Njahira v Republic (Criminal Appeal E072 of 2022)
[2024] KEHC 8620 (KLR) (16 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8620 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CRIMINAL APPEAL E072 OF 2022

JM OMIDO, J

JULY 16, 2024

BETWEEN

GEORGE KIBERA NJAHIRA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence of Hon. L. Wachira, Chief Magistrate rendered on 14th October, 2021)

JUDGMENT

1. George Kibera Njahira (hereinafter referred to as "the Appellant") was in the first count charged with the offence of sexual assault contrary to Section 5(1)(a)(i) and (b) as read with 5(2) of the *Sexual Offences Act* Cap 63A Laws of Kenya (erstwhile *Act No. 3 of 2006)*. It was stated in the particulars of the offence that on 28th April, 2020 at around lunch hours (sic) in Gatundu Subcounty within Kiambu County, the Appellant unlawfully used his fingers to penetrate the vagina of SW (name withheld), a child aged eight (8) years old.

2. In the second charge, the Appellant was faced with a charge of sexual assault contrary to Section 5(1)(a)(i) and (b) as read with 5(2) of the *Sexual Offences Act* Cap 63A Laws of Kenya. It was stated in the particulars of the offence that in the month of December, 2019 at an unknown time in Gatundu Subcounty within Kiambu County, the Appellant unlawfully used his fingers to penetrate the vagina of MW (name withheld), a child aged ten (10) years old.

3. The Appellant denied both counts which then paved way for a trial. It is to be noted that the second count was withdrawn under Section 87(a) of the Criminal Procedure Code as the complainant was not available to testify.

4. The Appellant now appeals to this court on the sentence vide a Petition of Appeal dated 30th November, 2022 and lodged in court on even date, proffering the following grounds of appeal:

a. That the learned trial Magistrate erred in both law and in fact on failing to observe the mitigating circumstances and factors of the Appellant as stipulated in the Sentencing Policy Guidelines.

b. That the learned trial Magistrate erred in both law and facts on whereby (sic) the meted/ imposed sentence was manifestly harsh and excessive.

c. That the learned trial Magistrate erred in both law and in fact on failing to observe Section 333(2) of the Criminal Procedure Code hence the time spent in remand (sic).

d. That the learned trial Magistrate erred in both law and in fact on failing to impose fine while sentencing.

e. That the Honourable Court to put into accounts (sic) that the Appellant is remorseful, sole breadwinner of his entire family and seeking the Court's leniency (sic).

f. That the Honourable Court puts into adequate consideration (sic) all relevant matters and leaving all irrelevant matters as stipulated by law (sic).

5. It was accordingly the prayer of the Appellant that this court allows the instant appeal and reduces the sentence.

6. The court directed that the appeal proceeds by way of written submissions and both the Appellant and the Respondent filed their respective submissions.

7. I have perused the petition of appeal, the submissions by the two sides and the record in its entirety.

8. This court has a legal duty to re-analyze, re-evaluate and assess the evidence adduced in the lower court so as to come up with its own conclusions bearing in mind that it did not have the benefit of seeing the witnesses testify (see Okeno vs Republic [1972] E.A, 32 at 36; Pandya vs Republic [1957] EA 336; Shantilal M. Ruwala vs Republic [1957] EA 570; and Peter vs Sunday Post [1958] EA 424.

9. The prosecution called six witnesses. Upon closure of the prosecution case, the Appellant gave a sworn testimony. On conclusion of the trial, the Appellant was found guilty and convicted on the first count and subsequently sentenced by the trial court to serve ten (10) years imprisonment.

10. It is instructive from the record that the court was informed that the Appellant was a first offender. The Appellant did not offer any mitigation despite having been accorded an opportunity to mitigate. In sentencing the Appellant, the court observed as follows:

> Court: The accused person is not remorseful. He is sentenced to serve 10 years imprisonment. Right of appeal 14 days.

11. From the Petition of Appeal, I understand the Appellant to be stating that:His mitigation was not considered.The time that he had spent in remand was not taken into account by the trial court when sentencing him.The sentence of 10 years was manifestly harsh and/or excessive.

12. In the instant appeal, the Appellant complains that his mitigation was not considered. However, as we have seen above, the Appellant was given an opportunity to mitigate but offered nothing in mitigation. He cannot therefore complain that the trial court failed to consider his mitigation.

13. On the severity of the sentence, Section 5(2) of the *Sexual Offences Act*, Cap 63A Laws of Kenya (formerly *Act No. 3 of 2006)* provides that a person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.

14. It is to be noted that sentencing is a matter of discretion of the trial court and an appellate court can only interfere with the sentence of the trial court if it is demonstrated that the court took into account irrelevant factors or that wrong principles were applied or that the sentence was so harsh and excessive that an error in principle must be inferred.

15. In the case of Patrick Muli Mukutha v Republic [2019] eKLR, the High Court (Odunga, J. as he then was) observed as follows:

> "This being an appeal against the sentence only, it is important to determine the circumstances under which an appellate court interferes with the sentence by the trial court. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:
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> > "7. 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"
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> > 8. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:
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> > > "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."
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> > 9. The predecessor of the Court of Appeal in the case of Ogolla s/o Owuor vs. Republic, [1954] EACA 270, pronounced itself on this issue as follows:-
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> > > "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."
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> > 10. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (R - v- Shershowsky (1912) CCA 28TLR 263) while in the case of Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-
> >
> > > "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)"

11. The Court of Appeal, on its part, in Bernard Kimani Gacheru vs. Republic [2002] eKLR restated that:

> "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."

12. In Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003 the Court had this to say:-

> "Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."

16. Nothing in my view has been presented by the Appellant to warrant the interference of the trial court's sentence, which was within the law. The decisions above guide me well on this issue. The Appellant has not demonstrated that when sentencing, the trial court took into account irrelevant factors or that wrong principles were applied or that the sentence was so harsh and excessive that an error in principle must be inferred. I cannot fault the trial court on the sentence that it imposed.

17. The other issue that the Appellant raises in his appeal is that the time that he spent in custody was not considered by the trial court when sentencing him. It is instructive from the record that the Appellant took plea on 8th May, 2020. He was released on bond 2 months and 1 day later, precisely on 8th July, 2020.

18. The record bears it that the Appellant jumped bail and was rearrested and presented before the trial court on 10th November, 2020 when his bond was cancelled and he was placed in custody. He remained in custody until 14th October, 2021, (a period of 11 months and 4 days) when he was sentenced. Cumulatively therefore, he was in remand custody for a total period of 13 months and 5 days.

19. Under Section 333(2) of the Criminal Procedure Code, the sentencing court was under an obligation to consider and take into account the period during which the Appellant remained in custody when sentencing him. The Court of Appeal in Ahamad Abolfathi Mohammed & Another v Republic [2018] eKLR held that: -

> " "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody.

It is not enough for the court to merely state that it has taken into account the period already spent in custody...".

20. According to The Judiciary Sentencing Policy Guidelines:

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

21. From the foregoing, the period during which the Appellant was in remand custody ought to have been taken into account in computing his sentence. Accordingly, guided by the authorities and text hereinabove, I am inclined to allow the appeal, which I hereby do, only to the extent that the period that the Appellant spent in custody, which is 13 months and 5 days, shall be deducted from the sentence of 10 years that the trial court imposed.

DELIVERED (VIRTUALLY), DATED & SIGNED THIS 16TH DAY OF JULY, 2024.

JOE M. OMIDO

JUDGE

Appellant: Present, virtually.

For the Respondent: Ms. Ndeda, Prosecution Counsel.

Court Assistant: Ms. Njoroge.