries to her vagina and bled. She in fact stained her clothes with blood.

[4] The accused and the complainant then moved to the home of his sister, where they slept and he again defiled her. On the next day the accused gave her fare to Kisumu where she attended a funeral. There, she met her brother, B, and her sister. She told them that she was with the accused. She also told them what had happened the previous night. Her sister took her to Agoro Health Centre for treatment.

[5] Dr. Peter Ogolla (PW5), a doctor at Rachuonyo Hospital, examined the complainant and filled a P3 form on 14th September 2015. Her skirt was blood-stained and soiled on the back. He found a recently broken hymen, there was inflammation of the external genitalia and bleeding from the bruises. The cervix also had bruises and was bleeding. He concluded that it was evidence of recent penetration.

[6] In his defence, the appellant denied the offence and stated that on that day, at about 7.00 p.m., on reacting to some noises he found the sister of the complainant alleging that the appellant had been defiled by Kevin and Isaiah. That M requested him for a rod so as to discipline the complainant but he declined. He and his witness, MO (DW3), stated that the complainant was never found at the home of the appellant.

[7] In a homegrown appeal, the appellant raised 9 grounds but in effect, his complaint is that the conviction was against the weight of evidence. He submitted that the complainant behaved in a manner likely to suggest that she was an adult of sound mind who enjoyed sex with various men. He wondered why the other two people, Kevin and Isaiah, who had sex with her, were not charged with a similar offence.

[8] He also took issue with the finding of the age of the complainant. The appellant submits that the complainant was not subjected to an age assessment and the age assigned to her was at best an estimate.

[9] In equally short submissions, the Director of Public Prosecutions opposed the appeal and argued that the age of the complainant was proved and the evidence was sufficient to found a safe conviction.

[10] This is a second appeal. The role of the court in such instance is circumscribed by the provisions of Section 361 (1)(a) of the *Criminal Procedure Code* to deal with only matters of law. On this rule, this Court has said;

> " 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."

See *Karani vs. R* [2010] 1 KLR 73.

[11] Let us start with the issue of the age of the complainant. The testimony of the complainant was that she was born on May 26, 2002and a Baptism Certificate which indicated the date of birth to be that day was produced as an exhibit. Undoubtedly, a medical age assessment may well be the best proof of age but documents such as Baptism Cards and School Certificates are not without value. Ordinarily, these documents would have been made without anticipation that the person whose age is entered would ever be a victim of a sexual offence and there may be no reason not to capture the correct age of the person.

[12] In this matter, the Baptism Certificate was prepared on August 17, 2014, about a year before the day of the assault and the appellant has not told us why the information in it should be doubted. At any

rate, the doctor who examined the victim before filling the P3 form estimated her age to be 13 years. We think and hold that the two courts below were correct in finding that the age of the complainant at the time of the assault was between the age of 12 and 15 years and the appellant was liable for sentence under Section 8 (3) which provides;

> [3] A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

[13] A second appellate court pays deference to concurrent findings of fact of the courts below unless the conclusion drawn is so perverse and cannot find any support in the evidence that was led at trial (see Adan Muraguri Mungara vs Republic [2010] eKLR). Other than contending that other persons who are said to have defiled the complainant should also have been charged, the appellant has not pointed out to us why the factual findings of the two courts below which proved the ingredients of defilement namely; age of the complainant, penetration and identification of the perpetrator; should be faulted. We see none ourselves.

[14] We turn to the question of sentence. The Supreme Court in the Directions in *Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others* (Amicus Curiae) [2021] eKLR stated

> "(14) It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.
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> [15] To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 296 (2), and attempted robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented, and fully argued before the High Court and escalated to the Court of Appeal, if necessary, at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases."

[15] Perhaps taking a cue from those directions, a challenge to the constitutional validity of the minimum sentences prescribed in the *Sexual Offences Act* was taken up in *Philip Mueke Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEELC 2936 (KLR) (17 May 2022) (Judgment), where Odunga J (as he then was) held:-

> "107. In my view, even without the application of the ratio in Muruatetu 1, based on what I have stated hereinabove, I find that whereas the sentences prescribed under the *Sexual Offences Act* are not unconstitutional by the mere fact of such prescription and the trial courts are at liberty to impose them, the imposition of the same as the minimum mandatory sentences does not meet the constitutional threshold particularly section 28 of the Constitution....
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> 111. My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever

sentence is imposed upholds the dignity of the individual as provided under Article 28 of the Constitution. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the Constitution, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of the Constitution as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional.

112. At the risk of being repetitive, I must make it clear that my finding herein does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentences as are appropriate to the offence committed."

[16] Even more recently, Mativo J (as he then was) weighed in on the matter in *Edwin Wachira & 9 others v Republic*: Mombasa Petition Nos. 97, 88, 90 and 57 of 2021 (Consolidated) (Unreported);

"35. Lucky for me the Supreme Court in Muruatetu one was categorical that mitigation forms an intergyral part of a fair trial, so, the fact that an accused person is deprived the right to mitigate curtails his rights under Article 50(1). Similarly, taking away judicial discretion and the fact that the mandatory minimum sentences take deprive the court the discretion to prescribe a sentence taking into account the individual circumstances of the accused unfair to the accused and it impinges on the right to a fair trial. Sentencing is an integral part of a judicial function and an important element of a fair trial process. Similarly, the provisions under challenge deprive the accused person the benefit of a lesser sentence informed by the circumstances of each offence. Lastly, unlike in other offences, the mandatory minimum sentences are discriminatory because they deprive the accused person the full benefit of the law contrary to Article 27 as earlier discussed.

36. For avoidance of doubt, a mandatory minimum sentence is not per se unconstitutional. The legislature in the exercise of its legislative powers is perfectly entitled to indicate the type of the sentence which would fit the offence it creates. It has never been suggested that the sphere of judicial power is invaded when Parliament provides for a maximum or minimum penalty for offences which are duly proved in courts of law. What is decried is absence of judicial discretion to determine an appropriate sentence taking into account the individual circumstances of an accused person, depriving an accused person the right to be heard in mitigation and or depriving the court the discretion to determine an appropriate sentence."

17. We think there is merit in these holdings and observe that in a long line of cases this Court had, before Muruatetu 2, held that the prescription of a minimum sentence could not fetter the judicial power of a court at sentencing. See for example *Dismas Wafula Kilwake v Republic* [2019] eKLR, *Jared Koita*

Injiri v Republic [2019] eKLR, *Christopher Ochieng v Republic* [2018] eKLR and *Daniel Kipkosgei Letting v Republic* [2021] eKLR.

18. The trial magistrate, at that time, felt constrained by the minimum prescriptions of Section 8 (3) of the *Sexual Offences Act* on the sentence to impose and cannot be faulted for the minimum sentence meted. After all, that was the prevailing interpretation of the law from the superior courts. But given the persuasive decisions of the High Court in Philip Mueke Maingi and Edwin Wachira arrived at in line with the directive of the Supreme Court, we are persuaded and hold that there is scope to relook at the sentence imposed. The notes at the sentencing proceedings show that the appellant did not have any previous record of conviction. In mitigation, he stated that he was an orphan and had two siblings who depended on him and whose primary school fees he was paying. On the other end of the spectrum, the appellant defiled the victim on more than one occasion, over days. In addition, he took advantage of a child who had already been a victim of defilement by two other men. These are aggravating factors. This is enough material for us to consider whether or not the sentence ought to be reviewed.

19. In the end the appeal against conviction is dismissed but we set aside the sentence of 20 years imprisonment and substitute it with imprisonment of 10 years, effective from the date of sentence by the trial court. Those are the orders of this Court.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022.

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR