Agengo & another v Republic (Criminal Appeal 59 of 2019)
[2023] KEHC 3964 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 3964 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL 59 OF 2019

JN KAMAU, J

APRIL 25, 2023

BETWEEN

PETER OMONDI AGENGO ..... 1ST APPELLANT

PETER OMONDI AGENGO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon A. R. Kithinji (PM) delivered at Maseno in Principal Magistrate's Court in Criminal Case No 584 of 2012 on 14th June 2013)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon. A. R. Kithinji, Principal Magistrate who sentenced him to fifteen (15) years imprisonment.

2. Being dissatisfied with the said Judgement, on 28th October 2019, the Appellant lodged an Appeal herein. His Petition of Appeal was undated. He set out six (6) grounds of appeal.

3. His undated Written Submission were filed on 23rd November 2022 while those of the Respondent were dated 17th October 2022 and filed on 19th October 2022. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

5. This was aptly stated in the case of Selle & Another vs Associated Motor Boat Co Ltd & Others [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

6. In his Written Submissions, the Appellant indicated that he had abandoned his appeal against conviction. Having looked at his Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the only issue that had been placed before it for determination was whether or not in the circumstances of this case, the sentence that was meted upon him by the Learned Trial Magistrate was lawful and/or warranted. The Grounds of Appeal Nos (4) and (5) were therefore dealt with together as they were all related.

7. The Appellant submitted that the sentence that was meted upon him though lawful, was harsh. He urged this court to reduce the same from fifteen (15) years to a lesser one. He asserted that he was remorseful of the events that led to the criminal offence. He added that he was a student undertaking an academic course in prison.

8. He contended that he was the sole bread winner of his family that was made up of his mother and siblings as his father had since died. He pleaded with court to consider that he was a first offender and that the Learned Trial Magistrate failed to consider his mitigation. He promised that if given another chance, he would live a life of peace, honesty and love to the nation. He pointed out that a lesser punishment would enable him resume his daily duty of serving the nation and his family.

9. On its part, the Respondent submitted that the fifteen (15) years imprisonment that was imposed upon the Appellant was a mandatory sentence as provided for in Section 8(4) of the Sexual Offences Act. It pointed out that in recent decisions the courts have addressed the issue of constitutionality of mandatory minimum sentences. In that regard, it placed reliance on the cases of Maingi & 5 Others vs Director of Public Prosecutions & Another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) and Joshua Gichuki Mwangi vs Republic Nyeri Criminal Appeal No 84 of 2015(eKLR citation not given) where the common thread was that minimum mandatory sentences left the trial court with no discretion to determine an appropriate sentence.

10. It further contended that in the instant case, the sentence that was meted herein was safe and justified and urged this court to be alive to the seriousness of the offence and the circumstances herein. It pointed out that the life of a sixteen (16) year old girl was changed because the Appellant took the girl in captivity for several months and forcefully had sex with her. It was emphatic that the Appellant herein should not be given another chance to deflower another young girl.

11. In this respect, it relied on the case of Athanus Lijodi vs Republic [2021] eKLR where it was held that a court will uphold a sentence prescribed by the Sexual Offences Act if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence was deserved or merited. It was its contention that the sentence herein was lawful and should be upheld.

12. Section 8(4) of the Sexual Offences Act under which the Appellant herein was charged provides that:-

> " 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."

13. In sexual offences, the age of a victim is an important ingredient to be considered when deciding the penalty to be meted out to an accused person. This was reinforced by the Court of Appeal in Kaingu Elias Kasomo vs Republic Criminal Case No 504 of 2010 that was cited in NNC vs Republic [2018] eKLR when it stated that:-

> " Age of the victim of sexual assault under the Sexual Offences Act is a critical component. It forms part of the charge which must be proved the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed will be dependent on the age of the victim."

14. According to the Birth Certificate, the Complainant (hereinafter referred to as "PW 1") was born on 1st December 1995. She was therefore aged sixteen (16) years as at 14th December 2011 when the incident occurred. In view of the fact that the sentence that was meted upon the Appellant was a mandatory minimum sentence of which he conceded was a lawful sentence, the Learned Trial Magistrate acted correctly in having sentenced him to fifteen (15) years imprisonment.

15. In the case of Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal had held that Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing offences. It took the view that the trial court could depart from the mandatory minimum sentence.

16. This situation obtained until the directions that were issued by the Supreme Court on 6th July 2021 in the case of Francis Karioko Muruatetu and Another vs Republic [2017] eKLR when it emphasised that the said case was only applicable to murder cases and that mandatory minimum sentences were still valid, lawful and constitution.

17. Post the said guidelines by the Supreme Court, two (2) schools of thought have emerged on the issue of the mandatory minimum sentences under the Sexual Offences Act. One school of thought takes the view that a trial or appellate court can exercise its discretion in meting out a lower sentence than that which has been prescribed in Section 8(2)- (4) of the Sexual Offences Act irrespective of the guidelines that were issued by the Supreme Court in the case of Francis Karioko Muruatetu vs Republic (Supra).

18. The other school of thought takes the view that courts cannot exercise any discretion in meting out sentences under Section 8(2)-(4) of the Sexual Offences Act after the Supreme Court issued its guidelines in the case of Francis Karioko Muruatetu vs Republic (Supra).

19. Notably, in the case of Maingi & 5 others vs Director of Public Prosecutions & Another (Supra), on 17th May 2022, while sitting as a High Court judge, Odunga J (as he then was) held that to the extent that the Sexual Offences Act prescribed mandatory minimum sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell foul of Article 28 of the Constitution of Kenya, 2010. He, however, clarified that the trial court was at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

20. In the case of GK v Republic (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR) that was delivered on 3rd December 2021, the Court of Appeal also stated that the law was no longer rigid with

regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

21. On 17th December 2021, in the case of Katu v Republic (Criminal Appeal 37 of 2017) [2021] KECA 337 (KLR) (17 December 2021) (Judgment) [2021], another bench of the Court of Appeal declined to review a sentence regarding a defilement on the ground that its hands had been tied by the case of Francis Karioko Muruatetu vs Republic (Supra).

22. It is clear that there is no consensus on how courts should proceed when considering the appropriateness of the sentence when hearing appeals or when re-sentencing persons convicted under the Sexual Offences Act because both the Court of Appeal and High Court are divided on this issue. High Courts and lower courts are therefore at liberty to align themselves with whichever school of thought that persuades them most.

23. Having considered the circumstances of the case herein in which the Appellant, a total stranger to PW 1 forcefully detained her for over five (5) months as a wife and continuously defiled her against her will over the said period was an aggravating factor which dissuaded this court from reviewing the sentence that was meted upon him despite him having improved himself academically while in prison.

24. This court therefore came to the firm conclusion that the sentence of fifteen (15) years imprisonment that was imposed on the Appellant herein was not harsh and/ or excessive warranting any interference and/or disturbance by this court.

25. In the premises foregoing, this court found that the Appellant's Ground of Appeal No (4) and (5) of the Petition of Appeal were not merited.

Disposition

26. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 28th October 2019 was not merited. The conviction and sentence be and are hereby affirmed as it is safe to do so.

27. It is so ordered.

DATED AND SIGNED AT KISUMU THIS 20TH DAY OF APRIL 2023

J. KAMAU

JUDGE

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF APRIL 2023

M. S. SHARIFF

JUDGE