Michubu v Republic (Criminal Appeal E025 of 2021)
[2023] KEHC 20645 (KLR) (25 April 2023) (Judgment)

Neutral citation: [2023] KEHC 20645 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E025 OF 2021

MS SHARIFF, J

APRIL 25, 2023

BETWEEN

JOHN KINYUA MICHUBU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal arising from the conviction and sentence by Hon P.N. Maina (S.P.M) in original Chuka PMC Sexual Offence Case No. 19/2020 delivered on 19/05/2020)

JUDGMENT

1. The appellant was charged in the subordinate Court with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offence Act*, 2006. The particulars being; on the 13th January, 2020 at around 1200 hrs in Tharaka North Sub County within Tharaka Nithi County intentionally and unlawfully caused his penis to penetrate the vagina of NM a child aged 16 years.

2. The appellant being arraigned pleaded guilty to the charges consequent upon which a plea of guilty on his own plea was entered and sentenced to 15 years. Dissatisfied, he appealed to this court raising the following amended grounds;

    a. The trial magistrate erred both in law and fact by failing to warn the appellant on the consequences of pleading guilty over the charges.

    b. The magistrate erred by failing to note that the appellant had been coerced by the police officers to plead guilty over charges he had not committed while in police cells.

    c. The learned magistrate erred by failing to note that the alleged victim was not produced before court to confirm whether she was a minor or not.

d. The learned trial magistrate erred by failing to consider that the appellant pleaded guilty unknowingly and out of fear.

3. The appeal thereafter was disposed of by way of written submissions. Both parties complied.

4. The appellant submits that while at the police station, he was beaten and coerced to plead guilty and when pleading, he did not know the nature of the charges facing him and ended up admitting the offence unknowingly. He submits that the court record does not show whether the court inquired from him if he understood Kitharaka, the language which allegedly used in court or that an interpreter was available to assist in interpretation. He relies on the authority in *Elijah Njikia wakianda vs republic* (2016) eKLR.

5. The respondent on its part filed submissions on 22/1/2022 in which learned counsel submits that the appellant pleaded guilty and sentenced to 15 years imprisonment and basing its arguments on Section 8(1)(4) of the *Sexual Offences Act* and the decisional authorities in RMM vs State (2021) eKLR and *Benard Kimani Gacheru vs Republic* (2002) eKLR, it is submitted that there is no evidence that the trial court acted on the wrong principles, ignored material facts or took into account irrelevant considerations or that the sentence was excessive. That this court ought not to interfere with the sentence.

Analysis and determination.

6. Having considered the record, there is no doubt the appellant pleaded guilty to the charges and the relevant provisions of the law is section 348 of the Criminal Procedure Code which provides;

> 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.

7. Having stated the above, the duty of this court in this appeal is to determine whether the plea of guilty was properly entered. The steps to be taken by a trial court when an accused pleads guilty were discussed in the celebrated case of *Adan vs Republic* (1973)EA 445 where the following steps were given;

(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 raises 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.

8. Further provisions on the steps to be taken are found in section 207(1) and (2) of the Criminal Procedure Code provides as hereunder:

(1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;

(2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:

Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

9. Having examined the record, the proceedings indicate that the appellant was called to plead in Tharaka language. There is no indication that the language was not understandable to the appellant. Had there been need to translate the proceedings to another language, the same should have reflected in the record. This court therefore finds that the appellant's plea of guilty was unequivocal. In the case of *Olel vs Republic* (1989) KLR 444 the court held that:

> "Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (Cap 75) does not merely limit the right of appeal in such cases but it bars it completely."

10. The above dispenses with the issue of language as raised by the appellant in his grounds of appeal.

11. The other issue coming out of the appeal is that of duress and or coercion as at the time of taking plea. Having examined the record, the appellant was arraigned on 12/5/2020. Upon pleading guilty, the facts were read out to which the appellant affirmed the correctness and even stated that the victim came to his home with her sister and they had consensual sexual intercourse on that day. He maintained that the victim was his girlfriend. He stated that he had refused to assist the victim procure an abortion.

12. After the facts, the matter was deferred to 19/5/2020 for sentencing by which time a pre-sentencing report had been filed.

13. My view in light of the above is that from the time plea was taken to the day the sentence was passed was sufficient time for the appellant to raise any issue of being coerced into pleading guilty if any had been exerted on him.

14. The totality of the above is that I find the issue of coercion to be an afterthought and I therefore reject it.

15. Instances where exceptional circumstances call for the interference with a plea of guilty were outlined in the case of *Alexander Lukoye Malika vs Republic* (2015) eKLR where the Court of Appeal rendered itself as follows:

> "A court may only interfere with a situation where an accused person has pleaded guilty to the charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of a mistake or misapprehension of the facts. An appellate Court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the appellant could not in law have been convicted of the offence charged."

16. Premised upon the evidence on record there are no exceptional circumstances that warrant this court's interference with the appellant's plea of guilty.

17. On the issue of sentence this court finds that the trial court sentenced the appellant to serve the prescribed statutory minimum term of 15 years on grounds that it was bound by the provisions of section 8(1) (4) of the *Sexual Offences Act* No 3 of 2006. In that regard the trial court erred in not exercising it's judicial discretion to sentence the appellant based on the Judiciary Sentencing Guidelines, the *Constitution* of Kenya 2010 specifically articles 27, 28,29,50, and recent judicial pronouncements.

18. The trial court failed to consider the overall twin objectives of punishment that is deterrence and rehabilitation. The trial court further failed to consider the aggravating and mitigating circumstances of the case. A reading of the presentencing report reveals that the indeed the appellant and the victim had an amorous relationship spanning over two years with the full knowledge of the victim's family and that upon the victim's family discovery of the victim's expectant status, they took the victim to the appellant's house whereat she was taken in as a wife only for one of her brothers to return the next day and recalled her whereupon a complaint was lodged with the police which culminated in his conviction.

19. The pre- sentencing report clearly elucidates the basis upon which the plea of guilty was made by the appellant who was at all material times a young man aged 23 years. Whereas the victim had not attained the age of consent, the evidence on record indicates that she indeed had been engaging in consensual sexual intercourse with the appellant. The victim's family had expected the appellant to marry her, and the appellant had stated to the probation officer that they had intended to get married once the victim cleared school.

20. Given that the victim was 14 years old when she commenced the relationship with the appellant I do find that the latter cannot be availed the defence under section 8(5) of the *Sexual Offences Act* however the sentence meted was harsh and excessive in the circumstances wherefore this court shall disturb it.

21. In the case of *Philip Maingi & Others vs DPP & Another* Machakos High Court Petition No E017 of 2021 Justice Odunga considered and relied on several local and international precedents including but not limited to *Francis Karaoki Muruatetu & Another vs Republic* (2017) eKLR and held as follows : -

> "My view is therefore that whereas the sentences prescribed may not be necessarily unconstitutional in the sense that they may still be imposed, in deciding what sentences to impose the Courts must ensure that whatever sentence is imposed upholds the dignity of the individual as provided under article 28 of the Constitution. In other words, since the provisions of the *Sexual Offences Act* came into force earlier than the Constitution, the prima facie mandatory sentences must now be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 28 of *the Constitution* as appreciated in the Muruatetu 1 Case. It is the construing of those provisions as tying the hands of the trial courts that must be held to be unconstitutional."

22. In the circumstances, I find that the appeal on sentence is merited and I do hereby set aside the sentence of 15 years and I substitute the same with one of 5 years to be computed from the date of the appellant's arrest.

It is hereby so ordered.

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

MWANAISHA. S. SHARIFF

JUDGE