Wakarau v Republic (Criminal Appeal E005 of 2021)
[2024] KEHC 3067 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3067 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL E005 OF 2021

AC MRIMA, J

MARCH 14, 2024

BETWEEN

HILLARY KIPRUTO WAKARAU ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. M.I.G Moranga (SPM) in Kitale Chief Magistrate's Court Criminal Case (S.O.) No. 138 of 2019 delivered on 28th January 2021)

JUDGMENT

Background:

1. Hillary Kipruto Wakarau, the Appellant herein, was charged with the offence of Defilement of a child contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*.

2. The Particulars of the offence are that on the 14th day of June 2019 within trans-Nzoia County intentionally caused your penis to penetrate into the anus of W.M. a child aged 8 years.

3. The Appellant faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* no. 3 of 2006.

4. The particulars were that, on the 14th day of June 2019 within trans-Nzoia County intentionally caused contact between your genital organ namely, penis, and the genital organ, namely, anus, of W.M a child aged 8 years.

5. The Appellant pleaded not guilty.

6. The Respondent urged its case by calling a total of 6 witnesses. At the end of their respective testimonies, the trial Court placed the Appellant on his defence.

7. The Appellant gave unsworn testimony. He was the sole defence witness.

8. Upon considering the evidence, the trial Court in its Judgment found that the ingredients of the offence of defilement were proved beyond reasonable doubt. Consequently, it sentenced the Appellant to 15 years' imprisonment.

The Appeal:

9. Through an undated Petition of Appeal, the Appellant urged its case as follows;

    1. That I am fully reformed and promise to change my ways for the better.

    2. That the High Court consider I the appellant criminal record in prison as I have not committed any crime in jail.

    3. That the High Court take into account the Appellant's age

    4. That I urge the high Court considers that I am the sole family breadwinner

    5. That I implore for a lenient sentence with a chance to be rehabilitated and go back to the society.

10. In his written submissions, the Appellant stated that he was not pleading innocence but was praying for leniency. He stated the offence he committed has negatively impacted him and that there is a scar he has left on his family members.

11. The Appellant stated that he has learnt his lesson through the time he has served. He submitted that he has changed his ways for the better and promised to be a role model and of good conduct in the society.

12. He urged the Court to consider the circumstances of the offence, mitigation and the fact that he was arrested at the age of 30 years and that he is now 33 years, a well reformed person.

13. In conclusion, he implored the Court to take into consideration the fact that he is the sole breadwinner and his family is now miserable. He prayed for a lesser sentence with a chance to be rehabilitated and allowed back to the society.

The Respondent's case:

14. The Prosecution challenged the Appeal through written submissions dated 19th June 2023.

15. In submitting on the fact that the ingredients of the offence of defilement were proved, it was stated that PW6 assessed the victim and produced his age Assessment Report as PExh.1 which estimated him to be 8 years old.

16. It also was its case that the Court observed the victim and believed that he was a minor based on observation and common sense. The decision in Misc. Appeal No. 24 of 2015, Mwalango Chichoro -vs- Republic was relied upon.

17. As regards proof of penetration, the Respondent referred to the victim's evidence where he stated that "alinirape kwa matako...". Further support was drawn from P3 form and the evidence of PW4 whom after examining the victim found that there were lacerations and injuries on the victim's anus.

18. The Respondent further submitted that the identity of the perpetrator was proved since the victim knew him. It was its case that the victim pointed at him in Court.

19. The Respondent submitted that the Prosecution proved all the elements of the case beyond reasonable doubt. It was urged that the Appeal is unmerited and ought to be dismissed.

Analysis

20. This being a first appeal, it's the duty of this Court to re-consider and to re-evaluate the evidence adduced before the trial Court with a view to arriving at its own independent conclusions and findings (See Okono vs. Republic [1972] EA 74). In doing so, this Court is required to take cognizance of the fact that it neither saw nor heard the witnesses as they testified before the trial Court and, therefore, it ought to give due regard in that respect as so held in Ajode v. Republic [2004] KLR 81.

21. The Appellant herein does not contest the findings of fact of the Trial Court. Also, he neither contests his conviction nor sentence. He basically is appealing to this Court for a more lenient sentence on account of having changed his ways. He claims that he is now reformed, has not committed any criminal offence while in custody and that he is the sole breadwinner in his family.

22. From the foregoing, the only issue for determination is whether the Appellant has made a case for review of his sentence.

23. From the outset, this Court is alive to the fact that sentencing is a discretion of the trial Court that must be exercised judiciously. An Appellate court cannot ordinarily interfere with the such discretion unless it is demonstrated certain mishaps took place.

24. In Eldoret Criminal Appeal No.253 of 2003, Shadrack Kipkoech Kogo v R, the Court of Appeal discussed sentencing in the following terms;

> "... 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)"

25. In Bernard Kimani Gacheru v Republic [2002], the learned Court of Appeal Judges expressed themselves thus;

> "... It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.

26. I have considered the circumstances of the case. It is a clear case of sodomy. The Appellant took advantage of the victim's confidence in him that he would accompany him home after a funeral ceremony.

27. The Trial Court having assessed the evidence, mitigation and general demeanour of the Appellant made the following remarks;

> The Court is of the view the accused does not show any remorse for his actions. His actions were a breach of interests of the child and his parents had trusted him to care moments

before only for him to defile their son. The act will have long lasting effects physiologically on the boy.

28. With the foregoing in mind, my attention is drawn to the decision in Petition E017 of 2021 Maingi & 5 others v Director of Public Prosecutions & another (Petition E017 of 2021) [2022] KEHC 13118 (KLR) where the Court in discussing sentencing referred to the case in R -vs- Scott and observed as follows;

> " ..... In the case R vs. Scott (2005) NSWCCA 152 Howie J Grove and Barr JJ stated: "There is a fundamental and immutable principle of sentencing that this sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed..."

29. The offence of sodomy on anyone, let alone a child of 8 years, is a lifelong traumatic experience. It is one that is not to be taken lightly by any Court upon the finding that an accused is guilty.

30. The Appellant herein was found guilty. He does not contest his conviction in this appeal. He only asks this Court for leniency.

31. Notably, he has served just over four years. Having regard to the requirement of reasonable proportionality between the offence committed and the sentence meted out and taking into consideration the absence of any evidence to corroborate the claimed change in character and not forgetting the retributive function of custodial sentence towards the victim as well as the need to protect the society from such incidences, I find no basis whatsoever to allow the Appeal.

32. In the premises, the Appellant's appeal is without merit. I dismiss it in its entirety.

33. It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 14TH DAY OF MARCH, 2024.

A. C. MRIMA

JUDGE

Judgment delivered in open Court and in the presence of: -

Hillary Kipruto Wakarau, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Chemosop/Duke – Court Assistants.