Kipyegon v Republic (Criminal Appeal 20 of 2019)
[2023] KEHC 20152 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEHC 20152 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BOMET

CRIMINAL APPEAL 20 OF 2019

RL KORIR, J

JUNE 29, 2023

BETWEEN

PHILEMON KIPYEGON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the Conviction and Sentence in Sexual Offence Number 43 of 2018 by Hon. P. Achieng in the Principal Magistrate's Court at Bomet)

JUDGMENT

1. The Appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. The particulars of the Charge were that on September 21, 2018 at 0510 hrs in Ndarawetta Location within Bomet County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of CC a child aged 16 years old.

2. The Appellant pleaded not guilty to the charge before the trial court. Thereafter, a full hearing was conducted. The prosecution called six (6) witnesses in support of its case.

3. At the close of the prosecution case, the trial court ruled that a prima facie case had been established against the Appellant and he was put on his defence.

4. At the conclusion of the trial, the Appellant was convicted of the offence of defilement and sentenced to serve 15 years in prison.

5. Being dissatisfied with the Judgment dated July 31, 2019, the Accused appealed against the conviction and the sentence and relied on the following grounds reproduced verbatim: -

    i. That I pleaded not guilty at the trial.

ii. That the trial Magistrate erred in law and fact by convicting and sentencing me to serve 15 years without considering the evidence which was not water tight.

iii. That the learned trial Magistrate erred in law and fact by relying on the family's evidence which was not favourable to base the conviction and the sentence.

iv. That the trial Magistrate further erred in law and fact by relying on the evidence of PW1 without considering that he was not examined.

v. That the trial Magistrate misdirected himself on a point of law and fact while relying on inconsistent, incredible and untrustworthy witnesses.

vi. That the trial Magistrate erred in law and fact by rejecting my defence which was very flexible.

6. Subsequently the Accused filed an Amended Appeal on February 3, 2023 where he stated that the Appeal was against the Sentence only. He relied on the following grounds:-

i. That the imposed sentence is excessively harsh and unjust considering that the Appellant was a first offender and a young man who needed a lesser sentence.

ii. That the imposed sentence is excessive and did not go well with the provisions of the policy sentencing directives of 12015 at paragraph 4.1

iii. That the Appellant is remorseful and regrets all his actions. He is repentant.

iv. That the Appellant before his conviction was a young man who worked hard to support himself and his family.

v. That the court considers my mitigation and awards 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.

vi. That the court considers the provisions of Section 333(2) of the *Criminal Procedure Code* and factor it in his sentence.

7. This being the first appellate court, I have a duty to consider the evidence on record afresh. This was succinctly stated by theCourt of Appeal for Eastern Africa in *Pandya v Republic* (1957) EA 336 where it stated: -

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

8. The Appellant amended his Appeal and prayed that the court address the issue of sentencing which he stated was harsh and excessive. As such, the Appellant's conviction is sustained.

9. I directed the Appeal to proceed by way of written submissions.

The Appellant's Written Submissions.

10. The Appellant submitted that the circumstances of the case were not grievous as no one had lost their life. That a lesser sentence was called for. He relied on *Thomas Mwambu Wenyi vs Republic* (2017) eKLR. The Appellant further submitted that the sentence of 15 years did not serve the objectives under paragraph 4.1 of the Sentencing Policy Guidelines which were the gravity of the offence, the threat of violence against the victim and the nature and type of weapon used.

11. It was the Appellant's submission that he condemned his actions and regretted his deeds. That he asked for forgiveness from God, the complainant and everyone involved in his misdeeds. It was the Appellant's further submission that the complainant was aged 16 years and the circumstances which prevailed during the commission of the offence were not grievous to warrant the sentence of 15 years. He relied on *Geoffrey Mutai vs Republic (*2017) eKLR.

12. The Appellant submitted that he be given another chance in life. That while in prison, he embraced rehabilitative work by being engaged in carpentry and joinery. The Appellant further submitted that with the experience and information acquired, he believed that he was fully rehabilitated and was ready to serve the nation. He relied on *Douglas Muthaura vs Republic* (2018) eKLR and *Daniel Gichimu & another vs Republic* (2018) eKLR.

13. It was the Appellant's submission that the court consider the period already spent in custody as per Section 333(2) of the *Criminal Procedure Code*. He relied on *Ahamad Abolfathi Mohammed & another vs Republic* (2018) eKLR. It was the Appellant's further submission that the court either grants an acquittal, reduces his sentence or order the Appellant to serve under the Community Service Order. He prayed that this court be guided by *Jackson Solomon Saitoti vs Republic* (2019) eKLR.

The Respondent's Written Submissions.

14. The Respondent submitted that the offence in question attracted a minimum sentence of 15 years as per Section 8(4) of the *Sexual Offences Act*. That further, there were aggravating factors when after defiling the victim, the Appellant assaulted the victim's mother. The Respondent further submitted that the sentence was just and lawful.

15. I have gone through and given due consideration to the trial court's proceedings, the Petition of Appeal filed on August 14, 2019, the Amended Appeal filed on February 3, 2023, the Appellant's Written Submissions dated October 5, 2022, the Respondent's Written Submissions dated June 24, 2021and and the only issue for determination was whether the Sentence was harsh and excessive.

16. The principles guiding an appellate court on sentencing were set out in *Ogolla s/o Owuor vs R* (1954) EACA 270, where the Court of Appeal held that: -

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors. This was further echoed in the dictum of the cases in R v Shershowsky {1912} CCA TLR 263 as emphasized in Shadrack Kipkoech Kogo v R Criminal Appeal No. 253 of 2003 thus "Sentence is essentially an exercise of discretion by the trial Court and for this Court to interfere it must be shown that in passing the sentence, the sentencing Court took into account an irrelevance factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."

17. Similarly in *S v Malgas* 2001 (1) SACR 469 (SCA), the Supreme Court of Appeal of South Africa held that:-

> "A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

18. The Appellant was charged and convicted of the offence of Defilement. Section 8(4) of the *Sexual Offences Act* 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."

19. As stated above, sentencing is at the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The trial court must be guided by the evidence and sound legal principles. An appellate court would be entitled to interfere with the sentence imposed by the trial court if it is demonstrated that the sentence imposed is not legal or is so harsh and excessive as to amount to miscarriage of justice, and or that the court acted upon a wrong principle.

20. In this case the Appellant was sentenced to 15 years for an offence which carried the minimum sentence of 15 years. I have considered the circumstances of the case and I have noted that the Appellant attacked SCM (PW2) who was the victim's mother. The Appellant bit PW2's ear when she had gone to rescue her daughter from the Appellant.

21. I have also noted from the trial court proceedings that the Appellant was not a first offender. On September 24, 2018, the trial court when deferring the issuance of bond to the Appellant stated that it had just sentenced the Accused in another matter. It was not stated in the record whether the sentence was in relation to the assault of the victim's mother.

22. The Appellant has submitted that the lengthy sentence was not warranted since no one lost their life in the incident. This court interprets the Appellant's submission to mean that the violation of the complainant's body was a minor indiscretion not worthy of such intervention by the law. I have considered that the Appellant jumped into the Complainant's home, found her preparing to bath and pounced on her in a brutal manner. There was no prior relationship between the Appellant and the complainant to suggest that they might have a stolen moment and he had no right to violate her in the manner he did.

23. It is my finding that given the circumstances of the case and the aggravating actions by the Appellant, the Appellant deserves to serve the custodial sentence issued by the trial court. It was not only legal as per the provisions of Section 8(4) of the *Sexual Offences Act* but lenient owing to the aggravating circumstances.

24. In the end, I find no reason to warrant interfering with the Sentence imposed.

25. The Appellant's appeal against Sentence has no merit and it is dismissed.

26. Orders accordingly.

JUDGEMENT DELIVERED, DATED AND SIGNED AT BOMET THIS 29TH DAY OF JUNE, 2023.

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R. LAGAT-KORIR

JUDGE

Judgement delivered in the presence of the Appellant, Mr. Waweru holding brief for Mr. Njeru for the Respondent and Siele (Court Assistant).