Mwandiki v Republic (Criminal Appeal E012 of 2023)
[2024] KEHC 8497 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CRIMINAL APPEAL E012 OF 2023

LW GITARI, J

JULY 4, 2024

BETWEEN

PHINEUS MWANDIKI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to Section 8(1) (4) of the *sexual Offences Act* No.3/2006 in Sexual Offences Case No.32/2020 before the Principal Magistrate's Court at Marimanti. The particulars of the charge were that on diverse date between 27/7/2020 and 5/8/2020 at Gaceraka Chiakariga Location in Tharaka Nithi County intentionally and unlawfully caused his penis to penetrate the vigina of P.G.G a child aged fourteen years. In the alternative he was charged with committing an indecent Act with a child contrary to Section 11)c) of the *Sexual Offences Act*.

2. The appellant denied the charges and after a full trial he was found guilty on the charge of defilement, convicted and sentenced to serve twenty (20) years imprisonment.

3. The appellant was dissatisfied with the both conviction and sentence and filed this appeal which was initially based on eight grounds. He however amended the grounds and filed supplementary grounds of appeal which is challenging the sentence imposed by the learned trial magistrate. Thus the appeal is on the sentence.

4. The brief facts of the case are that the complainant P.G.G (PW1) is a girl who at the time this offence committed, she was aged fourteen years as she was born on 21/6/2006 as per her birth certificate which was produced I court as exhibit. She testified that between July and August 2020 she was staying in the home of the appellant who she termed as boyfriend and during that time they engaged in sexual intercourse. The appellant was penetrating her genital organ with his penis. The area chief was informed of a school girl who was living with the appellant. He proceeded to the home of the appellant

and met the appellant and complainant sleeping on a bed and the two were naked. The matter was investigated and it was discovered that the three had been cohabiting for three weeks. The appellant was arrested and charged with this offence. The appeal was canvassed by way of written submissions. The appellant submits that the sentence was harsh and excessive. He prays that the sentence be set aside. For the respondent, it is submitted that the charged should have been under Section (8)(1) (3) as the complainant was born on 21/6/2006 as per the birth certificate which was produced in court. She submits that the sentence was not harsh and excessive in the circumstances and it is the correct sentence as stipulated by the law.

Analysis and determination

5. 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."

6. 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 EACA 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.

7. 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 Savekav Republic (1989) KLR 306.")

8. 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 since, 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."

9. In the case of *M.M.I. –v-Republi*c (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 Mokelav166 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."

10. 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.

11. 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 weight 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.

12. In this case the learned trial magistrate did not point out any aggravating factors. The appellant pleaded that he was a young man who had young children. He 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 17/5/2023.

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

L.W. GITARI

JUDGE

4/7/2024

The Judgment has been read out in open court.

L.W. GITARI

JUDGE

4/7/2024