Mbashani & another v Republic (Criminal Appeal 48 of 2019) [2023] KECA 1451 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1451 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 48 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

NOVEMBER 24, 2023

BETWEEN

MADUKU MBASHANI ..... 1ST APPELLANT

KWELA MANYWELE ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment of the High Court of Kenya at Bungoma (S. N. Riech, J) delivered on 28th February, 2019 in HCCRA No. 18 of 2018)

JUDGMENT

1. The appellants Kwela Manywele and Maduku Mbashani were charged before the Senior Resident Magistrate's Court at Webuye with the offence of trafficking in person contrary to section 3(3) &(5) of *Counter Trafficking in Person Act*, and being unlawfully present in Kenya contrary to section 53(1)(j) as read with section 53(2) of the *Kenya Citizenship and Immigration Act*.

2. They both pleaded guilty to the two counts and were convicted based on their own plea of guilty. Each was sentenced to serve 40 years' imprisonment on the first charge and 2 years' imprisonment on the second charge. On first appeal, the High Court (S. N. Riech, J.) dismissed the appeal finding the plea of guilty unequivocal, but reduced the sentence to 30 years' imprisonment. The appellants were not content with the results and therefore lodged this second appeal. Unfortunately, the 1st appellant Maduku Mbashani died before the appeal was heard and therefore his appeal has abated.

3. At the hearing of the appeal, Kwela Manywele the 2nd appellant, abandoned his appeal on conviction, and proceeded with the appeal on sentence only.

4. In his written submissions, the 2nd appellant argued that minimum sentence deprived the court of its legitimate jurisdiction to exercise discretion not to impose the mandatory minimum sentence in an

appropriate case, and that where a court notwithstanding the mitigating circumstances has to impose a set minimum sentence an accused person is denied his right to fair trial under article 50 of the *Constitution*.

5. The appellant drew the Court's attention to article 20(3) of the *Constitution* and submitted that the Court has an obligation to interpret the law in a way that favours fundamental rights, and that in this case the law was interpreted in a way that violated his right to fair trial, right to equal protection and equal benefit of the law, and right to non-discrimination. He relied on *Evans Wanjala Wanyonyi v Republic* [2019] eKLR and *Jared Koita Injiri v Republic*, where the court held that mandatory minimum sentences are unconstitutional.

6. The State through Mr. Kwame K. Chacha, a prosecution counsel in the Office of Director of Public Prosecutions, filed written submissions, in which it was urged that the sentence imposed on the appellant ought to be weighed against the gravity of the offence that he committed. Counsel noted that there was a need to impose a deterrent sentence because the offence the 2nd appellant was charged with involved trafficking vulnerable victims who were disabled and who were of tender age. Mr. Chacha pointed out that the first appellate court considered the fact that the appellant was a first offender and reduced the sentence by 10 years. He urged that the appeal before the Court, being a second appeal, severity of sentence is a matter of fact which the Court ought not to entertain.

7. In response to Mr Chacha's submissions, the appellant argued that the sentence imposed upon him was harsh and excessive, and amounted to inhuman and degrading punishment due to the period. He was of the view that such a sentence would not achieve the objectives of the *Judiciary Policy Guidelines* that includes rehabilitation.

8. We have considered the record of appeal and the parties' respective submissions. The core issue for determination is whether the Court should interfere with the sentence that was imposed on the 2nd appellant.

9. The 2nd appellant was convicted under section 3(3) and (5) of the *Counter Trafficking in Persons Act*. That section states as follows:

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> (3) The recruitment, transportation, transfer, harboring or receipt of a child for the purposes of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set out in subsection (1) of this Act.
>
> (4) .....
>
> (5) A person who traffics another person, for the purpose of exploitation, commits an offence and is liable to imprisonment for a term of not less than thirty years or to a fine of not less than thirty million shillings or to both and upon subsequent conviction, to imprisonment for life.

10. This means that the section provides for a mandatory minimum sentence of thirty years' imprisonment. In imposing the sentence of forty years' imprisonment, the trial court noted that he had considered the appellant's mitigation, but that the offence was serious because they took advantage of vulnerable children and therefore deserved a deterrent sentence. In reducing the appellant's sentence of forty years' imprisonment to thirty years' imprisonment, the learned Judge took note that the

appellants were first offenders, and reduced the sentence to the minimum sentence of thirty years' imprisonment.

11. We find that both the trial court and the first appellate court did not properly exercise their discretion as they proceeded from the premise that they were bound by the minimum sentence notwithstanding the circumstances of the case.

12. We appreciate that trafficking in persons is a serious offence which deserves a deterrent sentence. Nevertheless, the discretion of the trial court in sentencing must be preserved as it is the court that has before it the circumstances of the case. As was stated in *Dismas Wafula Kilwake v Republic* [2019] eKLR, the Court should be free to exercise its discretion in sentencing. Such discretion should include imposing the minimum prescribed sentence where appropriate, and a sentence which is less than the minimum prescribed where the circumstances so justify. This means that the court should weigh the circumstances before it, before imposing a sentence and not just feel obligated to impose the minimum sentence.

13. Sentencing is an exercise of discretion and where a court fails to exercise its discretion or exercises discretion in a manner that is whimsical an appellate court has a right to intervene. Although the High Court intervened in this case, the intervention was limited to the minimum sentence provided for the offence. This means that neither the leaned judge nor the trial court considered and weighed the circumstances surrounding the matter including the circumstances of the offender.

14. In this case, the sentence of thirty years was still harsh and excessive given the personal circumstances of the 2nd appellant that he had stated to the trial court, and the fact that he was a first offender. Moreover, such a lengthy term of imprisonment did not leave room for rehabilitation of the appellant.

15. For the above reasons, the appellant having abandoned his appeal against conviction, we dismiss the appeal against conviction, but allow the appeal against sentence to the limited extent of setting aside the sentence of 30 years' imprisonment and substituting thereto a sentence of 20 years' imprisonment with effect from January 29, 2018, the date when the appellant was first sentence. In addition, the two offences having been committed in one transaction we set aside the order that the two sentences imposed on the appellant to run consecutively, and order that the same shall run concurrently.

    Those shall be the orders of the Court.

DATED AND DELIVERED AT KAKAMEGA THIS 24TH DAY OF NOVEMBER, 2023.

HANNAH OKWENGU

.....

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.