**Jeremiah v Republic (Criminal Appeal 54 of 2021)**
**[2023] KEHC 22923 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 22923 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VIHIGA**

**CRIMINAL APPEAL 54 OF 2021**

**JN KAMAU, J**

**SEPTEMBER 26, 2023**

**BETWEEN**

**REUBEN OKWAKO JEREMIAH ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an Appeal from the Judgment of Hon W. K. Cheruiyot (SRM) delivered at Vihiga in Principal Magistrate's Court in SO Case No 50 of 2018 on 3rd April 2019)***

**JUDGMENT**

## Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) 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 W. K. Cheruiyot, Senior Resident Magistrate who sentenced him to twenty (20) years imprisonment.

2. Being dissatisfied with the said Judgement, on 22nd July 2019, the Appellant lodged the Appeal herein. His Petition of Appeal was undated. He set out four (4) grounds of appeal.

3. His undated Written Submissions were filed on 1st September 2020 while those of the Respondent were dated and filed on 14th July 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. Having looked at the Appellant's Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Trial Court failed to comply with the provisions of Article 50(2) of the *Constitution* of Kenya, 2010;

    b. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    c. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant by the Trial Court was lawful and/or warranted.

7. In his initial grounds of appeal, the Appellant had challenged both his conviction and sentence. In the Amended Grounds of Appeal that he subsequently listed in his Written Submissions, he abandoned the challenge on conviction and limited himself to the sentence. He submitted that he was remorseful for having been engaged in the offence in question and confirmed that he was not challenging the evidence on record.

8. Having admitted to the offence at this appellate stage, there was no value in analysing the evidence that was adduced in court to ascertain whether or not the Prosecution had proved its case to the required standard, which in criminal cases, is proof beyond reasonable doubt.

9. The Appellant also abandoned the issue of the court having failed to comply with the provisions of Article 50(2) of the *Constitution* of Kenya. Be that as it may, it sufficed for this court to state that the provision of legal representation was a progressive right that was currently limited to persons who had been charged with the offences of murder and robbery with violence. He, however, appeared to have couched this ground differently in his Written Submissions.

10. He contended that he was unrepresented as was required under Article 50(2) of the *Constitution* of Kenya and therefore acted as a pauper in law. He averred that he was the sole breadwinner with his siblings having a long way to go in life. He sought leniency on the ground that he was a first offender and the fact that he had undergone various rehabilitation programmes which included biblical study courses where he was issued with a recommendation letter from the School Head.

11. He submitted that the sentence of twenty (20) years that was imposed on him was harsh and excessive following the Ruling of the Supreme Court. He asserted that the court could exercise discretion in meting out a less severe custodial sentence or to consider meting out a non-custodial sentence. He further urged this court to consider the period he had spent in remand as part of his sentence as stipulated in Section 333(2) of the *Criminal Procedure Code*.

12. This court noted that the Respondent submitted on the both the question of conviction and sentence. However, as the Appellant had admitted to having committed the offence that he had been charged with, this court limited itself to the Respondent's submissions on the issue sentence only.

13. In this regard, the Respondent argued that Section 8(3) of the *Sexual Offences Act* provided for a mandatory sentence of not less than twenty (20) years where the child was aged between 12-15 years. It argued that the Appellant was convicted of the offence and that the Trial Court sentenced him to serve twenty (20) years. It thus urged this court to dismiss the Appeal herein for lacking merit.

14. As pointed hereinabove, the Appellant herein was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* because AA (hereinafter referred to as "PW 1") was about thirteen (13) years of age at the material time of the incident. An Age Assessment was done which put her age at fourteen (14) years at the time of the incident.

15. Section 8(3) of the *Sexual Offences Act* provides that:-

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

16. Having convicted the Appellant herein, the Trial Magistrate did not therefore err when he sentenced him to twenty (20) years imprisonment as that is what was provided by the law.

17. The above notwithstanding, this court took cognisance of the fact that there is emerging jurisprudence that the mandatory minimum sentences in defilement cases is unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

18. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another vs Republic [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

19. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake v Republic* [2018] eKLR where it 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.

20. With the directions of the Supreme Court which clarified that the case of *Francis Karioko Muruatetu and Another vs Republic* (*Supra*) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

21. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK v Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

22. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

23. In the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic* (Supra) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

24. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The *Sentencing Policy Guidelines* in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

25. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing in defilement cases is concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to lower than the twenty (20) years imprisonment that has been prescribed in Section 8(3) of the *Sexual Offences Act*.

26. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of fifteen (15) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.

27. Turning to Section 333(2) of the *Criminal Procedure Code* cap 75 (Laws of Kenya). The said section provides that:-

> " Subject to the provisions of section 38 of the *Penal Code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody" (emphasis court).

28. The requirement under with section 333(2) of the Criminal Procedure Code was restated by the Court of Appeal in *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

29. Further, Clauses 7.10 and 7.11 of the *Judiciary Sentencing Policy Guidelines* (under) provide that:-

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

30. A perusal of the proceedings of the lower court showed that the Appellant was arrested on 23rd October 2018. He was convicted and sentenced on 3rd April 2019. There was no indication that he was released on bond/bail while the trial was ongoing. He was therefore entitled to this period being taken into account in the computation of his sentence.

31. It was evident that the Learned Trial Magistrate did in fact consider the provisions of Section 333(2) of the *Criminal Procedure Code*. While sentencing the Appellant herein, he directed that the sentence would run from 25th October 2018 which was the date when Appellant was arraigned in court. The

Appellant's submission that this court consider the period he stayed in remand as provided under Section 333(2) of the *Criminal Procedure Code* was actually rendered moot.

32. The above notwithstanding, this court found it fair to direct that the sentence runs from 23rd October 2018 which was the date when the Appellant was arrested as he was definitely confined before being arraigned in court on 25th October 2023. Indeed, Section 333(2) of the *Criminal Procedure Code* provides that "the sentence shall take account of the period spent in custody" which period should include both custody in police cells and in remand in prisons. Two (2) days may look insignificant but it is a long period for a person serving a prison sentence.

33. In the premises foregoing, while Amended Grounds of Appeal Nos (1), (2), (3), (4), (5) and (6) were not really merited because the Learned Trial Magistrate sentenced the Appellant to a lawful sentence under the *Sexual Offences Act*, this court nonetheless found that there was merit in setting aside the sentence of twenty (20) years in view of the emerging jurisprudence and to review the period from when the sentence ought to run.

**Disposition**

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 22nd July 2019 was partly merited and the same be and is hereby allowed. The Appellant's conviction be and is hereby upheld as it was safe. However, his sentence of twenty (20) years that was imposed on him be and is hereby vacated and/or varied and/or set aside and reduced to fifteen (15) years imprisonment and the same to run from 3rd April 2019.

35. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 23rd October 2018 and 3rd April 2019 when he was arrested and sentenced respectively be taken into account when computing his sentence in accordance with Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

36. It is so ordered.

**DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF SEPTEMBER 2023**

**J. KAMAU**

**JUDGE**