Hassan v Republic (Criminal Appeal 015 of 2019)
[2024] KEHC 10006 (KLR) (11 June 2024) (Ruling)

Neutral citation: [2024] KEHC 10006 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CRIMINAL APPEAL 015 OF 2019

SN MUTUKU, J

JUNE 11, 2024

BETWEEN

BAKARI MUHINDI HASSAN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Appellant was tried and found guilty for the offence of defilement. He was sentenced to serve a prison sentence of twenty (20) years. He has moved this Court through Amended Grounds of Appeal filed in court on 1st July 2022 in which he has stated that:

    a. The imposed sentence is excessive considering I am a first offender, therefore ought to be given a lenient sentence.

    b. The Appellant's rehabilitation is evident through the prison administration records, as he has not been involved in any disciplinary issues.

2. In his undated written submissions filed on 4th July, 2022 he argued that he has been in custody since 2014 at the age of 27 years. That he is seeking this court to consider the time he has spent in custody as sufficient. That this court should consider an alternative sentence that considers the availability of less restrictive supervisory orders and that the court should consider a lenient sentence that will give him an opportunity for realization of his full potential.

3. He further submitted that during his time in custody he has acquired skills through the correctional facility's training program, where he has earned Grades II and III in joinery and carpentry. He urged that the court in its discretion should consider his mitigation and give him a non- custodial sentence for the remaining term.

4. The Appellant relied on *S -vs- Muchunu and another* (AR 24/2011) (2012) ZAKZPHC 6 Kwa Zulu Natal High Court where it held the view that the sentence that is imposed must have deterrent and retributive force and that in the interest of justice, crime should be punished, however, punishment that is excessive serves neither the interests of justice nor those of society.

5. The Respondent opposed the application and submitted that the conviction and the sentence imposed are legal and that the Applicant has not demonstrated that the sentence is illegal.

Determination

6. I have considered the issues raised by the Appellant in this Appeal. The Appellant seems to have abandoned the Appeal, seeking review of the sentence instead. He informed this court that all that he was interested in was the reduction of the sentence and that he was not challenging conviction. I will therefore confine this ruling to the issue at hand, that the sentence is excessive and ought to be reduced. To my mind, this court, sitting as an appellate court, is being invited to interfere with the sentence of the lower court.

7. Sentencing is left to the discretion of the trail court. That discretion cannot be interfered with by an upper court unless it is demonstrated that the trial court grossly misdirected itself. The guiding principles on when the appellate court can interfere with sentencing are well laid down in various authorities. In *S vs. Malgas* 2001 (1) SACR 469 (SCA), it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"

8. The Court of Appeal had the this to say on the issue in *Shadrack Kipkoech Kogo - vs - R*. Eldoret Criminal Appeal No.253 of 2003:

> " 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 – vs- R. (1989 KLR 306)"

9. Section 8(1) as read with section 8(3) of the *Sexual Offences Act*, under which the Appellant was charged, provides that:

> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) 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.

10. The above provision of the law imposes a mandatory sentence in the lower limit. Courts have found mandatory sentences, whether minimum or maximum, undesirable because they interfere with the

discretion of the court. In *S vs. Toms* 1990 (2) SA 802 (A) at 806(h)-807(b), where the South African Court of Appeal held that:

> " The infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

11. These sentences are, however, legal sentences as long as they remain in place and the courts are not wrong in imposing them.

12. I have considered the circumstance of this case and the sentence imposed. I have considered the submissions by the Appellant. I find that he has not demonstrated that the trial court misdirected itself in imposing the sentence. I find no reason to interfere with the discretion of the trial court. I therefore find that having found no reason to interfere with the sentence, the Appellant shall continue serving the remainder of the sentence until completion.

13. The Appeal/Application is hereby dismissed.

DATED, SIGNED AND DELIVERED THIS 11TH JUNE 2024.

S. N. MUTUKU

JUDGE