Omari v Republic (Criminal Appeal E029 of 2023)
[2024] KEHC 2199 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2199 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL E029 OF 2023

KW KIARIE, J

MARCH 5, 2024

BETWEEN

DAVID OMONDI OMARI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O.A case NO.6 of 2023 of the Principal Magistrate's Court at Kendu Bay by Hon. C.A. Okore–Principal Magistrate)

JUDGMENT

1. David Omondi Omari, the appellant herein, was convicted after pleading guilty to the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the *Sexual Offences Act* No 3 0f 2006.

2. The particulars of the offence are that on diverse dates between the 11th day of April 2023 and the 18th day of April 2023 within Homa Bay County, intentionally and unlawfully caused his penis to penetrate the vagina of MA, a child aged 15 years.

3. The appellant was sentenced to twenty years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence. M. Korongo and Company Advocates represented him. He raised grounds of appeal as follows:

    a. The trial magistrate erred in law and fact in failing to give the complainant a hearing before sentencing, denying the appellant their constitutional right to a fair trial.

    b. The trial magistrate erred in law and fact in sentencing the appellant person without a probation report.

    c. That the trial magistrate erred in law and fact in proceeding with the sentencing while the plea of guilty was not equivocal.

d. The trial magistrate erred in law and fact in plea taking, especially since the accused had indicated that they understood Dholuo, whether a translator was present, and if the charge and possible sentence were adequately explained to him.

e. The trial erred in law and fact in admitting the complainant's birth certificate before convincing herself that the document was produced before the court per the rules of evidence.

f. The trial magistrate failed in law and fact to consider the circumstances in which the offence was committed and, if at all, the accused could know the complainant's age.

g. That the trial magistrate filed in law and fact in failing to appreciate that the appellant was not in the right state of mind when pleas were taken.

h. That the trial magistrate erred in law by failing to see that the appellant was a layman and needed legal counsel, a right provided for under the *onstitution*.

i. The trial magistrate erred in law in failing to warn the appellant of the severity of the charges and the consequences of the sentence.

j. The trial m magistrate erred in law and fact, relying on medical evidence after the appellant was prosecuted. Since this evidence was not conclusive in providing that penetration happened, it required the said evidence to be corroborated.

k. That the trial magistrate erred in law and fact in accepting a guilty plea from the appellant, who pleaded through blackmail and false promises of his liberty as the charge was said to be a minor charge punishable by a short probation sentence.

l. The learned trial magistrate erred in law and fact by failing to consider the appellant's criminal records, seeing that he was a first-time offender.

m. That the learned trial magistrate erred in law and fact in failing to give the appellant a sense to mitigate correctly and to consider his remorse for what transpired.

n. In any event, the sentence was manifestly excessive.

4. The state opposed the appeal through David Ndege, learned counsel. He raised the following grounds of opposition:

a. That the plea was unequivocal.

b. That the sentence meted was legal.

5. This is a first appellate court. As expected, I have analyzed and evaluated all the evidence adduced before the lower court afresh. I have concluded, considering I neither saw nor heard any witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

6. In the leading case of *Joseph Marangu Njau v Republic* [2015] eKLR, the Court of Appeal stated:

Whereas all the perils a guilty pleader embraces may not much matter in petty offences or in mere infractions which do not present much risk to life or liberty, much is at stake in the offences that attract more penal severe consequences. In the case before us, the balance of the appellant's natural life stood to be spent behind bars upon conviction.

Cognizant of the ever-present dangers of misjustice [sic] in guilty pleas, the courts have been vigilant to act upon and to uphold them only when they are clear, express, unambiguous and unequivocal. When a plea of guilty is challenged as not having been entered unequivocally, it becomes a matter of law that

permits the superior courts to entertain appeals notwithstanding Section 348 of the *CPC* aforesaid. The predecessor of this Court considered and authoritatively laid down the manner in which pleas of guilty should be recorded and the steps which should be followed, in the decades-old case of *Adan v Republic* [1973] EA 445, as follows;

> "(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 to add any relevant facts;
>
> (iv) if the accused does not agree with the facts or raise 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."
>
> In the instant case, I will endeavour to establish if the plea adhered to the procedure described in *Adan* (*supra*).

7. The appellant was taken to court for a plea on the 24th day of April 2023. The charge was read to him in Dholuo, the language he said he understood. When called upon to respond, he said it was true. The facts were read to him, and he said they were correct. He added that the complainant was under the age of eighteen years.

8. The facts that were read to him and that he confirmed correctly supported the charge of defilement. A copy of the complainant's birth certificate indicates that she was born on March 1st, 2008. Therefore, it supports the age stated on the charge sheet.

9. I, therefore, find that the plea by the appellant was unequivocal.

10. Section 348 of the *Criminal Procedure Code* 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 or legality of the sentence.

11. Having established that the plea was taken correctly, I will therefore endeavour to verify the legality of the sentence, bearing in mind that an appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] E.A. 599, as follows:

    The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in*James v Rex*[1950], 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence

is manifestly excessive in view of the circumstances of the case. *R v Shershewsity* [1912] C.CA 28 T.LR 364.

12. Contrary to the contention of the appellant that he was not allowed to mitigate, the record states otherwise. In his mitigation, he stated that the complainant was his friend and that he provided her with accommodation whenever she was away from home.

13. It is not legally required for the trial court to ask for a probation officer's report. This may be done when the court wants to consider whether a non-custodial sentence is viable. This cannot be a ground for appeal.

14. Section 8 (3) of the *Sexual Offences Act* provides as follows:

    A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

15. In the instant case, the minor was fifteen years old. The prescribed minimum sentence is mandatory; any other sentence would be illegal. I, therefore, have no basis to interfere with the sentence. The appeal is consequently dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 5TH DAY OF MARCH 2024

KIARIE WAWERU KIARIE

JUDGE