FOO v Repuplic (Criminal Appeal E019 of 2021)
[2023] KEHC 2499 (KLR) (28 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2499 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E019 OF 2021

KW KIARIE, J

MARCH 28, 2023

BETWEEN

FOO ..... APPELLANT

AND

REPUPLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case NO. E008 of 2020 of the Principal Magistrate's Court at Oyugis by Hon. C.A. Okore–Senior Resident Magistrate)

JUDGMENT

1. FOO, the appellant herein, was convicted after pleading guilty to the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 0f 2006.

2. The particulars of the offence are that on diverse dates between October and November 2020 at Sino location, Rachuonyo South sub County within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of VAO, a child aged 16 years.

3. The appellant was sentenced to fifteen (15) years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.

4. The appellant raised grounds of appeal as follows:

    a. That he was intimidated by police officers to plead guilty out of serious torture while in police cells.

    b. That the learned magistrate did not warn herself if the appellant was found in the room with the said victim.[Sic]

    c. That the trial magistrate errored in both law and facts to have relied on un-buttressed evidence having no credible exhibit to confirm the act.

d. That the trial magistrate acted to link or connect the appellant with sexual affairs with the said girl.

e. That the trial magistrate was biased for the appellant was under age (17 years) and was not conversant with the law and had no lawyer to represent him.

f. That the trial court never realized that the appellant was tortured and forced by day.[Sic]

g. That my lord the learned trial magistrate errored in both law and facts out of mere fabricated allegation without realizing that I was arrested while walking in town.

5. The appeal was opposed by the state through David Ndege, learned counsel. He raised the following grounds of opposition:

a. That the plea was unequivocal.

b. That the sentence meted was legal.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

7. In the leading case of *Joseph Marangu Njau v Republic* [2015] eKLR the Court of Appeal stated:

Whereas all the perils a guilty pleader embraces may not much matter in petty offences or in mere infractions which do not present much risk to life or liberty, much is at stake in the offences that attract more serious penal consequences. In the case before us, the balance of the appellant's natural life stood to be spent behind bars upon conviction.

Cognizant of the ever-present dangers of misjustice [sic] in guilty pleas, the courts have been vigilant to act upon and to uphold them only when they are clear, express, unambiguous and unequivocal. When a plea of guilty is challenged as not having been entered unequivocally, it becomes a matter of law that permits the superior courts to entertain appeals notwithstanding Section 348 of the CPC aforesaid. The predecessor of this Court considered and authoritatively laid down the manner in which pleas of guilty should be recorded and the steps which should be followed, in the decades-old case of Adan v Republic [1973] EA 445, as follows;

> " (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
>
> (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
>
> (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
>
> (iv) if the accused does not agree with the facts or raise any question of his guilt his reply must be recorded and change of plea entered;
>
> (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

In the instant case I will endeavour to establish if the plea adhered to the laid down procedure as indicated in the case of Adan (supra).

8. The appellant has contended that he was tortured before he plead guilty. He was arrested on November 9, 2020 in company of the complainant and both were placed in cells. This followed a complaint by the complainant's father to the police at Oyugis. The two were picked by police officers from Oyugis and the appellant was charged in court on November 11, 2020.

9. When the appellant was taken to court on November 11, 2020 he did not complain that he had been tortured. The trial court did not notice anything to suggest that he had been tortured. He pleaded guilty to the charge.

10. The matter was adjourned to November 16, 2020 for the reading of facts. When the facts were read to him, he confirmed them to be true. He did not raise any complaint about the alleged torture.

11. When the appellant was given a chance to mitigate, this is what he told the court:

> Pardon me. It is true she followed me to my home, she wanted me to marry her; I knew she was underage. I know she is 16 years old. She had told me that. I am 25 years old. I am working as a boda-boda rider and a farm hand for someone. I know I am older than her by ten years.

12. I therefore find that there is no evidence of torture to induce the plea of guilty. His plea was unequivocal and the trial court did not deviate from the laid down guidelines.

13. In the charge sheet the apparent age of the appellant is provided as adult. During his mitigation he gave his age as twenty five (25) years. He cannot claim to have been seventeen (17) years.

14. Section 348 of the *Criminal Procedure Code* provides as follows:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

I will therefore endeavour to establish the legality of sentence bearing in mind that an appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of Nillson v Republic [1970] EA 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) CCA 28 TLR 364.

15. Section 8 (4) of the *Sexual Offences Act* provides as follows:

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

16. In the instant case the minor was aged sixteen years. The prescribed sentence is mandatory and any other sentence would be illegal. I therefore have no basis to interfere with the sentence. The appeal is therefore dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 28TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE