Odhiambo v Republic (Criminal Appeal 99 of 2014)
[2021] KEHC 180 (KLR) (29 October 2021) (Judgment)

Neutral citation: [2021] KEHC 180 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL 99 OF 2014

JM MATIVO, J

OCTOBER 29, 2021

BETWEEN

NELSON AMAYO ODHIAMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. On 17th April 2014, the Petitioner appealed to this court against the conviction and sentence of 21 years imprisonment imposed on him by the trial court in CMCCR 3118 of 2011, Mombasa, for the offence of defilement contrary to section 8 (1) (3) of the *Sexual Offences Act*.[1]. Vide a Notice of Motion supported by his affidavit dated 15th February 2018, the Petitioner sought production of the lower courts file, but the same does not seem to have been availed.

2. However, the Petitioner narrowed down his grounds of appeal and he is only challenging the sentence. In his written submissions, he argued that he was only challenging the harsh sentence of 21 years imposed upon him on grounds that section 8(3) of the *Sexual Offences Act* provides that a person convicted under the said section is liable, upon conviction to a prison sentence of not less than 20 years. He argued that the said provision is not mandatory and cited *Kichajele S/O Ndamungu v Republic*[2]in support of the proposition that the word "shall be liable to" does not mean that the sentence prescribed is the maximum sentence but that the court may impose a lesser sentence below the limit indicated. He also cited *Opoya v Uganda*[3] which adopted a similar reasoning and argued that section 8(3) is to be construed as the maximum penalty, so the trial court had discretion to impose a lesser sentence.

1 Act No. 3 of 2006.

2 {1949} EACA 64.

3 {1967} EA 752.

3. Additionally, the appellant cited *Francis Karioko Muruatetu & another v Republic*[4] for the proposition that sentencing is a crucial component of a trial and failure to take into account mitigation may lead to miscarriage of justice. He argued that being a first offender aged 33 years was a mitigating factor. He also argued that he had undertaken some theological causes while in prison and the prison authorities have issued him with a favourable report. He relied on Evans Wanjala Wanyonyi v Republic in which the court reduced a prison term of 20 years to 10 years and urged the court to consider the circumstances of the commission of the offence and the delicate position his siblings and review the sentence. Lastly, he urged the court to consider his pre-trial detention period.

4. Miss Anyumba, the Respondents counsel submitted that section 8(3) uses the words "is liable upon conviction to a term not less than" which implies mandatory sentence. She cited *M. K. v Republic*[5] which construed the said provision to impose a mandatory minimum sentence. Counsel took issue with the absence of the lower courts proceedings upon which the court can evaluate whether the sentence of 21 years is excessive and argued that no illegality has been shown. She argued that the appellant was afforded an opportunity to mitigate and cited *Shadrack Kipchoge Kogo v Republic*[6]which held that sentence is an exercise of the trial court and for this court to interfere, it must be shown that the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was harsh and excessive.

5. Lastly, counsel submitted that he has no objection to the pre-trial detention period being considered under section 333 (2) of the *Criminal Procedure Code*.[7]

6. It is an established position of law that the words "shall be liable to" do not in their 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. However, the presence of the words "not less than" in Section 8 (3) of the *Sexual Offences Act* connotes a mandatory term. The appellant appears to have overlooked the said words which distinguish the said provision from the authorities he cited.

7. The learned Magistrate imposed a sentence of 21 years, one year over and above the period provided by the Act. Crucially, the duration of the sentence of imprisonment under the said provision shall not be less than the term provided as the minimum sentence., which is 20 years. The starting point in determining the term of the custodial sentence is the language deployed in section 8(3). The first step is for the court to establish the custodial sentence set out in the statute for that particular offence. The section provides a period of not less than 20 years. The second step is whether the period of 21 years is harsh and excessive.

8. Sentencing is the discretion of the trial court which must be exercised judiciously and not capriciously. As was held in *Shadrack Kipchoge Kogo v Republic*,[8] the court of appeal stated: -

> " 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

[4] Pet Nos 15 & 16 of 2015.

[5] Criminal Appeal No. 248 of 2014, {2015} e KLR.

[6] Criminal Appeal No. 253 of 2003.

[7] Cap 75, Laws of Kenya.

[8] Criminal Appeal No. 253 of 2003 (Eldoret), Omolo, O'kubasu&Onyango JJA)

a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

9. Thus, while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigating and aggravating factors should also be considered.[9] I find no reason to fault the Trial courts exercise of its discretion while passing the sentence nor do I find anything to suggest that 21 years is excessive.

10. The appellant claims that the time he was in custody was not considered. However, the lower court record was not availed to this court. While appellants know generally that a party who files an appeal is asking the appeal court to change the trial court's decision, they may be unaware of the one significant restriction on the appellate court: it cannot consider anything that was not presented to the trial court. The task of the appellate court is not to decide whether the trial court's decision was right or wrong; its task is to assess whether that decision is a sustainable result when the facts presented at the trial through testimony and exhibits are measured against the applicable law. In other words, whether the law as applied to the facts presented support the result?

11. In this regard, the only thing the appellate court is permitted to work with is the record of appeal —the trial court record. The appellate court may not consider any facts or arguments not originally considered by the trial court. The record is a very critical component of an appeal. A record can be thought of as a "packet" that contains all of the important information the appellate court will need to fully understand what occurred in the trial court to make its final determination. Ultimately, the record limits the scope of information that parties can utilize in their arguments and that the appellate court will consider as it moves to review the case.

12. It follows that in absence of the lower courts record, this court has no way of ascertaining when the appellant was arrested, whether he was out on bond and the length of the trial. Simply put, there is no basis before this court upon which the court can arrive at a finding whether or not the accused was in custody from date of arrest until the time he was convicted. In view of my conclusions herein above, it is my finding that there is no basis for this court to interfere with the sentence imposed by the trial court. This appeal is dismissed.

Right of appeal 14 days.

SIGNED, DATED AND DELIVERED ELECTRONICALLY AT MOMBASA THIS 29 TH DAY OF OCTOBER 2021

JOHN M. MATIVO

JUDGE

[9] See *Somanvs Kerala {2013} 11 SC.C 382* Para 13, Supreme Court of India