Otieno v Republic (Criminal Appeal E057 of 2022)
[2023] KEHC 26806 (KLR) (21 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26806 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E057 OF 2022

RE ABURILI, J

DECEMBER 21, 2023

BETWEEN

COLLINS ODHIAMBO OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal against the conviction and sentence by the Hon. C. Oruo on the 14.10.2022 in the Principal Magistrate's Court in Winam in Sexual Offence Case No. E010 of 2022)

JUDGMENT

Introduction

1. The appellant herein Collins Odhiambo Otieno was charged and convicted of the offence of rape contrary to section 3(1)(a)(b)(3) of the *Sexual Offences Act* No.3 of 2006 and sentenced to serve 10 years' imprisonment.

2. The particulars of the offence were that on the 9th day of February 2022 in [particulars withheld] sub-county, Kisumu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MHA without her consent.

3. The appellant was aggrieved by the conviction and the sentence and filed the instant appeal on the 9th November 2022. The grounds of appeal are:

    i. That the trial court failed to analyse the medical evidence that did not link the appellant with the offence in question.

    ii. That the trial court failed to consider that there was contradiction meted by PW3 Clinical Officer and the investigating officer regarding the appellant by the complaint.

iii. That the trial court immensely failed to avail essential witnesses (C) to prove whether she was part and parcel of the offence in question.

iv. That the trial court failed to consider that there was animus of witnesses hence a single identifying witnesses.

v. That the trial court failed to prove relationship between complainant and the appellant.

vi. That the trial court failed to prove beyond reasonable doubt to prove the element of consent of ... the complainant.

vii. That the court be pleased to judicially consider the mandatory nature of the sentence passed.

viii. That the court be pleased to consider that ingredients forming the offence were not altogether summed up.

ix. That the court be pleased to consider that long incarceration would ruin my future and shelve my dreams thus to consider the provisions of section 333(2) of the CPC given that I am a first offender.

x. That I wish to be present during the hearing of this appeal and/or be supplied with the court record so as to adduce more grounds.

4. The appeal was canvassed by way of written submissions.

The Appellant's Submissions

5. The appellant submitted that the trial court erred in law and in fact in convicting him relying on the evidence of a single eye witness without knowing the dangers of acting on uncorroborated testimony of the complainant as was held in the cases of Chila v R [1976] EA, Cardon Wayner v R & 2 Others [2011] eKLR, Eliud Ouma Agwara v R [2016] eKLR and the case of Biko Ogweno v R HCCRA No. 45 of 2015.

6. It was submitted that even in light of the provisions of Section 124 of the *Evidence Act*, it was incumbent upon the trial court to state the reasons as to why it thought the victim was telling the truth.

7. It was submitted that the medical evidence was too remote as it never gave any specific evidence of penetration and further that no witness was called to ascertain that on the particular day, the complainant and the appellant were seen together.

8. The appellant submitted that the complainant's testimony was unbelievable and not reliable as the complainant was hell bent on extorting money from him.

9. It was submitted that the trial court failed to point out the complainant's demeanour during her testimony and that neither did the trial court record that it believed her uncorroborated testimony hence a reasonable doubt that was fatal to the conviction and ground for the appellant's acquittal.

10. The appellant submitted that the court ought to take into consideration the time spent in custody in considering his sentence as provided in section 333 (2) of the CPC and further to reduce it to a less severe sentence as it amounted to a minimum mandatory sentence that was unconstitutional.

The Respondent's Submissions

11. The respondent submitted that penetration was provd by the complainant's testimony which was corroborated by that of PW3, the Clinical Officer who confirmed that the complainant had engaged

in a sexual act. It was further submitted that the complainant never consented to the sexual act with the appellant as was evident from her testimony.

12. It was submitted that the appellant was positively identified and that the appellant also testified that the complainant was his ex-girlfriend.

13. The respondent submitted that contrary to the appellant's submissions, the fact that the state did not call C as a witness was not detrimental to its case and thus the court ought not to draw an adverse inference against it as the witnesses called were enough to establish a prima facie case against the appellant.

14. It was submitted that there weren't any inconsistencies and contradictions in the prosecution's case and if at all there were any, they did not affect the substance of the prosecution's case as was held in the case of Peter Ngure Mwangi v R [2014] eKLR.

15. On the sentence meted out on the appellant, it was submitted that the sentence was proper in the circumstances of the case and was not excessive as the penalty section provides for a prison term of up to life imprisonment

Role of the Court

16. As a first appellate court; I am obliged to re-evaluate the evidence afresh and arrive at my own independent conclusion. I am however reminded to bear in mind that I neither saw nor heard the witnesses and give due regard for that. See Okeno v R. (1972) E.A. 32.

Evidence at the Trial Court

17. The case for the prosecution was as follows: PW1, the complainant testified that she knew the appellant having known him since 2021 when they met on Facebook. It was her testimony that they had agreed to meet on 9.2.2021 and so on the said date, she went to Kisumu where they met at 4pm and proceeded to the appellant's place at [particulars withheld] where the appellant had suggested they go and talk on how he could grant her a loan for her business.

18. PW1 testified that they got to the appellant's home at 5pm where the appellant told her to phone her mother and inform her that she would not be going back home after which he took her phone and locked the door.

19. It was the complainant's testimony that at about 7.30pm she and the appellant had a disagreement and that the appellant called his friends to bring food which they ate after which the appellant left the house leaving her locked in. She further testified that when the appellant returned, he was wild.

20. PW1 testified that she slept with her clothes on but the appellant told her she could not do so to which she responded by saying that they could not have sex since it was the first time they were meeting. She further testified that in an effort to protect herself she informed the appellant that she was HIV positive but the appellant still forced her to have sex.

21. It was her testimony that she later told the appellant that since they had unprotected sex, they needed to go to hospital to have PEP which the appellant agreed but she somehow managed to escape, get a phone and call her friend C and told her what had happened. She further stated that she managed to get to the Police Station and reported the incident of rape and the Police went and arrested the appellant then took her to hospital.

22. In cross-examination, PW1 reiterated her testimony and further stated that the appellant threatened to kill her if she screamed. She further stated that they were both taken to the hospital by the police for examination but the appellant refused to be examined.

23. PW2 MA, the complainant's mother corroborated the complainant's testimony that on the 9.1.2022, the complainant left for Kisumu and did not return only for her to receive a call from one C at 9pm informing her that the complainant was at Migosi Police Station. It was her testimony that the police informed her that the complainant had been raped.

24. PW3 Philip Kilimo a clinical officer at Kisumu County Hospital testified and produced the P3 form, PEX1, for the complainant which he had filled on the 11.2.2022. It was his testimony that on examination of the complainant, he found that the genitalia was normal with whitish discharge in the vaginal area. He also produced the complainant's PRC form filled on the 10.2.2022 as PEX2.

25. In cross-examination, PW3 stated that the history given was that the appellant had threatened the complainant using a knife and further that the whitish discharge could remain in the vaginal area for even a week.

26. In re-examination, PW3 stated that the complainant reported that she surrendered to unprotected sex after being threatened by a knife and that this constituted rape.

27. PW4 No. 11093, P.C. Ghawal Kamote testified that the complainant made the report vide OB 20/10/2/2022 stating that she had been raped by a person known to her. PW4 testified that they proceeded to the scene where they did not find the appellant but were informed that he had gone to Kibos Prison Clinic for medication so they followed him there and arrested him and escorted both him and the complainant to Kisumu District Hospital for treatment. PW4 testified that the complainant was treated but the appellant refused to be treated. In cross-examination, PW4 reiterated his testimony.

28. Placed on his defence, the appellant denied the charges. He testified that on the 10.2.2022, he was arrested at Kibos Prison Dispensary where he had gone to seek medication as he was not well. It was his testimony that the complainant was his ex-girlfriend with whom they had separated as she was dishonest.

Analysis and Determination

29. I have considered the grounds of appeal and the submissions by the appellant and the prosecution counsel against the evidence adduced at the trial court. The issues for determination are whether the prosecution proved its case against the appellant beyond reasonable doubt and secondly, whether the sentence imposed was manifestly harsh and excessive in the circumstances.

30. The statutory definition of rape is in section 3 (1) of the *Sexual Offences Act* which provides that:

> (1) A person commits the offence termed rape if—
>
> (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;
>
> (b) the other person does not consent to the penetration; or
>
> (c) the consent is obtained by force or by means of threats or intimidation of any kind."

31. The main ingredients of the offence of rape created in section 3 (1) of the *Sexual Offences Act* include intentional and unlawful penetration of the genital organ of one person by another, coupled with the absence of consent. In the case of Republic v Oyier[1985] KLR 353, the Court of Appeal held that:

1. The lack of consent is an essential element of the crime of rape. The mens rea in rape is primarily an intention and not a state of mind. The mental element is to have intercourse without consent or not caring whether the woman consented or not.

2. To prove the mental element required in rape, the prosecution had to prove that the complainant physically resisted or, if she did not, that her understanding and knowledge were such that she was not in a position to decide whether to consent or resist.

3. Where a woman yields through fear of death, or through duress, it is rape and it is no excuse that the woman consented first, if the offence was afterwards committed by force or against her will; nor is it any excuse that she consented after the fact."

32. The complainant herein testified that the appellant raped her and that he threated to kill her if she screamed. This testimony was captured in the corroborating evidence adduced by PW3, the PRC form wherein it was captured that the patient reported that she surrendered to unprotected sex after being threatened by the appellant with a knife. The complainant also testified that she tried to dissuade the appellant by telling him that she was HIV positive. It is worth noting that this testimony remained unchallenged even in cross examination.

33. From the foregoing, it is evident that the complainant did not consent to the sexual act perpetrated on her by the appellant.

34. The appellant argued that he was convicted on evidence that was uncorroborated by medical evidence. However, there is no requirement in law for the evidence in sexual offences to be corroborated by medical evidence before a conviction can be reached. In Kassim Ali v Republic (2006) eKLR the Court of Appeal held that examination to support the fact of rape is not decisive as the fact of rape can be proved by the evidence of a victim of rape or by circumstantial evidence. Also in AML v Republic (2012) eKLR, the same court held that the fact of rape is not proved by way of a DNA test but by way of evidence. In J.W.A v. Republic 2014 (2014) eKLR the court held that corroboration in sexual offences is not mandatory.

35. It is therefore clear from the above authorities that medical evidence to connect an accused person to the offence of rape is not necessary for a conviction to be entered. The law is that the court can convict on the basis of oral or circumstantial evidence. More so, the court can convict on the basis of the evidence of a single witness if it believed that the evidence was trustworthy. All that the court is required to do is to warn itself of the dangers of convicting on the evidence of a single witness and convict if it is fully satisfied that the evidence points to the culpability of the accused. The Court of Appeal in Chila v. Republic (1967) E.A 722 articulated this position and held that:

> " The Judge should warn ... himself of the danger of acting on uncorroborated testimony of the complainant, but having done so he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, then the conviction will normally be set aside unless court is satisfied that there has been no failure of justice."

36. In this case, the evidence by the complainant was corroborated by medical evidence. It is not expected that in sexual offences, the accused person would parade his victim to attract onlookers as witnesses for the complainant. It therefore does not make sense at all to allege that the complainant's evidence was that of a single eye witness, given the circumstances under which the offence was committed. Further, the evidence of C was not necessary as she was not an eye witness but only received a call from the complainant on what had happened and she in turn called the complainant's mother, who testified.

37. In the premises, the argument by the appellant that the evidence of the complainant was uncorroborated was not sustainable in law as there was nothing to demonstrate that the complainant was lying, even in the absence of medical evidence.

38. In the instant case, I reiterate that the complainant's testimony was corroborated by her mother, PW2 as regards her visit to Kisumu on the 9.2.2022 and her receiving a call from C regarding the complainant not being safe. PW3, the Clinical Officer who examined the complainant also corroborated her testimony that she was raped and that the appellant refused to be examined when brought to the hospital. Finally, PW4, the investigating officer testified giving the details of the complainant's case and further how the appellant refused to be examined at the hospital as testified by the complainant.

39. Section 124 of the *evidence Act* provides that a court can convict based on the evidence of the victim alone in sexual offences. In this regard, am guided by the Court of Appeal case in Stephen Nguli Mulili v Republic [2014] eKLR where the court held that:

> "With regard to the issues of corroboration and the appellant being proved as the one who defiled the complainant, section 124 of the Act is clear that the court may convict on the evidence of the alleged victim alone provided that the court is satisfied that the alleged victim was truthful. From the record it appears that the trial court was satisfied that the victim told the truth."

40. In my view, the complainant was truthful in her testimony. Her testimony was well corroborated. Further, from the court record, I find that the evidence adduced by the prosecution proved beyond reasonable doubt that penetration occurred.

41. As to whether the appellant was properly identified, the complainant testified that she had known the appellant since 2021 as they had met via Facebook. In his own testimony, the appellant testified that the complainant was his ex-girlfriend. This means that the appellant was well known to the complainant.

42. It is well settled that evidence on identification should be treated with a lot of care so the court must satisfy itself that it is safe to act on the evidence and to ensure that it is free from the possibility of error. The Court of Appeal in Wamunga v Republic (1989) KLR 424 had this to say on the issue:

> "Where the only evidence against a defendant is evidence of identification or recognition, a trial court is enjoined to examine such evidence carefully and to be satisfied that the circumstances of identification were favourable and free from possibility of error before it can safely make it the basis of a conviction."

43. In the circumstances of this case, the appellant and the complainant knew each other since 2021 and there was no evidence that the appellant camouflaged himself. I am satisfied that the appellant's identification was free from the possibility of error or mistake. I am thus satisfied that the prosecution proved beyond reasonable doubt that it was the appellant who raped the complainant.

44. The appellant raised issues in his submissions before this court with the prosecution's failure to call certain witnesses and that this lapse ought to be interpreted in his favour and lead to his acquittal. The law on the number of witnesses to be called is found in Section 143 of the *Evidence Act*, Cap. 80 which states that:

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

45. The legal principle was affirmed in Keter v Republic [2007] EA 135 as follows:

> " ... the prosecution is not obliged to call a superfluity of witnesses, but only such witnesses as are sufficient to establish the charge beyond reasonable doubt."

46. The witnesses that were called by the prosecutor were sufficient to establish the case against the Appellant. The witnesses that were not called, in my view have not been shown to have been crucial. I have already stated that Charity was not a crucial witness as she aonly received a call from the complainant then she relayed the information to the Complainant's mother. The complainant's mother testified on the information she received from Charity on the state of the complainant and indeed, it turned out to be that the complainant had been raped.

47. The appellant pleaded that there were inconsistencies and contradiction in the testimony of the prosecution witnesses. However, it is evident as laid out hereinabove that the evidence adduced by the prosecution witnesses corroborated each other. I find no material contradiction that could render the conviction of the appellant unsafe.

48. Furthermore, the Court of Appeal addressed itself on the issues of contradictions in the case of Richard Munene v Republic [2018] eKLR where it stated interalia that only when such inconsistencies or contradictions are substantial and fundamental to the main issues in question and thus necessarily creates some doubt in the mind of the trial court that an accused person will be entitled to benefit from it.

49. Accordingly, I find and hold that there were no contradictions and inconsistencies sufficient to create doubt in the trial court's mind as to the appellant's guilt. Consequently, this ground fails.

50. Taking all the above into consideration, I find that the prosecution proved beyond reasonable doubt that the appellant committed the offence of rape against the complainant. I find the conviction of the appellant was safe. I uphold it.

51. Turning to the issue of sentence meted. The appellant pleaded in his petition of appeal that the sentence meted out was a mandatory minimum and thus violated his constitutional rights and further that the court ought to take into account the time spent in custody as provided under Section 333 (2) of the CPC. This was opposed by the respondents who submitted that the sentence meted on the appellant was proper as the act prescribes life imprisonment.

52. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion is however limited to the statutory minimum and maximum penalty prescribed for a particular offence.

53. In the case of Shadrack Kipchoge Kogo v Republic Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows;

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

54. Similarly, in the case of Wanjema v Republic (1971) E.A. 493 the court stated as follows:

> " An appellate court should not interfere with the discretion which a trial court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into

consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

55. The punishment prescribed for the offence of rape in section 3 (3) of the *Sexual Offences Act* is a term which shall not be less than ten years but which may be enhanced to imprisonment for life. The section provides as follows:

Rape

3. (1) A person commits the offence termed rape if—

(a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

(b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

56. I thus find the sentence of ten years' imprisonment that was meted herein as lawful. Should this court interfere with the said sentence being the 'minimum mandatory'?

57. The principles guiding interference with sentencing by the appellate Court were set out in S v 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 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."

58. Equally, 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 discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."

59. The former Court of Appeal for Eastern Africa in the case of Ogolla s/o Owuor vs. 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."

60. Odunga J (as he then was in the High Court) in MM1 v Republic [2022] eKLR added a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case" citing R - v- Shershowsky (1912) CCA 28TLR 263 while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated that:

> " 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 – vs- R. (1989 KLR 306)"

61. 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, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with 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, anyone of the matters already states is shown to exist."

62. Sections 3(3) of the *Sexual Offences Act* uses the phrase (3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

63. Sir Henry Webb C.J. in Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64 stated as follows on the proper construction of the words "liable to", in the penalty section of a statute:

> " The wording used throughout the code is "shall be liable to" but a consideration of the various sections shows in our judgment, that the use of the words "shall be liable to" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."

64. In Opoya versus Uganda [1967] EA 752 at page 754 where Sir Clement DeLestang V.P. stated thus:

> " It seems to us beyond argument that the words "shall be liable to" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."

65. See also in Patrick Muli Mukutha v Republic [2019] eKLR where Odunga J (as he then was in the High Court) stated as follows, citing all the above cases:

> " A similar position was adopted in D W M vs. Republic (supra) where the Court held that:
>
> "As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the *Sexual Offences Act* that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

66. The learned Judge in the above case noted that however, the relevant provisions use the phrases "shall be liable" and "not less than" in the same breath. He therefore concluded that:

> " ....as a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as Mativo, J graphically put it in Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR:
>
> "The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."

67. I have no reason to differ from the above position and agree that indeed, the subsections providing for discretion by the use of the phrase...liable to.. must be read as if the sentences provided are the maximum sentences.

68. Accordingly, I find and hold that the use of the words "... is liable to imprisonment" in section 3(3) of the *Sexual Offences Act*, gives room for the exercise of judicial discretion. I would therefore, having regard to the circumstances of this case, find that the trial court had discretion in sentencing but that he did not exercise that discretion in line with Article 50(2) (p) of *the Constitution* which provides that:

> " Every convicted person is entitled to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

69. I hasten to add that no adult woman of sound mind should fall prey to facebook machinations by prince charmings. The complainant was an adult of sound mind. She was aged 25 years. She only knew the appellant on facebook. She agreed to visit him and waited for him from 11.am until 4 pm and he only led her into his house at night yet she had not known what kind of person he was. However naïve she was, she strode on extremely dangerous grounds of trusting a total stranger and agreeing to go to his house in the night. She entrapped herself into the arms of a criminal. Although her phone was taken away, she comfortably said she wanted to sleep. How, now? When the appellant left the complainant in his house and locked the door only for him to return appearing wild, the complainant should have read

the signs and screamed for help since it is not indicated that the house where the accused/ appellant lived was in an isolated place.

70. I warn women, stop trusting strangers at night! Beware of serial sex pests who could be serial killers!

71. The appellant further submitted and urged the court to have his sentence comply with section 333 (2) of the Criminal Procedure Code. Section 333(2) of the Criminal Procedure Code provides: -

> " Subject to the provisions of Section 38 of the Penal Code, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

72. It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

73. In the instant case, it is not in doubt that the appellant was in custody from the date of his arrest on the 10.2.2022 to the 28.10.2022 when he was sentenced, a period of 8 months and 18 days. The trial court did take it into consideration but seemed not to be clear. It was not evident whether the 10-year sentence included the time that the appellant had been in custody or not, as the warrant of commitment to prison does not indicate that the sentence be calculated from the date of arrest.

74. Therefore, in compliance with Section 333 (2) of the Criminal Procedure Code, I hereby order that the appellant's imprisonment term shall commence from the day of arrest that is the 10.2.2022.

75. In the end, the appeal against conviction is found to be devoid of any merit. It is dismissed. The appeal against sentence is successful to the extent that the ten-year prison term is set aside and substituted with a five-year prison term to be calculated from 10.2.2022, the date of arrest.

76. This file is closed.

77. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE