Otieno v Republic (Criminal Appeal E032 of 2021)
[2025] KEHC 5845 (KLR) (8 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5845 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KILGORIS

CRIMINAL APPEAL E032 OF 2021

CM KARIUKI, J

MAY 8, 2025

BETWEEN

DERRIK OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. R.M. Oanda (S.P.M) in Kilgoris MCSO No. E026 of 2021 delivered on 16/07/2021)

JUDGMENT

1. The trial court convicted the appellant and sentenced him to serve 15 years' imprisonment for the defilement of a 15-year-old girl.

2. Being dissatisfied with the said conviction and sentence, he preferred an appeal vide a supplementary amended ground of appeal under section 350(2) (v) of the *Criminal Procedure Code* as follows;

    i. That the trial magistrate erred in both law and fact when convicting the accused person while relying on the facts adduced in court, which facts were not proved to the required standards of law, given that the accused pleaded guilty to the alleged charges.

    ii. That the judgment of the court was a nullity as the trial proceeded without the court warning that the appellant had a right to a fair and impartial trial as enshrined in *the constitution* as per article 50(2)(h), i.e., the right to be represented by an advocate.

    iii. That the appellant was not accorded a fair and impartial trial as guaranteed by article 25© of *the Constitution*, as the trial commenced without the court having received a report as to Appellants mental fitness' to stand trial or prove to the court that his plea of guilty was voluntary.

    iv. That the sentence of 15 years awarded to the appellant is highly excessive and punitive.

v. That the sentence is illegal, given that the trial learned magistrate did not warn the appellant on the consequences of pleading guilty, given the seriousness of the offence.

Brief facts

3. The appellant was charged with defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. No. 3 of 2006.

4. The particulars were that on diverse dates between 30/06/2021 and 14/07/2021 in Trans Mara south sub-county within Narok County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of SA a child aged 15 years.

5. The appellant was tried and convicted. The appellant was sentenced to 15 years' imprisonment.

Directions of the court.

6. The appeal was canvassed by way of written and oral submissions.

The Appellant's submissions.

7. The appellant submitted that he was not warned by the court of the consequences of pleading guilty and was not afforded legal representation, given the seriousness of the offence charged. The appellant relied on Adan V Republic [1973] E.A. 445, JOO V Rep [2015] eKLR, Eliud Waweru Wambui V Republic [2019] eKLR, Gillick Vs West Norfolk And Wisbech Area Health Authority [1985] 3 All Er 402, S V Malgsa [2001] (2) (Sca) 1235, and Fredrick Otieno Odero V Republic [2021] eKLR,

The respondent's submissions.

8. The respondent submitted that all principles in Adan vs Republic [1973] EA 445 were adhered to. Therefore, in totality, the plea was undoubtedly unequivocal.

9. The respondent submitted that the appellant ought to have been sentenced to a minimum of 20 years' imprisonment. Therefore, his sentence can only be reconsidered for enhancement if he principle of legality is to go by.

Analysis and Determination.

The court's duty

10. First appellate court is obligated to re-evaluate the evidence and make its own conclusions, bearing in mind that the trial court had the advantage of hearing and observing the demeanor of the witnesses. See Okeno vs. Republic [1972] E.A 32

11. The court has considered the grounds of appeal, the trial court record, and the respective parties' submissions. In this appeal, the appellant pleaded guilty and was thus convicted of his own plea of guilty.

12. Section 348 of the *Criminal Procedure Code* bars appeals from subordinate courts where an accused was convicted upon a plea of guilty, except on the extent and legality of sentence. It 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 and legality of the sentence."

13. In the case of Olel v Republic [1989] KLR 444, the court held: -

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

14. I find that the appellant is, by virtue of this section, and authority, barred from challenging the conviction and his only recourse was to challenge the extent or legality of the sentence imposed on him by the trial court.

15. However, the court has to satisfy itself that the plea is unequivocal. The Court of Appeal gave directions on how a plea should be recorded in the case of Aden v R [1973] 443 when it held: -

    (i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;

    (ii) The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;

    (iii) The prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or add any relevant facts;

    (iv) If the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

    (v) If there is no change of plea, a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded.

16. A perusal of the record shows that the charge was read to the appellant in Kiswahili language through an Interpreter, which he understood, and he pleaded to the charge. The appellant is then recorded to have responded:

> " True."

17. However, the court then did not enter a plea of guilty, but the state counsel went on to read facts to the appellant, and the court recorded as follows accused- facts are true.

Court- accused is convicted on his own admission.

18. The court noted the appellant's mitigation, then went on to sentence the Appellant to 15 years imprisonment.

19. I find that the plea taken herein is unequivocal, as the record shows that the Appellant pleaded guilty.

20. I find no merit in the complaint that the plea was equivocal. I also find that the appellant was properly convicted. His appeal on conviction, therefore, fails.

21. On sentence, is 15 years' imprisonment imposed for the offence of defilement harsh or illegal in the circumstances of this case?

22. The relevant penalty clause under which the appellant was sentenced is Section 8 (4) of the *Sexual Offences Act*, which section provides that:

> 8(3) "A person who commits an offence of defilement with a child aged twelve and fifteen years is liable upon conviction be sentenced to imprisonment for term of not less than twenty years".

23. The trial court considered the mitigation by the appellant and the circumstances surrounding the offence, including the fact that the offence is becoming rampant in the region.

24. The law is clear on such offences where minors do not have the capacity to consent to any sexual relationships and even marriage. Thus, a deterrent sentence is necessary.

25. The victim was a child- she was 15 years old. The manner the offence was committed was by taking advantage of a child. The child is likely to also suffer post-traumatic effects from agonizing memories of the incident. In addition, the fact that the prevalence of the offence justifies 15 years imprisonment in this case. Therefore, a deterrent sentence is necessary.

26. There is new jurisprudence; Minimum sentences set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. Although sentencing is an exercise of judicial discretion, it is parliament and not the judiciary that sets the parameters of sentencing for each crime in statute. See the Supreme Court in Republic Vs Joshua Gichuki Meangi And Intiative For Strategic Litigation in Africa (ISLA) And 3 Others Supreme Court Petition No. E018 of 2023.

27. Furthermore, the Supreme Court decision in Republic vs. Joshua Gichuki Mwangi (Petition E018 of 2023) [2024] KESC 34 (KLR) (delivered on 12th July, 2024), emphasized the court's obligation not to interfere with mandatory minimum sentences prescribed under the *Sexual Offences Act*. In that case, the Supreme Court categorically held that the minimum sentences in the *Sexual Offences Act* are not unconstitutional; and that trial courts have no discretion to go below the statutory minimum sentences in sexual offences.

28. The apex court held:

> " 56. Mandatory sentences leave the trial court with absolutely no discretion, such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences, however, set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence. In fact, to use the words mandatory and minimum together convolutes the express different definitions given to each of the two words. Although, the term 'mandatory minimum' can be found used in different jurisdictions, including the United States, and in a number of academic articles, it is not applicable as a legally recognized term in Kenya. In this country, a mandatory sentence and minimum sentence can neither be used interchangeably nor in similar circumstances as they refer to two very different set of meanings and circumstances.
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> 57. In the Muruatetu case, this court solely considered the mandatory sentence of death under Section 204 of the *Penal Code* as it is applied to murder cases; it did not address minimum sentences at all. Therefore, mandatory sentences that apply for example to capital offences, are vastly different from minimum sentences such as those found in the *Sexual Offences Act*, and the *Penal Code*. Often in crafting different sentencing for criminal offences, the drafters of the law in the Legislature, take into consideration a number of issues including deterrence of crime, enhancing public safety, sequestering of dangerous offenders, and eliminating unjustifiable sentencing disparities."

29. In the circumstances, the 15-year imprisonment sentence is upheld.

Conclusion and orders

i. The appeal on conviction and sentence is dismissed.

ii. It is so ordered.

DATED, SIGNED, AND DELIVERED AT KILGORIS THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2025.

CHARLES KARIUKI

JUDGE

In the presence of:

Court Assistant: Mr.nyangaresi