Wambugu v Republic (Criminal Appeal E019 of 2022)
[2024] KEHC 1616 (KLR) (21 February 2024) (Judgment)

Neutral citation: [2024] KEHC 1616 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E019 OF 2022

SM MOHOCHI, J

FEBRUARY 21, 2024

BETWEEN

AMOS GACHINGA WAMBUGU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against Sentence of 20 years Imprisonment by Hon. B. LIMO (SRM) delivered on 24th March, 2021 respectively in Nakuru CM Criminal S.O. 27 of 2021 Republic -vs-Amos Gachinga Wambugu)

JUDGMENT

1. The Appellant, Amos Gachinga Wambugu being aggrieved by the Sentence on his own "plea of guilty" delivered by Hon. B. Limo Senior Resident Magistrate on 24th March, 2021 on the following grounds among others;

    i. That, the learned trial magistrate erred in law and in fact by pronouncing an excessive sentence far from the weight of evidence adduced and circumstances of this case.

    ii. That, the learned magistrate did not warn him on the consequence of pleading guilty.

    iii. That, the zoom network was not clear and that he did not hear well or understands the charges he was facing.

    iv. That, the learned magistrate erred by not considering that he was young offender aged 17 years and his rights under *Children Act* was infringed.

    v. The Appellant prays for success of his appeal, sentence be set aside and the case be ordered for retrial.

2. The Appellant was convicted on his own "plea of guilty" for the offence of "defilement" contrary to Section 8(1) as read together with Section 8(2) of the *Sexual Offences Act*.

    i. On Count I, the particulars were that on 29th October, 2021 at Kihuho Village, Mirangine Sub-county within Nyandarua County, intentionally caused his penis to penetrate the Vagina of JWN a child aged ten (10) years.

3. The Appellant prays that the conviction and sentence imposed against her by the trial Court be set aside and she be set free.

Submissions

4. This Court had upon admitting the Appeal on the 12th June 2023 directed that the same shall be heard and disposed off by way of written submissions of which the Appellant complied with by filling his "written submissions for mitigation" dated 8th November 2023while the Republic filed its written submissions signed by Monicah Mburu dated 11th December 2023.

5. The Appellant in a rather surprising turnaround, mitigates in submission urging for reduction of his imprisonment sentence urging remorse and regret, that, he admits he caused serious pain and much agony and that he seeks forgiveness from God urging this Court to forgive him. He argues he has been in custody since 2019 and that he was 19 years old when the alleged offence occurred and that he is currently 23 years old craving for a second chance in life and he thus seeks thus Court's mercy.

6. The Appeal is opposed that the Plea entered was unequivocal and that the sentence of imprisonment of twenty (20) years was lenient than the Life imprisonment prescribed by law.

7. That the Appellant was not a minor and that, he had three deferred dates scheduled for sentence where the Appellant would have reconsidered his plea and that the sentence as imposed was lawful and should thus not be disturbed. The Respondent urges the dismissal of this Appeal for want of merit.

Analysis and Determination

8. The tangent of this Appeal calls for an early comment here, that as a 1st Appellate Court this is not a Court to exercise mercy, sympathy or other emotions on Appeal. This Court is concerned in ensuring that the administration of criminal justice occurs without fault and is beyond reproach, that the trial complies with the constitutional and procedural standards. That the evidence admitted and relied upon in conviction, complied with the law and as such the Appellant ought to have known.

9. It is the duty of this first Appellate Court for an exhaustive examination of the trial Court proceedings in criminal cases as was restated in the case of *Charles Mwita –vs- Republic*, C. A. Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that;

> " In Okeno v R [1972] E.A. 32 at page 36 the predecessor of this Court stated: - "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya –v- R [1957] EA. 336) and to the appellate Court's own decision on the evidence".

10. Being a 1st Appeal Court, I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwalla –v- R* [1957]EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Courts findings and conclusion; it must make its own findings and draw its own conclusions Only then can it decide whether the magistrate's

findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E.A. 424."

11. On the 3rd February 2021, the Appellant was arraigned before the trial Court and before taking plea he indicated to the Court that, he was eighteen (18) years old, the substance of the charge and every element thereof was explained to him in Kiswahili language and on being asked whether he admits or denies the truth of the charge he responded "kweli"

12. The Court entered "plea of guilty" and invited the prosecution to present the facts of the case which the prosecution shared as follows;

> " That on the 29th January 2021, the complainant was on her way home at 1700 hrs when she met the Appellant who lured her using a "mandazi" to a nearby bush, the accused later left her to go home where she slept till morning. The complainant had difficulty in walking and after being questioned she disclosed the Appellant had defiled her. Her grandfather arrested the appellant and took him to the police station, that the complainant aged ten (10) years old was then taken to a hospital in dundori where she was examined and a P3 form was duly filled classifying the injuries as "harm".

13. The P3 form dated 1st February 2021 was produced as exhibit 1, the Post Rape (PRC) form dated 1st February 2021 produced as exhibit 2. Upon being asked if the facts were true the Appellant responded "Fact are correct" and the Court consequently convicted the Appellant on his own plea of Guilty the prosecution sought the Appellant to be treated as a first offender and when invited to mitigate the Appellant sought for the leniency of the Court.

14. From the above reproduction, there is no iota of doubt that, the plea was taken in accordance with the guidelines set out in Adan vs Republic. The plea was taken in a language understood by the Appellant "Kiswahili". There is no substance in the assertion by the Appellant that the Court did not make him understand the charge that he was facing.

15. However, this Court notes that, the trial Court did not warn the Appellant of the possible severe sentence that awaited him, in the event that he had pleaded guilty to the charge. The offence that the Appellant was facing carried a maximum sentence of Life imprisonment. I do think that this type of charge with serious penal consequences that the trial Court was obligated to warn the Appellant of the consequences of pleading guilty, as the offence did carry a lengthy imprisonment term. There is thereby substance in this argument as advanced by the Appellant in his Petition of Appeal.

16. The issue that then begs is that, Did the failure to warn the Appellant of the dire consequences upon his plea of guilty, infringe his right to fair trial under Article 50(2) of the *Constitution* therefor plea was not equivocal?

17. This Court notes that after conviction the sentence was deferred three (3) times on the 17th February 2021, 16th March 2021 and 23rd March 2021 before he was ultimately sentenced on the 24th March 2021 via Teams platform. This Court is of the view that the Appellant had over one month and twenty (20) days to reflect on the plea, reconsider the same while the Court was awaiting a pre-sentence report. The Appellant was thus, fully alive to the consequences of his actions as is further buttressed in his current submissions to this Court.

18. This Court finds that the Appellant's plea before the trial Court was unequivocal even without having been forewarned by the Court and that the prolonged period before sentence were opportunities to change his plea which he never did.

19. Sentencing is a discretion of the trial Court and being so it must be done judiciously. Guidance on the subject can be derived from the Court of Appeal decision in the case of *Shadrack Kipkoech Kogo v R*. Eldoret Criminal Appeal No.253 of 2003 where it was held 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 v R (1989 KLR 306)"

20. This Court finds from my exhaustive examination of the Record of Appeal that, the sentence as imposed was lawful and the trial Court did not take into account any irrelevant factor or that a wrong principle of law was applied and the same is clearly not excessive and there is no basis of this Court to disturb the discretion exercised.

21. I am persuaded from the foregoing that the Appeal lack merit and the same is hereby dismissed.

22. The conviction and sentence is hereby confirmed.

It is so ordered.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 21ST DAY OF FEBRUARY, 2024.

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MOHOCHI S.M (JUDGE)