Mbii v Republic (Criminal Appeal E015 of 2023)
[2024] KEHC 8498 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8498 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E015 OF 2023

LW GITARI, J

JULY 4, 2024

BETWEEN

ALFRED MUCHUI MBII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appeal arises from the decision in Sexual Offence Case No.56/2017 in the Chief Magistrate's Court at Chuka where the appellant was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No.3 of 2006. The particulars of the charge were that on unknown date in August 2019 at [Particulars withheld]village Kandungu Location in Tharaka Nithi County the appellant intentionally and unlawfully caused his penis to penetrate the virgina of B.M.K a child aged fifteen (15) years.

    1. In the alternative the appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The appellant denied he charges and after a full trial he was found guilty on the charge of defilement, convicted and sentence to serve twenty (20) years imprisonment.

    2. The appellant was dissatisfied with both conviction and sentence and filed this appeal which initially raised six grounds but in his submissions he stated that after the conviction and sentence he filed this appeal against sentences and raised two grounds.

        These are:-

        1. That the learned trial magistrate erred in law and facts by imposing a harsh and excessive sentence thereby overlooking the mitigating circumstances of the case and failed to consider the Judiciary Sentencing Policy and Guidelines (2013).

2. That the learned trial magistrate erred in law and facts by failing to note that the appellant was a first offender hence qualified for the law under Article 50(2) (p) of *the Constitution*.

3. The brief facts are that the complainant B.M.W. is girl who was from on 25/11/2004 as per the birth certificate which was produced in court as exhibit 1.

   Sometimes in August 2019 the appellant went to the complainant's home and found her alone. The appellant told the complainant to accompany him to his home. She agreed. The two went to appellant's house where they lay on the bed and engaged in sexual intercourse. She then went home. After one month she realized that she was pregnant. The complainant's father P.K (PW3) found the complainant vomiting and enquired whether she had a problem. She did not disclose to him that she was pregnant but since he was aware that she used to pass by a bar where the appellant was working, he went and reported to the Chief. In turn the area Chief MN(PW1) went and arrested the appellant on 22/12/2019 and led him to complainant's home where he summoned her parents. The complainant confirmed that she was pregnant and the person responsible was the appellant who she said w her boyfriend and they had engaged in sexual intercourse regularly. The Chief took the two to the police station. The appellant was arrested and charged with this offence.

4. The learned trial magistrate ordered a D.N.A test to be conducted to ascertain whether the appellant was the father of the child.

5. The appellant, the complainant's baby by name L.M were escorted by a police officer (PW6) to the Government Chemist where samples were taken for the D.N.A test. The Government Analyst Emily Okwaro (PW7) from the Government chemist Nairobi conducted the tests and concluded that the appellant was the father of the child L.M, the child of Brenda Mwende.

   PW7 produced the report as exhibit 6a and the exhibit Memo Form exhibit 6b

6. The appellant upon being placed on his defence gave a sworn statement and narrated that he was arrested on 22/12/2019 on allegation that he had defiled B. On being cross-examined he admitted that he engaged in sexual intercourse with the complainant and she became pregnant. He admitted that she was not yet eighteen (18) years when he had sexual intercourse with her.

7. The appeal was canvassed by way of written submissions. The appellant submits that there were no aggravating circumstances that led the trial court to impose a long sentence of twenty years. The appellant relies on the case of Joshua Gichuki Mwangi-v- Republic and has urged the court to be persuaded by it. He further submits that he admitted that he had sexual intercourse with the complainant.

8. The respondent submits that the sentence imposed was in accordance with the law and the trial court did not err in anyway while passing the sentence. That the sentence was commensurate with the offence committed. The respondent submits that the mitigation was considered.

Analysis and determination

3. Section 8(1)(3) of the Sexual Offence Act provides:

(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."

4. The appellant is only aggrieved with the sentence and it is therefore important to set out the circumstances under which an appellate court interferes with the sentence. In the case of Ogolla s/o Owuor –v- Republic 1954 E.A.C.A 270 the court stated:-

> The court does not alter a sentence unless the trial Judge has acted on wrong principles or overlooked some material factors."

5. It is well settled that the court will interfere with the sentence where it is shown that the sentence is manifestly excessive. In the case of Shadrack Kipkoech Kogo –v- Republic Eldoret, Criminal Appeal No. 253/2003 the Court of Appeal stated as follows:-

> 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 therefor an error of principle must be inferred (see also Saveka-v-Republic (1989) KLR 306.")

6. The court of Appeal in the case of Bernard Kimani Gacheru –v- Republic (2002) eKLR held on the issue of appeal against sentence :-

> "It is now settled law, following several authorities of 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 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 any of the matters already stated is shown to exist."

7. In the case of M.M.I. –v-Republic (2022) eKLR, Justice Ondunga (as he then was) while dealing with an appeal on the sentence stated that the principle guiding interference with the sentencing by the appellate court were properly set out in S.-v- Malgas (2001) (1) SACR 469 (SCA) paragraph 12 where 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 satisfied 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 trial court would have imposed had it been the trial court is so marked that it can properly be described as "shocking. "startling" or "disturbing in- appropriate.
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> Similarly in Mokela-v-166 The State (135/11) (2011) ZASCA 166 the Supreme Court of South Africa held that: "It is well established that sentencing remains prominently within the discretion of the sentencing court. This statutory principle implies that the appeal court

does not enjoy a carte blanche to interfere with the sentences which have been properly imposed by a sentencing court. In my view this includes the terms and conditions imposed by the sentencing court or how or when the sentence is to be served."

8. In this case the appellant was convicted of an offence under Section 8(1) (3) of the *Sexual Offences Act* (supra) where the offender is liable to imprisonment for a term of not less than twenty years. The learned trial magistrate imposed the minimum mandatory sentence. She however considered the sentence provided under Section 8(1) (3) (supra) and passed a sentence of twenty years. The appellant was treated as a first offender. The appellant pleaded for leniency, he also admitted the charge in his defence.

9. I find that these were relevant material factors which the trial court did not consider when passing the sentence. The learned trial magistrate was bound by the law to consider these two factors which were in favour of the appellant and weigh them against those which supported severe penalty. As stated in the above cited authorities, sentence is essentially a discretionary matter and the trial court must take into account all the relevant factors. An appeal court will interfere with the exercise of discretion where the learned magistrate overlooked some relevant matters or took into account irrelevant matters.

10. In this case the learned trial magistrate did not point out any aggravating matters. She overlooked the fact that the appellant admitted the charge though very late in the proceedings. She also overlooked the fact that the appellant in pleading for leniency showed that he was remorseful. Failure to consider these factors gives this court reason to interfere with the sentence. I find that sentence of twenty (20) years imprisonment though lawful was on the higher side. I set aside the sentence of twenty years and substitute it with a sentence of ten years imprisonment which run from 13/4/2022.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 4TH DAY OF JULY 2024.

L.W. GITARI

JUDGE