Simiyu v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 687 (KLR) (31 January 2024) (Judgment)

Neutral citation: [2024] KEHC 687 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CRIMINAL APPEAL E004 OF 2023

DK KEMEI, J

JANUARY 31, 2024

BETWEEN

ERNEST SIMIYU ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence of Hon J.O Manasses (RM) in Sirisia Senior Resident Magistrate's Court Sexual Offence Case No. E004 of 2022 dated 11.1.2023)

JUDGMENT

1. The Appellant herein Ernest Simiyu has lodged this appeal against the sentence of 15 years' imprisonment for defilement contrary to section 8(1) as read with section 8(4) of the *Sexual Offences Act* No. 3 of 2006 by Hon Manasses (RM) in Sirisia Sexual Offence case No. E004 of 2022. It was alleged that on 2nd January 2022 at [particular withheld] in Bungoma West Sub-County within Bungoma County at 8.00pm the Applicant herein intentionally and unlawfully caused his penis to penetrate the vagina of Z.N.W a child aged 16 years old.

2. In the alternative charge, the Appellant was charged with the offence of committing an indecent act contrary to section11(1) of the *Sexual Offences Act* No. 3 of 2006. It was alleged that on 2nd January 2022 at [particular withheld] in Bungoma West Sub-County within Bungoma County at 8.00pm the Applicant herein intentionally and unlawfully touched the vagina of Z.N.W a child aged 16 years old.

3. At the conclusion of the trial, the trial magistrate convicted the Appellant in the main charge of defilement contrary to section 8 (1) as read with section 8(4) of the *Sexual Offences Act*, 2006 and sentenced him to 15 years imprisonment as provided under the *Act*.

4. Aggrieved, the Applicant filed the present appeal on 19th January 2023 in which he seeks revision of sentence. Hence, his appeal is not on the conviction but on sentence only.

5. In a nutshell, the appeal is premised on grounds that this Court considers the preferred mitigation grounds and grant the appellant favorable sentence review.

6. The appeal was canvassed by way of written submissions. Both parties filed and exchanged their respective submissions.

7. The Appellant submitted that this Court do issue a more lenient sentence as the one imposed was excessive in view of the gravity of his offence.

8. The Respondent, opposing the appeal, submitted that the Appellant had an opportunity to mitigate before his sentence was given and that the same was duly considered by the lower Court. Counsel submitted that the sentence passed is proper, legal and factored in the circumstances of the offence. Counsel urged this Court to dismiss the appeal. She relied on the cases of *S v Malgas* 2001 (1) SACR 469 (SCA) and *Bernard Kimani Gacheru v Republic* (2002) eKLR.

9. I have considered the appeal and the submissions presented as well as the relevant law. I find the following issues for determination; Whether the trial magistrate's sentence of 15 years was too harsh with regard to the offence of defilement.

10. The revisionary jurisdiction of this Court is wide in scope but it is limited to the parameters set out in Section 362 of the *Criminal Procedure Code* which states as follows:

> "The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court."

11. In my view, section 362 should be read together with section 364 of the *Criminal Procedure Code* which specifies the orders the Court can make, in its discretion, if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the Court to exercise any of the powers conferred on it as an appellate Court by sections 354, 357 and 358 of the *Criminal Procedure Code* if what is impugned is a conviction and if it is any other order except an order of acquittal, the Court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

12. I have read the record of the trial Court. It reveals that the Appellant was convicted of the offence of defiling a child aged 16 years and was sentenced to serve 15 years' imprisonment. The record confirms the Appellant's contention that the *Sexual Offences Act* No. 3 of 2006 deprived that lower Court discretion thus a violation of his rights.

13. I am in agreement with the Respondent's submission that the punishment prescribed for the offence of defilement where the victim is aged 16 years old is a sentence of 15 years or more. The evidence in this case discloses that the Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act*.

14. The trial Court bearing in mind the evidence adduced during the trial showing the age of the victim, proceeded to impose a sentence on the Appellant which did conform to the *Sexual Offences Act* provision under which he was charged and which provided for a mandatory minimum sentence of not less than 15 years' imprisonment.

15. In his mitigation, the Applicant pleaded that he was a first offender, prayed for the Court to factor the days he was in custody, that he suffers from epilepsy and chest pains, and that he is the sole breadwinner

to his parents and siblings. The Court proceeded to call upon the Probation Officer's Pre-sentence report.

16. I note that section 8 (4) of the *Sexual Offences Act* provides that upon conviction the offender shall be imprisoned for a term of not less than fifteen years. It is thus clear that at the time of passing the sentence upon the appellant herein, the trial Court had its hand bound at the back by the strict sentences provided under the *Sexual Offences Act*.

17. The Supreme Court decision in *Francis Karioko Muruatetu & Another v Republic* [2017] eKLR and subsequent decisions by the Court of Appeal have ruled that the mandatory minimum sentences no longer have a place in our jurisdiction because they deprive the trial Court of its discretion to mete out a sentence that is commensurate with the gravity of the circumstances surrounding the commission of the offence. The Supreme Court held that a trial Court ought to consider the following before passing sentence: -

    a. Age of the offender,

    b. Whether or not the offender is a first offender,

    c. Whether the offender pleaded guilty,

    d. The character and record of the offender,

    e. Commission of the offence in response to gender-based violence,

    f. Remorsefulness of the offender,

    g. The possibility of reform and social re-adaptation of the offender,

    h. Any other factor that the court considers relevant.

18. The Court of Appeal has also recently applied the same principle in *Evans Wanjala Wanyonyi v Republic* [2019] eKLR, *Christopher Ochieng v Republic* [2018] eKLR in holding that the mandatory minimum sentences deprive Courts of their legitimate jurisdiction to exercise discretion not to impose these sentences where circumstances dictate otherwise. The only caution to be taken by the court is that such discretion must be exercised judiciously and not capriciously. The trial Court must subject its mind to sound legal principles and take account of all relevant factors while eschewing extraneous or irrelevant factors. An appellate Court will therefore only interfere with sentence where it is shown that the sentence imposed is either illegal or is either too harsh or too lenient in the circumstances of the case. See *Francis Muthee Mwangi v Republic* [2016] eKLR.

19. In *Fatuma Hassan Sato v Republic* [2006] eKLR, Makhandia-J. (as he then was) observed:-

> " Sentencing is a matter for the discretion of the trial court. The discretion must however be exercised judiciously. The trial court must be guided by evidence and sound legal principles. It must take into account all relevant factors and exclude all extraneous factors...."

20. The *Sentencing Policy Guidelines* for the judiciary stipulate that:-

> " .... The sentencing process, which entails the exercise of judicial discretion, must be in accord with the Constitution, as embodied in the judiciary's overall mandate of ensuring access to justice for all. These guidelines are in recognition of the fact that while judicial discretion remains sacrosanct, and a necessary tool, it needs to be guided and applied in alignment with recognized principles, particularly fairness, non-arbitrariness in decision making, clarity and

certainty of decisions. The guidelines are therefore an important reference tool for Judges and Magistrates that will enable them to be more accountable for their sentencing decision."

21. In the instant case, the learned trial magistrate imposed the least sentence permissible as provided under section 8 (4) of the *Sexual Offences Act*, 2006. However, as stated above, the Court of Appeal has since held that the minimum mandatory sentences stipulated by the Sexual Offences should no longer be allowed to stand. This means that Courts now have the liberty to consider factors such as but not limited to mitigation from accused person while following the guidelines set by the Supreme Court of Kenya in the *Muruatetu Case* (*supra*) and any pre-sentencing reports/statements from victims in deciding the appropriate sentences to be imposed on accused persons convicted of sexual offences.

22. In the present case, after conviction, the pre-sentence report indicated that the Appellant had no previous records meaning this was his first offence but that the appellant is not wanted in the village due to his conduct. In mitigation, the Appellant stated that he was a first offender, prayed for the Court to factor the days he was in custody, note that he suffers from epilepsy and chest pains, and that he is the sole breadwinner to his parents and siblings. The Appellant did not express any remorse for the physical pain and damage he caused to the victim, Z.N.W during and after committing the offence. The pre-sentence report indicated that he is not remorseful at all. His actions almost disrupted the complainant's education. Considering the circumstances of the case and the mitigation of the Appellant which was duly considered by the trial court, I find that the trial court imposed a sentence which is not excessive but commensurate with the appellant's blameworthiness. Hence, I see no reason to interfere with it. However, as the appellant was in custody throughout the trial, the said period must be factored in the sentence as provided for under section 333(2) of the *Criminal Procedure Code*.

23. In the result and save only that the sentence of 15 years' imprisonment from the date of arrest, the appeal herein lacks merit. The sentence of 15 years' imprisonment shall commence from the date of arrest namely 3.1.2022.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024.

D. KEMEI

JUDGE

In the presence of:-

Ernest Simiyu Appellant

Miss Kibet for Respondent

KIzito Court Assistant