Onyango v Republic (Criminal Appeal 41 of 2021)
[2023] KEHC 22921 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22921 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 41 OF 2021

JN KAMAU, J

SEPTEMBER 26, 2023

BETWEEN

NINCACIOUS ODWUOR ONYANGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. Ochieng (PM) delivered at Hamisi in Principal Magistrate's Court in SO Case No 9 of 2021 on 2nd February 2021)

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 M. Ochieng, Principal Magistrate who sentenced him to twenty (20) years imprisonment.

2. Being dissatisfied with the said Judgement, on 17th February 2021, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 12th February 2021. He set out four (4) grounds of appeal.

3. His undated Written Submissions were filed on 30th August 2022 while those of the Respondent were dated and filed on 17th October 2022. The Judgment herein is based on the said Written Submissions both which parties relied upon in their entirety.

Legal Analysis

4. Notably, the Appellant pleaded guilty to the offence of defilement as aforesaid. There was therefore no evidence to analyse. He referred this court to the case of Okeno vs Republic (1972) EA 32 where it

was held that it was the duty of the appellate court to scrutinise the lower court findings with a view to coming to its own conclusions in the matter bearing in mind that it never saw nor heard the witnesses and make due allowance for that.

5. He submitted that he was a layman in law which the Prosecution took advantage of and failed to arraign witnesses in court so that he could cross-examine them. He asserted that he did not sanitise the P3 Form, PRC Form and Treatment Notes.

6. He added that he was not given witness statements that the Prosecution was relying upon and hence he was not given enough time to be heard, give his evidence and to mitigate as was provided in Article 50(2) of *the Constitution* of Kenya.

7. He further submitted that every citizen is entitled to access to information from the State as provided in Article 35 (v)(1) (sic) of *the Constitution* and that under Section 35(1)(b), every citizen was entitled to information held by another person that was required for the exercise or protection of any right or fundamental freedom.

8. He added that the twenty (20) years that was imposed on him was harsh and was without discretion or mitigation or a pre-sentence report which was against the law.

9. He thus urged this court to quash his conviction and set aside his sentence and direct that this matter be referred for re-trial in line with Article 50(6) (b) of *the Constitution* of Kenya.

10. On its part, the Respondent submitted that the Appellant was convicted on his own plea of guilty and that consequently, under Section 348 of the Criminal Procedure Code, he could only challenge the extend (sic) and legality of the sentence. It argued that he had not shown any reason why this court should interfere with the conviction and sentence and urged it to dismiss the Appeal herein.

11. As was correctly stated by the Appellant herein, 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.

12. 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.

13. Having said so, the court can only evaluate evidence that was adduced during trial. As the Appellant pleaded guilty to the charge, this appellate court was discharged from the duty of scrutinising such evidence.

14. The Respondent therefore set out the correct position of the law that once the Appellant pleaded guilty to the charge, he could only appeal against the extent and legality of the sentence as provided in Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya) that provides as follows:-

> " 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."

15. The above notwithstanding, an appellate court can enquire into the legality or otherwise of the proceedings preceding the pleading of guilty by an accused person to satisfy itself that the right to a fair trial of such an accused person has not been infringed upon, breached and/or violated.

16. A perusal of the proceedings of 1st February 2021, the substance and every element of the charge was read to the Appellant herein in a language that he understood, Kiswahili, and when he was asked if he admitted or denied the charged, he stated as follows:-

> " It is true."

17. The Learned Trial Magistrate entered a plea of "Guilty" but warned him that the offence was serious, that the offence carried a minimum sentence and that he was entitled to legal counsel. The Appellant again responded:-

> " It is true."

18. The Learned Trial Magistrate again entered a plea of "Guilty" against him. The facts were read out to him as follows:-

> " On 20/1/2021 at 6.00 pm complainant went to accused house after having an argument with her family. They had supper. Had sexual intercourse (sic). Complainant's mother traced Complainant to accused house. Reported to Nyumba Kumi who went to accused house. Accused arrested. Complainant taken to Tigoi Health Centre. Accused taken to Gambogi Police Base. P3 Form filled on 31/1/2021. Tests done. Labia majora and minora normal. Hymen absent. Treatment Note-Exh 1, PRC- Exh 2, P3 Form- Exh 3, Copy of Baptismal Certificate- Date of birth-29th May 2005 Exh 4 "

19. He then stated as follows:-

> " The facts are true."

20. The Learned Trial Magistrate then convicted him on his own plea of guilty. The Prosecution indicated that it did not have any previous records. He then indicated that he had no mitigation. The Learned Trial Magistrate rendered herself as follows:-

> " Notes that the Accused is not remorseful. Further notes offence carries a minimum sentence and is rampant in this area. Offence should be deterred. Accused to serve 20 years in jail. Right of Appeal explained."

21. Section 207 (1) and (2) of the Criminal Procedure Code stipulates as follows:-

    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.

22. It was clear to this court that the proceedings for taking the plea were lawful and in compliance with the provisions of the law. The plea of guilty was unequivocal. The Appellant's confirmation that the facts as read out to him was also not ambiguous. There was no doubt in the mind of this court that

he understood what he was pleading to. He was warned that the charge was serious, that it carried a minimum sentence and that it was best that he seeks legal representation but he reiterated that he had pleaded guilty to the charge.

23. There was no clearer demonstration of the Appellant's guilt than what he exhibited during the aforesaid proceedings. The fact that he reflected on the harsh sentence when he was incarcerated was not a ground to seek to quash his conviction and set aside his sentence so as to give him a second bite at the cherry through a retrial.

24. Indeed, a retrial is not ordered whimsically. There have to be solid grounds under which the same can be granted. This is because there is a danger of witnesses not being found, memory of witnesses being eroded which could all contribute to the delay in conclusion of cases.

25. A re-trial should only be ordered where no prejudice would be occasioned to an appellant or where it will not give a party seeking a re-trial a second bite at the cherry by panel beating its case to fill gaps in a fresh trial. Indeed, an appellate court will not order that a re-trial be conducted where it finds that a conviction cannot be sustained based on the evidence that is currently before it at the time of hearing and determination of an appeal.

26. In this regard, this court fully associated itself with the holdings in the cases of Ahmedi Ali Dharamsi Sumar vs Republic [1964] E.A. 481 and re-stated in Fatehaji Manji vs Republic [1966] E.A. 343 that Mutende and Thuranira Jaden JJ cited in the case of Jackson Mutunga Matheka vs Republic [2015] eKLR where it was stated as follows:-

> " ... a retrial will only be ordered when the original trial was illegal or defective. It will not be ordered where the conviction is set aside because of insufficiency of evidence of for the purpose of enabling the prosecution fill up gaps in its evidence at the first trial, even where a conviction is vitiated by a mistake of the trial court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on particular facts and circumstances and an order for retrial should only be made where the interest of justice required it and not ordered where it is likely to cause an injustice to the accused."

27. Having considered the facts of this case, this court came to the firm conclusion that this was not a suitable case for it to order a retrial.

28. Be that as it may, this court found it prudent to determine the extent and legality of the sentence that was imposed on the Appellant herein for completeness of record.

29. As pointed hereinabove, he was charged under Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* because PW 1 was about fifteen (15) years of age at the material time of the incident. She was born on 29th May 2005. The offence was said to have been committed on 20th January 2021. She was therefore fifteen (15) years and eight (8) months.

30. 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."

31. Section 8(4) of the *Sexual Offences Act* states 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."

32. As the Complainant had not attained the age of sixteen (16) years, the Learned Trial Magistrate did not therefore err when she sentenced the Appellant to twenty (20) years imprisonment as that is what was provided by Section 8(3) of the *Sexual Offences Act*.

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

34. 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

41. 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*.

42. 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 the Complainant and the society to find retribution in that sentence.

43. Turning to Section 333(2) of the Criminal Procedure Code cap 75 (Laws of Kenya). The said section stipulates 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).

44. 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.

45. 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 (emphasis)."

46. A perusal of the proceedings of the lower court show that the Appellant was arrested on 31st January 2021. He was convicted and sentenced on 1st February 2021. He could have had the benefit of deduction of the one (1) day he had been held in custody at the police station. 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. A day may look insignificant but it is a long period for a person serving a prison sentence.

47. In the premises foregoing, while none of the Grounds of Appeal that the Appellant relied upon were merited, this court nonetheless found and held that although the Learned Trial Magistrate sentenced the Appellant to a lawful sentence under the *Sexual Offences Act*, there was merit in setting aside the sentence of twenty (20) years in view of the emerging jurisprudence and grant the Appellant the day he was entitled to under Section 333(2) of the Penal Code.

Disposition

48. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 17th February 2021 though not merited, the same be and is hereby allowed to the extent that the 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 31st January 2021. However, his conviction be and is hereby upheld as it was safe.

49. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 31st January 2021 and 1st February 2021 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).

50. It is so ordered.

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

J. KAMAU

JUDGE