Lepachako v Republic (Criminal Appeal 44 of 2019)
[2023] KEHC 22643 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22643 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAHURURU

CRIMINAL APPEAL 44 OF 2019

CM KARIUKI, J

SEPTEMBER 28, 2023

BETWEEN

RAPHAEL ONEKIPUKEL LEPACHAKO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Conviction and Sentence of Hon J. Wanjala Chief Magistrate in Chief Magistrate Court at Nyahururu Law Courts Criminal case No. 106 of 2017)

JUDGMENT

1. The Application was charged with an offense of Defilement Contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act* No. 3 of 2006. He pleaded not guilty, and after the trial, he was convicted and sentenced to twenty (20) years imprisonment.

2. He was not happy with the verdict thus, lodged an instant appeal whereby he set out grounds of appeal as follows;

    a. That the trial magistrate erred in law and fact by failing to find that the prosecution evidence did not prove that the appellant caused his penis to enter the genital organ of the complainant.

    b. That the trial magistrate erred in law and fact by failing to find that the prosecution evidence was full of glaring contradictions and discrepancies.

    c. The trial magistrate erred in law and fact by failing to find that the prosecution did not medically connect the appellant to the offense since the medical report indicated that the hymen was missing and old and that the injuries were not connected to the offense.

    d. That the trial magistrate erred in law and fact in finding a conviction against the weight of evidence, adding that he ordered the complainant's birth certificate to ascertain her age.

e. That the trial magistrate erred in law and fact by not recognizing that the prosecution had not proved the charge of defilement beyond a reasonable doubt.

f. That the trial magistrate erred in law and fact by passing sentence under the circumstances and not considering that the appellant was the first offender

g. That the sentence is too harsh hence pray that the honorable court will consider my prayers that it be quashed and set aside by considering the above-narrated grounds.

3. When the matter came for hearing, he opted to abandon other grounds but mitigate on the sentence noted out

4. Mitigation was as follows:

i. Begs leave for the court to intervene and reduce the sentence imposed against me.

ii. He has a family of seven children who depend on him in education and catering.

iii. He is an orphan and the only male as the head of the family

iv. During His stay in prison, he engaged in rehabilitation programs, has attained a certificate in RODI Kenya certificates in Bible league courses, i.e., Prisoner journey project Philip and Bronze level of the Prison Project.

v. He has also changed and turned to Christian life; the Rodi Kenya has enlightened him in many ways he can earn a living using intensive training.

vi. That since he has gone through the reforms and rehabilitation programs, he humbly begs the court to accord him a lighter, lesser sentence so that he can rejoin my family back to the society

5. The ODPP responded by urging the court to find no supporting documents to the mitigation nor report from the Prisons of the Applicant's conduct. Also, the court was urged to consider the case's circumstances where an in-law converted a fifteen (15) years old girl into a wife.

Issue, analysis, and determination

6. The only ground the court can consider is whether; the trial magistrate erred in law and fact by passing the sentence under the circumstances and not considering that the appellant was the first offender, thus warrants this court to reduce the same.

7. The appellant is only aggrieved with the sentence in this appeal. It is, therefore, important to set out the circumstances under which an appellate court interferes with the sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in *S vs. Malgas* 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of the 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 that the appellate court would have imposed had it has been the trial court is so marked that it can properly be described as "shocking," "startling," or "disturbingly inappropriate"

8. Similarly, in *Mokela v The State* (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " It is well-established that sentencing remains pre-eminently within the sentencing court's discretion. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences that a sentencing court has properly imposed. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

9. The predecessor of the Court of Appeal in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on this issue as follows:-

> " The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

10. To this, I would add a third criterion, namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (*R v Shershowsky* [1912] CCA 28TLR 263) while in the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No.253 of 2003, the Court of Appeal stated 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 irrelevant 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 (see also *Sayeka v R*. [1989 KLR 306]"

11. The Court of Appeal, on its part, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated that:

> " 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, the sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with a 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. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless any one of the matters already states is shown to exist."

12. Under section 8. (1) of The *Sexual Offences Act* -, A person who commits an act that causes penetration with a child is guilty of an offense termed defilement. (2) A person who commits an offense of defilement with a child aged eleven years or less shall upon conviction, be sentenced to imprisonment for life. If victims aged between 12 and 15 minimum 20 years. In the instant case, the victim was said to be 15 years.

13. It is not disputed applicant was a first offender and that he was sentenced to a mandatory minimum sentence before the mandatory minimum sentence had been declared unconstitutional thus, the mitigation was minimum. It could not have any impact even if merited as the court's hands were tied.

14. Thus, the appellant could not have any fair trial as far as the sentence is concerned in terms of the provisions of Article 50 of the *constitution* of Kenya. Thus the court finds it apt to order fresh

sentencing before the lower court with jurisdiction considering all mitigations appellant will tender. Thus, the court makes the orders;

i. The trial court's sentence is set aside, and the appellant shall be produced before the chief magistrate's court Nyahururu for mitigation and sentence.

DATED, SIGNED, AND DELIVERED AT OLKALOU THIS 28TH DAY OF SEPTEMBER 2023

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CHARLES KARIUKI

JUDGE