Lawrence v Republic (Criminal Appeal 48 of 2017)
[2021] KECA 172 (KLR) (19 November 2021) (Judgment)

Neutral citation: [2021] KECA 172 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 48 OF 2017

W KARANJA, DK MUSINGA & S OLE KANTAI, JJA

NOVEMBER 19, 2021

BETWEEN

MBUVI KABWERE LAWRENCE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Mombasa (Meoli, J.) delivered on 3rd June, 2013 in Criminal Appeal No. 95 of 2011.)

JUDGMENT

1. Mbuvi Kabwere Lawrence, the appellant, was convicted before the Chief Magistrates' Court at Malindi for the offence of defilement of a child aged 8 years contrary to section 8(2) of the *Sexual Offences Act* and sentenced to life imprisonment. Aggrieved by the said decision, he preferred an appeal to the High Court, which appeal was unsuccessful, hence this second appeal before us challenging the sentence only, as per his amended grounds of appeal on record.

2. This being a second appeal, our role was succinctly set out in *Karani v. R [2010] 1 KLR 73* where this Court expresseditself as follows: -

> " 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."

See also *M'Riungu v Republic [1983] KLR 455*. Under that section, severity of sentence is a matter of fact.

3. The brief background of the case is that on diverse dates between August and 3rd December 2010, the appellant in Watamu Location within Kilifi County, intentionally and unlawfully committed an act which caused penetration of his male genital organ into the female genital organ of NM, a child aged 8 years.

4. In his amended memorandum of appeal, the appellant faults the learned judge for failing to acknowledge that mandatory laws can now be construed as discretionary; for not considering the mitigation factors in his case; for not observing proportionality of the offence to the indeterminate sentence; and for failing to observe the rationality of the life sentence amidst the current jurisprudence pertaining to sentencing of offenders.

5. The appeal was virtually heard and was canvassed by way of written submissions with oral highlights during the hearing. The appellant, citing the Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic [2017] eKLR*, submitted that the High Court erred in law in affirming the mandatory sentence that had been passed by the trial court. He urged this Court to reduce the sentence to ten (10) years' imprisonment.

6. Mr. David Fedha, Senior Prosecution Counsel, opposed the appeal. He urged us not to interfere with the sentence, but if we were inclined to do so, to sentence the appellant to at least forty (40) years' imprisonment simply because the appellant violated the rights of a minor who could not defend herself. Reliance was placed on the cases of *John Irungu v Republic [2016] eKLR* and *Ali Abdalla Mwanza v Republic [2018] eKLR*.

7. We have carefully considered the entire record of appeal and both the written and oral submissions by the parties. The appellant was charged under section 8(2) of the *Sexual Offences Act* which provides that:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."

8. From the record, it is clear that the trial court passed the mandatory sentence as prescribed by the law, which was upheld by the first appellate court. In Francis Karioko Muruatetu & Another v Republic (supra), the SupremeCourt expressed itself thus:

> " Section 204 of the *Penal Code* deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigation circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right."

9. This Court has previously held that the decision in Muruatetu Case (ibid) applies mutatis mutandis to the mandatory sentences as provided for in the *Sexual Offences Act*. In the case of *Jared Koita Injiri v Republic [2019] eKLR*, the Court expressed itself as follows:

> " In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the *Sexual Offences Act*, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis."

10. However, on 6th July 2021 the Supreme Court issued some guidelines on the constitutionality and applicability of its decision in the Muruatetu case and stated, inter alia, that:

> " The Supreme Court's decision did not invalidate mandatory sentences or minimum sentences in the penal Code, the *Sexual Offences Act* or any other statute. The decision

was not an authority for stating that all provisions of the law prescribing mandatory or minimum sentences were inconsistent with the Constitution."

11. Article 163(7) of the *Constitution* stipulates that all Courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Although the above guidelines were not pronounced as a decision of the Supreme Court, they have the force of law and cannot be disregarded. In our view, we are not persuaded that there is any basis for interfering with the sentence that was pronounced by the trial court.

12. On the basis of the foregoing, we are unable to disturb the sentence to life imprisonment. Consequently, we dismiss this appeal in its entirety.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

W. KARANJA

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR