Kipkoech v Republic (Criminal Appeal 216 of 2011)
[2024] KEHC 2436 (KLR) (6 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2436 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 216 OF 2011

SM MOHOCHI, J

MARCH 6, 2024

BETWEEN

WELDON RUTO KIPKOECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal against Sentence of LIFE Imprisonment by Hon. S.M. SOITA (SRM) delivered on 1st September, 2011 in Molo CM Criminal S.O. 736 of 2010 Republic -vs- Weldon Ruto Kipkoech)

JUDGMENT

1. The Appellant, Weldon Ruto Kipkoech being aggrieved by the Conviction and Sentence following trial delivered by S.M. Soita, Senior Resident Magistrate on 1st September, 2011 on the following Amended grounds among others;

    i. That, the learned trial magistrate erred in law by awarding a life sentence but failed to hold that this sentence was against the spirit of *the constitution* of Kenya and that it does not serve the objectives of sentencing as listed in pages 15, paragraph 4:1 of the policy Guidelines 2016.

    ii. That, the learned trial magistrate erred in law and fact when convicted the appellant on hearsay evidence which was not corroborated by the victim this was acting on the wrong principles of the law and also failed to note that there were too many gaps in the prosecution's case and crucial witnesses failed to testify before the court.

    iii. That, the learned trial magistrate erred in law and fact when failed to note that, the appellant was not accorded fair hearing since he was not provided with the relevant documents that the prosecution wished to rely on being witness statements prior to the commencement of the hearing of the case.

iv. That, the learned trial magistrate erred in law and fact by convicting and sentencing the appellant in a prosecution case which was not proved according to the required standards.

v. That, the appellant's defense was not conclusively analysed. These gaps were to be filled in favour of the appellant.

2. The appellant humbly prays for the following orders;

i. That, the conviction be quashed and the sentence imposed on him be set aside and he be set at liberty.

ii. That, the honourable court do issue any further orders as may be just and expedient in the circumstances or,

iii. That, the honourable court be pleased to re-evaluate the evidence and make an independent finding on both conviction and proper sentence.

3. This court had upon admitting the Appeal on the 24th April 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" dated 25th July 2022 and "written submissions for mitigation" dated 1st November 2023 while the Republic thru Monicah Mburu State Prosecution counsel orally submitted on the 11th December 2023.

Appellant's Submissions

4. On the 1st ground the Appellant submits that,on the 1st September 2011 Hon. S.M. Soita (PM) awarded a conviction to him However, the prosecutor told court that the offence was serious and prevalent within the jurisdiction of the county, and prayed for a deterrent sentence. the appellant gave a mitigation and told court that, he was the eldest son in their family and that he was the sole bread winner.

5. The court held that;

> " all facts considered, accused now sentenced to life imprisonment."

6. The Appellant submit that, with much respect to the learned trial magistrate's findings and considerations, this sentence was awarded in mandatory form, as by the provisions of section 8(2) of the *Sexual Offences Act*. Section 8(2) states that,

> " 2) a person who commits an offense of defilement with a child aged eleven or less shall upon conviction be sentenced to imprisonment for life."

7. The Appellant submit that, that this proviso is couched in mandatory form and leaves no room for the trial or a judge to exercise any discretion in sentencing.

8. That this is what the Appellant submit is bad law and he was prejudiced, that sentencing is a judicial process thus, in sentencing, a court must look at the circumstances of the case as well as the accused person's mitigation before determining the most appropriate and suitable penalty to impose. The Appellant submit that, this was not done in his case. That the learned trial magistrate awarded a harsh and excessive sentence considering the circumstances of the case, the circumstances of the accused during the time when offence was committed and the mitigation given by the Appellant on trial.

9. As to whether the accused (appellant) was prejudiced by this sentence? The Appellant submits that he was prejudiced by this sentence since, in Kenya a life imprisonment means the natural life of the convicted person since there is no parole in Kenya.

10. That Under Article 50(2) of *the constitution* sets out some of the principles that are considered to constitute fair trial. One of these principles is the right to lodge an appeal or apply for review in a higher court, if convicted, Article 50(2) (q)]. However, a life sentence is not subject to review.

11. Thus, an accused person sentenced to life imprisonment is deprived of this right. On a life sentence, the appeal is limited to conviction only. There is no opportunity for a reviewing higher court to consider whether the life sentence was an appropriate punishment in the circumstances of the particular offence or offender.

12. The Appellant contends that, the right to justice is also fettered. Article 48 of *the constitution* on access to justice provides that;

> " The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

13. That the scope of access to justice as enshrined in Article 48 is very wide. Courts are enjoined to administer justice in accordance with the principles laid down under Article 159 of *the constitution*. Thus, with regard to access to justice and fair hearing, the state through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair one cannot be said to have accessed justice. In this respect, I submit when a defilement convicts, sentence cannot be reviewed by a higher court he is denied justice which cannot be justified in light of Article 48 of *the constitution*.

14. That it is evident that the trial process does not stop at convicting the accused. There is no doubt that sentencing is a crucial component of a trial. It is during sentencing that the court hears submissions that impact on sentencing. This means that the principle of fair trial must be accorded to the sentencing stage too. Pursuant to Section 216 and 329 of the Criminal Procedure Code, Chapter 75 Laws of Kenya, mitigation is a part of the trial process; Section 216 provides;

> " The court may, before passing sentence or making an order against an accused person under section 215 receive such evidence as it thinks fit in order to inform itself as to this sentence or order to be passed or made."

15. Section 329 of the Criminal Procedure Code provides;

> " The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed."

16. The Appellant submit that, from the reading of these sections, it is without doubt that the court ought to take into account the evidence, the nature of the offence and the circumstances of the case in order to arrive at an appropriate sentence. It is evident that on the need for noting down mitigating factors, not only because they might affect the sentence, the court of appeal has consistently reiterated but also for futuristic endeavours such as when the appeal is placed before another body for clemency.

17. That from the above law, I submit that mitigation is an important congruent element of fair trial. The fact that mitigation is not expressly mentioned as a right in *the constitution* does not deprive it of its

necessity and essence in the fair trial process. In any case, the rights pertaining to fair trial of an accused pursuant to Article 50(2) of *the constitution* are not exhaustive.

18. The Appellant submit that, the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the universal declaration of human rights and in the same vein Article25(c) of *the constitution* elevates it to a non-derrogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratise society, without which the rule of law and public faith in the justice system would inevitably collapse.

19. The Appellant submit that, under Section 8(2) of the *Sexual Offences Act*, deprives the courts of the use of judicial discretion in a matter of life imprisonment. Such a law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the life sentence in appropriate cases. Where a Court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of *the constitution* an absolute right.

20. The Appellant, implore this court to find that, the sentence of life imprisonment awarded to the Appellant does not conform to the cited law provisions and therefore this court considers the circumstances of the case, the circumstances that prevailed during the commission of the offence and any other favourable circumstances and order that the Appellant be awarded an appropriate definite sentence.

21. The Appellant submit that, upon considering the appropriate definite sentence, the court to consider that the Appellant has been in custody since the time he was arrested. Thus the court be pleased to invoke Section 333(2) of the Criminal Procedure Code and order that his sentence should run from the date of arrest. On this issue I will borrow guidance from the case of Ahamad Abolfathi Mohammed & another vs Republic (2018) eKLR, where the court held that;

> " By dint of section 333(2) of the criminal procedure code, the court was obliged to take into account the period that they spent in custody before they were sentenced."

22. In Sammy Wanderi Kugotha v Republie (2021| eKLR, the court held that,

> " 611. I ask myself whether the life sentence imposed on the appellant is appropriate sentence in the circumstances of this case.
>
> 621. The Court of Appeal in Thomas Mwambu Wenyi vs. Republic (2017] Eklr cited the decision of the Supreme Court of India in Alister Anthony Pereira vs. State of Maharashtra at paragraphs 70-71 where it was held on sentencing that: -.
>
> > "Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the

> crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence." eswv.-

63. Of important consideration: first, the victim of the offence is a child of 4 years. Second; the said child will forever live with the shame and great mental trauma caused to her by this savage act of sexual debauchery. Third; this is a serious offence of which extreme societal desire to get rid of society of these wickedness and sexual perversion has been expressed publicly and formally through *Sexual Offences Act*. See James Okumu Wasike (2020) eKLR.

64. In aggravation the appellant used an unfair advantage to secure and satisfy his sexual desires on the minor. The Court considers the offence to be quite egregious, and it was committed against a minor. It bears repeating that the penalties enacted in the SOÁ reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.

65. The trial court sentenced the appellant to life imprisonment after considering his mitigation. The sentence is also lawful. Nonetheless, the manner section 8(2) of the *Sexual Offences Act* is couched portend and has been understood by many judicial commentators to ported a mandatory sentence. Such fettering of judicial discretion in sentencing is inconsistent with *the Constitution*. But, I proclaim a new approach; a new yardstick. Section 7 of the Transitional Provisions under the Sixth Schedule of *the Constitution* foresaw the dilemma of application of *the Constitution* upon existing law. It permitted existing laws to continue in force, but, provided courts with legal tool to construe such law with such modifications or adaptations or alterations or exceptions in order to bring it into conformity wvith *the Constitution*. The section provides: -

> 7. Existing laws.
>
> (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

66. In light thereof, I do think, it is no longer a peremptory rule or requirement that courts should always strike down a provision of a statute- especially existing law- if the offensive or objectionable element thereto could be resolved in the manner commanded in section 7 stated above. I will therefore, read the word "shall" in section 8(2) of the *Sexual Offences Act* to mean 'may'" in order to bring the section into conformity with *the Constitution*.

67. Be that as it may, Parliament and other state organs with legislative mandate should embark on harmonizing existing law with *the Constitution*. In the meantime, they should take up pronouncements such as this one, and carry out appropriate legislative enactments or amendments to existing law in order to bring it into conformity with *the Constitution*.

68. The possibility of fetter-real or perceived- on the discretion of the trial court in sentencing under this provision is likely. This is an important consideration here.

69. I note also that the appellant is a young person. The need to rehabilitate and reintegrate offenders into society to cke meaningful life after imprisonment is one of the objectives of punishment; it should never recede to the background in sentencing.

    In the circumstances of this case, life sentence may not serve such restorative or rehabilitative purposes for this young soul. I shall, therefore, impose a sentence that punishes the offender but also gives him an opportunity of re-integration into society to eke a meaningful life after imprisonment.

70. In sum, I set aside the life sentence. In lieu thereof, the appellant will serve 20 years' imprisonment from the date he was first sentenced. It is so ordered. The appeal on sentence succeeds.

    It is my humble prayer that may this court find that the sentence imposed on the appellant was not only harsh but excessive in the circumstances and may this court find favour to the Appellant and find that, since the appellant had been in custody since 2010, he has suffered enough, thus may this court find the time served be appropriate or the court awards any definite sentence."

23. 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 urging this court to grant him a definite imprisonment term craving for a second chance in life and he thus seeks thus court's mercy.

24. 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.

25. With regards to ground two that, the trial court acted on the wrong principles of the law when it awarded a conviction without the evidence of the star witness (victim). The Appellant submit that, the trial was marred with breaches of *the constitution*, the trial court ignored statutory provisions. He misconstrued the law and breached rules of procedure and thus the trial magistrate compromised the accused rights to a fair trial thus prejudicing him.

26. That the trial court acted on the wrong principles of the law by awarding a conviction and a sentence of life imprisonment but kept a blind ear on the fact that the victim did not testify or give any evidence that she was defiled. That on page 9 line 1-6 the trial magistrate recorded-proposed PW1 in Kiswahili-he later stated that,

    " we cannot get anything meaningful from the child."

27. Thus, he stated;

> " her evidence will be dispensed with."

28. That the Oxford advanced learners dictionary of current English (ninth edition) defines dispense-to stop using something because you no longer need them, or do away with. Thus, from the reading of that statement, the victim's evidence was no longer needed thus it was not used in evidence.

29. What is the law when the victim is a vulnerable witness?

That Parliament was aware that some witnesses may be vulnerable because of several factors ranging from age to religion. So, they clearly set out the procedure in the *Sexual Offences Act* and Section 32 of the same Act.

30. Thus, it was an error in law for the learned trial magistrate to dispense the evidence of the star witness (victim) and go on taking other evidence from supporting witnesses without involving Section 31 and 32 of the *Sexual Offences Act* No. 3 of 2006 whose evidence were they corroborating if the victim had not testified?

31. Who was PW1? The child or the mother? -see page 9 lines 1-8. With much respect to the learned trial magistrate, that the offence of defilement was proved to the required standard of proof beyond reasonable doubt. The Appellant submit not. PW1 (M S), the mother of the victim whom the trial court relied on to convict the Appellant told court, (she was not an intermediary),

> " I left P at home with a mother of a neighbour called Naomi Chemutai. I returned at 4.30 p.m. I found my daughter who started weeping when she saw me. I asked Naomi what was wrong with my daughter and she said she did not know. She said she had left P with my worker called Weldon. Naomi had gone to borrow fire. - stated on page 9 lines 10-20"

32. Thus, from the above evidence it's clear that the involvement that, case was brought about by a certain Naomi Chemutai. From evidence the victim was left with Naomi Chemutai from the morning to 4.30 p.m. of 9th March, 2010. Having been told by the trial court that the victim could not give only meaningful evidence, then it was important to note that PW1's (the Appellant) evidence was only hearsay evidence which is not admissible in law.

33. In John Chege Ndungu vs Republic (2005] eKLR, Cr. appeal no. 247 of 2004, the court held that;

> " First of all, the evidence of PW3 in which he implicated the appellant with the offence was hearsay and therefore inadmissible for reasons that the source of the information was not disclosed nor the informer called as a witness to testify."

34. The court went on to state:

> " I must raise my concern at this point in the taking down of hearsay evidence in criminal trials. In this case the evidence of PW3, apart from the fact that he arrested the appellant was all hearsay and should not have been recorded. I hope that the learned trial magistrate will note this fact and record only the evidence that is admissible as provided under the *evidence act*."

35. The Appellant submit that, the evidence of PW1 was hearsay evidence she was not with her daughter from morning to 4.30 pm and relied on evidence of Naomi Chemutai who was never called to testify. That the court was not told why Naomi was never called to testify. Thus, without any corroborating

evidence from the victim or any eye-witness who witnessed the victim being defiled by the Appellant then the offence of defilement cannot be said to have been proved against the Appellant.

36. It's the Appellant's submission that the court has power to summon any witness or witnesses and cross-examine them though not summoned as a witness if his evidence appears to be essential to the just decision of the case. This power is given to the court under Section 150 of the Criminal Procedure Code.

37. That the trial court did not involve this important provision and thus left the prosecution case staggering. The failure to call Naomni Chemutai to testify in court was an error. She was certainly a very crucial witness in this case. She was the one who was left with the victim not the Appellant.

38. In Bukenya vs Uganda |1972] Ea 549, Spry Ag. Plutta Mustaffa JA held:

    1..... .

    2. The prosecution must make available all witnesses necessary to establish the truth even if their evidence may be in Consistent.

39. The Appellant thus submits that it was unsafe to convict him and as such his Appeal should be allowed with the sentence being set aside and him being set to liberty.

Respondents Case

40. The Appeal is opposed, that the sentence was lawful and in accordance with law, that the sentence prescribed under Section 8(2) b of the *Sexual Offences Act* is up to life imprisonment.

41. The Respondent maintain that the trial court acted within the law when sentencing the Appellant and as to whether the court could have imposed a more lenient sentence? The Respondent contends that the court considered all factors before sentencing.

42. That the Complainant was aged 2 years and suffered such a traumatic experience as can be seen in PW1's evidence at page 10 and PW2's evidence at 11 as well as PW3's evidence at page 12 and that the deterrent sentence imposed was the only appropriate sentence under the circumstances.

43. That the Sentence was not imposed as a mandatory sentence but rather as the appropriate sentence.

44. With regard to want of corroboration as alleged by the Appellant, the Respondent contends that the evidence of defilement was well corroborated by three (3) witnesses who gave credible and consistent evidence.

45. The Respondent contends that the Ground of Appeal of denial of fair trial rights by not being provided with witness statements, is an afterthought on the part of the Appellant and at no time did he raised his concerns with the trial magistrate.

46. With regards to ground four (4) of the Appeal, the Respondent submits that they presented cogent and consistent corroborated evidence on the age, the trial court considered and analysed the defence case that was unsworn without calling any witness which it sums as mere denial of the charges which could not displace the prosecution's case.

47. The Respondent contends that the conviction safe and sentence as imposed was lawful and thus pray for the dismissal of the Appeal for want of merit.

Analysis and Determination

48. 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.

49. 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".

50. 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 court's 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."

51. On the 12th January 2011, the court dispensed with the testimony of the two-year-old victim and called the mother as PW1 this court deems PW1's evidence as intermediary evidence that was permissible in law.

52. Although the Appellant submitted that the process of the Complainant testifying through her mother on the 12th January 2011, as an intermediary did not materialize, the decision by Ochieng' J. in Kennedy Chimwani Mulokoto v Republic Eldoret High Court Criminal Appeal No. 51 of 2011 stated: -

> " When the mother of the little girl gave her evidence, she was deemed to be giving evidence on behalf of that little girl... Therefore, for all intents and purposes, when the mother of the little girl gave evidence, she did so as a legally recognized intermediary, for and on behalf of the little girl. Such evidence was admissible."

53. In the case M.M v Republic [2014] eKLR of it was held that:-

> " Any requirement that insists on a child victim of defilement, irrespective of his or her age to testify in order to found a conviction would occasion serious miscarriage of justice. What fair hearing would a child victim aged six (6) months, like that in the case of Robinson Tole Mwakuyanda V. R. H. C. Cr. Appeal No. 227 of 2007, get if the courts were to insist on the evidence of such a child, who on account of his/her tender age cannot speak."

54. The adoption of the evidence of the mother of the child as an intermediary was therefore proper in the circumstances of the above quoted authorities as the Complainant, a child of tender years aged 2 years old was unable to testify in court.

55. The Failure to have the two-year-old victim testifying was not fatal to the prosecution's case as PW1 was the mother that testified as intermediary.

56. 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)"

57. This Court finds from my exhaustive examination of the Record of Appeal that, the sentence was imposed was lawful and the trial court did not consider 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.

58. This court is equally guided by the holding by the Supreme Court of Kenya, and in the Court of Appeal Manyeso v Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), which held that:

> " Having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence. We note in this respect that the appellant did raise the concern of his sentence of life imprisonment while he was 18 years of age in his first appeal, and the High Court held as follows in this regards;
>
> > "The nature of the offence and the makeup of the offender are of such a nature that the public require protection for a considerable time, unless there is a change of circumstances of the appellant. Clearly there are no set of circumstances that are different to warrant interference with the legal sentence imposed by the trial court. In my view, it cannot also be said to be excessive, unlawful or punitive to the extent that this court jurisdiction can be invoked to vary it."

59. This court therefore in the circumstances, uphold the Appellant's conviction of defilement, but partially allow his appeal on sentence and accordingly set aside the sentence of life imprisonment imposed on the Appellant and substitute therefore a sentence of 40 years' imprisonment to run from 15th March 2010.

It is so ordered.

SIGNED, DATED AND VIRTUALLY DELIVERED AT NAKURU THIS 6TH DAY OF MARCH, 2024.

MOHOCHI S.M

(JUDGE)