Kipruto v Republic (Criminal Appeal 38 of 2020)
[2024] KEHC 4910 (KLR) (14 May 2024) (Judgment)

Neutral citation: [2024] KEHC 4910 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL 38 OF 2020

PN GICHOHI, J

MAY 14, 2024

BETWEEN

BOAZ KEREBEC KIPRUTO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against conviction and sentence in the Judgement of Hon. A. Mukenga (SRM) delivered on 10{{^th}} August, 2022 in Molo Chief Magistrate's Court S.O Case No. 136 of 2019)

JUDGMENT

1. Boaz Kerebec Kipruto (hereafter referred to as the Appellant) faced two charges before the trial court.
2. In Count 1, he was charged with the offence of Rape contrary to Section 3(1) (a) (c) (3) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence were that on 8th day of December 2019 at Kuresoi North Sub-County within Nakuru County, he intentionally and unlawfully caused his penis to penetrate the vagina of R.R by use of force and threats.
3. He was also charged with the alternative count of indecent act with an adult contrary to section 11 (1) (A) of the Sexual fences Act No. 3 of 2006 . The particulars were that on 8th day of December 2019 at Kuresoi North Sub-County within Nakuru County, he intentionally and unlawfully touched the buttocks , breasts and vagina of R.R. with his hand against her will.
4. In Count 2, he was charged with the offence of assault contrary to Section 251 of the Penal Code. The particulars were that on 8th day of December 2019 at Kuresoi North Sub-County within Nakuru County, he assaulted R.R thereby occasioning actual bodily harm on her both hands.
5. He denied both charges and after hearing both the Respondent's witnesses and Appellant, the trial court convicted the Appellant on Count 1 and 2 and sentenced him to serve 15 years imprisonment on Count 1 and to serve 3 years imprisonment in Count 2. Both sentences to run concurrently.

6. Dissatisfied, he filed a Petion of Appeal on 25th August 2021 seeking that the conviction be quashed, the sentence set aside and therefore he be set at liberty. He raised Five (5) grounds of appeal as follows:-

    1. That the learned trial magistrate erred in law and in fact by failing to consider the Appellant's defence which was plausible and cogent and which watered down the Respondent's case.

    2. That the learned trial magistrate erred in law and in fact by failing to appreciate that the Respondent's case was marred with contradictions.

    3. That the learned trial magistrate erred in law and in fact by failing to appreciate that the medical evidence adduced by the Respondent did not support or corroborate its case.

    4. That the learned trial magistrate erred in law and in fact by failing to consider the Respondent's case was not proved beyond any reasonable doubt.

    5. That the learned trial magistrate erred in law and in fact by imposing an excessive sentence in the circumstances.

7. The Appellant however filed Supplementary grounds of appeal on 23rd February 2024 which also included submissions. He indicated that he was appealing on sentence only.

8. On what would be an appropriate sentence, he cited the Court of Appeal decision in Thomas Mwambu Wenyi v Republic [2017]eKLR and Judiciary Sentencing Policy Guidelines. He stated that considering that he was a first offender, was remorseful and that he had a young family, the 20 years imprisonment was excessively harsh and unjust.

9. He therefore urged the Court to consider his mitigating grounds and award a lesser sentence as the Court considers favourable or substitute the remaining sentence to a non- custodial sentence including that he serves on Community Service Orders and considering that he is now reformed. He also urged the Court put into account Section 333 (2) of the Criminal Procedure Code.

10. Mr. Kihara for the Respondent filed his submissions on 27th February, 2024 on both conviction and sentence. However, with the Respondent having indicated in the supplementary grounds of appeal and orally before Court that he was appealing on Sentence only, then this Court considers that the grounds in regard to conviction are abandoned. This court finds no reason go to the said issues.

11. On sentence, the Respondent submitted that the Appellant was brutal and, in his testimony, he did not show any remorse. Terming the sentence lenient, the Respondent urged the Court should not uphold it.

Determination

12. As earlier noted, the Appellant is aggrieved on sentence only. Contrary to the Appellant's assertion, and as indicated earlier in this judgment, the sentence imposed by the trial court on this count was not twenty (20) years but Fifteen (15) years.

13. Regarding the offence of Rape which was the subject of Count I, Section 3 of the *Sexual Offences Act* No. 3 of 2006 provides:-

    (1) A person commits the offence termed rape if –

        (a) he or she intentionally and unlawfully commits an act which causes penetration with his or her genital organs;

        (b) the other person does not consent to the penetration; or

(c) the consent is obtained by force or by means of threats or intimidation of any kind.

(2) In this section the term "intentionally and unlawfully" has the meaning assigned to it in section 43 of this Act.

(3) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.

14. Contrary to the Appellant's assertion, and as indicated earlier in this judgment, the sentence imposed by the trial court on this count was not twenty (20) years but Fifteen (15) years.

15. As rightly put by the Appellant, the Judiciary Sentencing Policy Guidelines provide that sentence meted out must be proportionate to the offending behaviour and that the punishment must not be more or less than is merited in view of the gravity of the offence.

16. Further, the Court of Appeal in Thomas Mwambu (supra) cited with approval the High Court holding in Ambani v Republic [1990] KLR 161 that:-

> "...a sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and that the court should look at the facts and the circumstances of the case in its entirely before settling for any given sentence."

17. With those guideline and principles in mind, the issue for consideration is whether the said sentence should be interfered with.

18. On that issue the Court of Appeal in Bernard Kimani Gacheru v Republic [2002] eKLR held:-

> "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 stated is shown to exist."

19. There is no doubt that the Appellant was treated as a first offender. In his mitigation, the Appellant had this to say before the trial court:-

> "I am an orphan . We are four in our family. We have no parents. I pray that the court forgives me and releases me. I am a young man. I am not married."

20. The record shows that when sentencing the trial court held:-

> "The accused person is a first offender. However, the offence he committed was heinous. He accosted a woman in her house where she expected to be secure.
>
> The medical evidence show that she was expectant at the time of the offence , and the court only hopes that the child was not harmed by this violent act.

> The court cannot condone sexual violence against women. The accused person has not yet expressed any remorse for his action. I have considered his mitigation and it is my view that a deterrent sentence will be appropriate in the circumstances."

21. This Court has looked at the evidence before the trial court. The complainant (PW1) was alone in her house on the material night and it was raining . At midnight, the Appellant came to her widow, removed the gunny bag covering the widow and flashed his torch on her face and said "today I have found a woman." He then went to the wooden door, kicked it open and entered her one roomed house. He was armed with a knife. He kept saying that he had found a woman. She struggled with him and he cut her on the right palm and left hand. He pinned her on the logs and as he held the knife with the other hand. He removed her trouser , underwear and skirt. He placed the knife on the table raped her repeatedly. No one could hear her screams as it was raining. He left at 5.00 am. He had not used any protection as he raped her.

22. The Doctor (PW6) who examined the complainant confirmed that she was Ten (10) weeks pregnant and had general abdominal tenderness. A lot of spermatozoa was found in her genitalia. Her right upper limb had bruises and was painful. There were general muscle pains and joint pains. She had cut wound on the left upper limb. This was captured in the medical report too.

23. That evidence reveals extreme violence on the complainant in the circumstances herein and it is clear that the trial court did capture that violence aptly and the gravity of the offence.

24. The sentences in the two counts were to run concurrently which means he was to serve a total of Fifteen (15) years.

25. There is nothing to show that said sentence is manifestly excessive or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle.

26. This Court finds no reason to interfere with the same. A custodial sentence was and is still is appropriate.

27. Regarding Section 333 (2) of the Criminal Procedure Code, there is nothing before the trial court show compliance- (See Court of Appeal in Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR).

28. In the upshot:-

    1. The appeal is dismissed for lack of merit.

    2. The sentence is affirmed.

    3. The period spent in custody from date of arrest on 08/12/2019 be taken into account in computing the sentence.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 14TH DAY OF MAY , 2024

PATRICIA GICHOHI

JUDGE

In the presence of:

Boaz Kerebei Kipruto -Appellant

Mr. Kihara for Respondent

Ruto- Court Assistant