Mariesto v Republic (Criminal Appeal E059 of 2022)
[2024] KEHC 11692 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEHC 11692 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E059 OF 2022

SC CHIRCHIR, J

SEPTEMBER 26, 2024

BETWEEN

ISAIAH MARIESTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. Hon.Sylvia A. Wayodi RM in chief's magistrate's court at Kakamega SOA no.175 OF 2021 delivered on 31st August 2022)

JUDGMENT

1. The Appellant, has proffered this Appeal seeking to set aside the sentence meted to him in Kakamega chief Magistrate's court Sexual offences case No. 175 of 2021 . He was charged and convicted for the offence of defilement of a 6 years old girl contrary to section 8 (1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006 (The Act) and sentenced to 25 years in prison.
2. The particulars of the offence were that on the 8th December 2021 at an unknown time at xxxx sub-location xxxx location xxx within Kakamega county intentionally caused his penis to penetrate into the genital organs namely vagina of CK a girl aged 6 years old. (particulars withheld)
3. He also faced an alternative charge of committing an indecent Act with a child contrary to section 11(1) of the *sexual offences Act* no. 3 of 2006.
4. The appellant denied the charges and the matter went to full trial.

Petition of appeal

5. The appellant was aggrieved by the judgment, prompting this petition of Appeal. He has set out the following grounds:

a). Thatthe imposed sentence is excessive harsh and unjust considering that the appellant was first offender.

b). Thatthe imposed sentence is excessive and does not go well with the provision of the policy sentencing directives 2015 under paragraph 4.1

c). Thatthe appellant is remorseful and regrets his action. He is repentant.

d). Thatthe appellant before his conviction and sentence was a young man who was 30 years old.

e). Thatthe appellant worked tirelessly to support his family and self and elderly parents and has potential if given another chance.

f). Thatthe court considers his mitigation grounds and award a lesser sentence or substitute the remaining sentence with a non-custodial sentence or the court be pleased to order that the appellant serves in the community service order.

g). Thatthe court considers the provisions of section 333(2) of the criminal procedure code to be factored in his sentence.

6. The Appeal was canvassed by way of written submissions.

Appellant's submissions

7. It is the appellant's submission that the offence did not warrant a harsh sentence of 25 years; that the sentence is not in tandem with past decisions as well as the judiciary sentencing policy guidelines.

8. He avers that the suit was based on circumstantial evidence and that the sentencing was too harsh considering he never pleaded guilty; that he is remorseful for his actions and that he has fully reformed during the time he has spent in prison.

9. He further submits that before his conviction, he took care of his elderly parents. He also submits that he was 28 years at the time of his arrest and having been sentenced to 25 years it means he would spend his life in prison.

10. He also urges the court to also consider the time he spent in custody before being sentenced. In this regard he has cited section 333(2) of the Criminal procedure code and relied on the court of appeal decision in the case of Ahamad Abolfathi Mohammed & another v Republic (2018) eKLR.

Respondent's submissions

11. Much of the respondent's submissions dwelt on the conviction, which in my respectful view is not relevant to the issue herein. The Appellant is not challenging the conviction, only sentencing.

12. On sentence, the respondent points out that the Appellant was given a lesser sentence of 25 years against the maximum sentence of life imprisonment. They therefore seek that the sentence be upheld.

13. The parties have relied on a number of past decisions which I have perused.

Analysis and determination

14. I have considered the petition of Appeal, the lower court record and the parties ' submissions as well as the Authorities relied on.The only issue for determination by this court is whether the 25 year sentence was excessive and whether the trial court failed to take into account the time spent in custody prior to conviction.

15. It is now well settled that sentencing is at the discretion of the trial court and the principles upon which an Appellate court may interfere with the said discretion has been a subject of many past decisions. In the case of *Bernard Kimani Gacheru v Republic* [2002] eKLR the court of Appeal stated as follows:- "It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle."

16. Duly guided by the above decision I will now proceed to consider whether this court should interfere with the sentence of 25 years.

17. The Appellant was charged under Section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The provisions state as follows:

    1. a person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

    2. 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.

18. In mitigation, the Appellant told the court that his parents died and he was taking care of his younger brother. The prosecution also informed the court that Appellant was a first offender.

19. In sentencing the Appellant to 25 years the trial court considered his mitigation as well Justice Odunga's decision in the case *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022]. In the cited case the judge declared that the mandatory minimum sentences provided under the *sexual offences Act* unconstitutional.

20. The record shows that the trial court took into consideration the fact that the accused was a first offender; she considered his mitigation as well the findings of the social inquiry report.

21. The social inquiry report indicate that the appellant was 30 years and confirms that the victim was 6 years old. The appellant submits that the sentence was harsh and excessive, given the offence.

22. This was a sexual assault of a child of 6 years by a 30- year old Adult. . The trauma to such a young child was not just emotional and psychological but also physical considering her tender organs. When the Appellant submits that " the sentence was harsh and excessive given the offence" he is clearly trivializing the offence. It is rather callous and brings into question the sincerity of his plea of remorse.

23. Further the Appellant took advantage of the vulnerable. Taking advantage of those vulnerable in the society is an aggravating factor.

24. The Appellant was liable to a life sentence but he got away with a 25 year sentence. Given the circumstances of the offence , the sentence in my view, was rather lenient.

25. The Appellant complainant is devoid of any merit and his appeal on this ground is dismissed .

26. On whether the court should take into consideration the time the Appellant spent in custody prior to conviction, Section 333 (2) of the *Criminal Procedure Code* provides as follows:

    (2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

27. In *Ahamad Abolfathi Mohammed & another v Republic* (2018) eKLR. the court of Appeal defined " taking into account " as follows: "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person"

28. In simple terms, I understand the court of Appeal to have been saying that once the court has determined the period of imprisonment, it must then deduct the period spent in remand from the determined sentence. Thus it is not enough to merely state " I have taken into account the period spent in custody prior to conviction".

29. There is no evidence that the trial court in this case took into account the period that the Appellant had spent in custody prior to conviction. To that extent only, this Appellant's Appeal succeeds.

30. In the end the Appeal herein is hereby dismissed and the sentence passed by the trial court is upheld save that its effective date is 10/12/2021 being the date when the Appellant was first arraigned in court.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 26TH DAY OF SEPTEMBER, 2024.

S .CHIRCHIR.

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant

The Accused.

Ms Osoro for DPP.