Ali v Republic (Criminal Appeal E026 of 2022)
[2023] KEHC 1520 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1520 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E026 OF 2022

FG MUGAMBI, J

FEBRUARY 14, 2023

BETWEEN

BAKARI OMAR ALI ALIAS KIPONDA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the conviction and sentence of Hon. Sandra Ogot, SRM dated 11th February 2022 in Sexual Offence Case No. 46 of 2020 at the Senior Resident Magistrates Court at Msambweni)

JUDGMENT

1. The Appellant was charged, convicted and sentenced to life imprisonment for the offence of Defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars were that on 15th August 2020 in Vanga location, Kwale county, he intentionally and unlawfully caused his penis to penetrate the anus of MMA, a child aged 6 years old. In the alternative charge, the appellant was charged with the offence of committing an indecent act contrary to Section11(1) of the *Sexual Offences Act* No. 3 of 2006.

2. At the trial the Prosecution called 5 witnesses. PW1, the complainant gave unsworn evidence of the way the Appellant lured him by asking him to get cigarettes for the Appellant and later being forced into mangrove bushes and defiled. PW2, a fisherman at Vanga was also an eye witness to the offence who testified how he found the Appellant with the complainant after he heard the complainant crying. It was PW2 who raised an alarm. PW 3, the father to AMM gave his testimony around how he saw his son upon arriving home and the condition of AMM. It was he who took AMM to the hospital and called the police. PW4, the medical doctor who examined the minor testified to the evidence of defilement and PW5 was the Investigating Officer. When put on his defence the Appellant gave sworn testimony and did not call any witnesses. He denied any wrongdoing and instead claimed that he was a victim of an irate mob who had suspected him of defiling the minor.

3. The Appellant now appeals against the conviction and sentence as set out in the amended Petition of Appeal filed on 7th October 2022. The Appellant also relies on his written submissions. It is his case that while the complainant was subjected to a medical examination, the fact that he (the Appellant) was not subjected to the examination means that the medical evidence is not sufficient to tie him to the offence. The Appellant alleges that his was a case of mistaken identity in light of the fact that there were many fishermen at the ocean when the Appellant was arrested and this is a factor that the learned trial magistrate failed to take into account. It is his case that his evidence that he was a victim of an irate mob who accosted him and forced him to confess to the offence was never taken into account by the trial magistrate. Finally, the Appellant prays that this court finds that his sentence is manifestly harsh and excessive and in breach of article 50 of *the Constitution*.

4. The Prosecution opposed the appeal through the written submissions of its counsel. They argue that the ingredients for defilement had been proven beyond a reasonable doubt. The age of the complainant had been established using his birth certificate as 6 years. The penetration was proved by the complainant's testimony and corroborated by the evidence of PW2, PW3 and the medical evidence. Finally, the Respondent's argument is that the complainant was conversant with the Appellant and had positively identified him at the trial. PW2 also identified the Appellant as the perpetrator. The Respondents argue that the conviction was thus safe and the sentence imposed is therefore lawful and justified.

5. As the first appellate court it is the duty of this court to analyze and re-evaluate the evidence which was before the trial court and come to its independent conclusions on that evidence without overlooking the conclusions of the trial court. (See *Okeno v. Republic* [1972] EA. 32). I am cautious and give due regard to the fact that I neither saw nor heard the witnesses as cautioned in *Njoroge v Republic* (1987) KLR, 19 & *Okeno v Republic* (1972) E.A, 32. Depending on the facts and circumstances of the case, the first appellate court may come to the same conclusions as those of the lower court or it may rehash those conclusions. There is nothing objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decision (See *David Njuguna Wairimu v Republic* [2010] eKLR)

6. Against this background, I have considered the evidence before the trial court both for the prosecution and defence and reassessed that evidence and taken into account the written submissions and authorities cited by both the appellant and the prosecution counsel. I shall now proceed to determine the Appellant's appeal which is premised on the following main grounds.

That there was no medical evidence to link the Appellant to the alleged offence

7. It is an established position that medical examination of a perpetrator is not a mandatory requirement to prove defilement. However, in appropriate cases such examination may be necessary depending on the circumstances of the case. An example would be where prove against the perpetrator would only be dependent on medical examination of the perpetrator or a DNA test. In such circumstances the court has discretion to order the examination. Section 36 of the *Sexual Offences Act* provides as follows: -

    a.

        "(1) Notwithstanding the provisions of section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and other scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence.

8. The Appeal before this court is a clear case where the court can rely on the testimony of the complainant alone to convict, without the need for medical examination if the learned trial magistrate for reasons to be recorded believed the complainant. This requirement is provided for under Section 124 of the *Evidence Act* as follows:

    a. "Notwithstanding the provisions of section 19 of the *Oaths and Statutory Declarations Act* (Cap. 15), where the evidence of an alleged victim admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him.

    b. Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

9. It has also been held that the evidence of the victim is key in sexual offences and the only crucial medical examination is that of the victim to corroborate the fact of defilement or rape as the case may be. In the case of *Fappyton Mutuku Ngui v R* (2014) eKLR where a similar issue of medical examination of the perpetrator was considered, the Court of Appeal stated:

    a. "In our view such evidence was not necessary and in any event the trial court found that there was sufficient medical evidence in support of PW-2's testimony which was trustworthy as to the person who had defiled her."

    It therefore follows that if the trial magistrate believes the testimony of the victim on the identity of the perpetrator, the evidence is sufficient to support the conviction.

10. Looking at the evidence from the lower court, the trial court gave reasons why she believed the testimony of PW1 including the fact that the complainant positively identified the Appellant who was familiar to him. The complainant was also not the only eye witness to the offence and PW2 corroborated the evidence of the complainant and positively identified the perpetrator who was also familiar to him. For these reasons, this ground of appeal fails.

That the Learned Trial Magistrate erred in her assessment that the evidence of the complainant (PW1) was not challenged by the Appellant

11. It is the Appellants submission that the trial magistrate erred in her finding that the Appellant did not controvert the complainant's testimony in cross examination and failed to consider that the Appellant was beaten up and not in a state to cross examine the complainant. The Appellant claims that the reason he was not able to defend himself in court was because of the injuries he had sustained under the hands of the irate mob after the offence.

12. The evidence on record indicates that when the Appellant appeared for plea, the learned trial magistrate ordered that he be taken for medical assessment and this was done. He was only called to take plea upon a medical report indicating that he was fit to stand trial. It is on the same grounds that trial proceeded. In any case, the record from the lower court also indicates that he was able to cross examine the other witnesses. The trial court record shows that when given the opportunity to, the Appellant failed to cross examine the complainant despite being continuously warned by the trial court on the need for the cross examination. His choice not to cross examine the Appellant cannot therefore be visited on the court. Accordingly, I find this ground to be devoid of merit. I dismiss it.

That the arrest of the Appellant was a case of mistaken identity

13. Another ground of appeal raised by the Appellant is that his arrest was a case of mistaken identity. He submits that there were other fishermen in the ocean and anyone would have been the perpetrator. He alleges that he was confronted by an irate mob who forced him to admit that he was the assailant and he had no time to argue his case before the arrest.

14. The evidence on record unerringly points at the Appellant as the perpetrator of the crime. The Appellant was known to MMA who positively identified him as 'Kibangi'. MMA's evidence was consistent and was corroborated by the evidence of PW 2, another eye witness to the offence. The trial court conducted a voire dire examination of MMA and found that while he was aware of his circumstances and surroundings, he was of tender years and incapable of understanding the meaning of giving evidence on oath. The learned trial magistrate, in the judgment, found that MMA's testimony, together with that of the other prosecution witnesses was reliable and truthful, with no reason to lie against the Appellant. It is unlikely that this would be a case of wrong identification taking into account the time of day that the offence was committed. This too was considered by the trial magistrate. In the foregoing, I reject the Appellant's claim that his arrest was a case of mistaken identity.

That the sentence imposed on the Appellant is manifestly harsh and in breach of article 50 of *the Constitution*

15. The Appellant argues in his appeal that the sentence imposed on him by the trial court was manifestly harsh and excessive in breach of article 50 of *the Constitution* of Kenya. He further argues that the trial court should have taken into account that he was a first time offender and that the intimidating court environment made it difficult to articulate his defence. I am cognizant of the recent developments in jurisprudence on the need for sentences to remain at the discretion of the judge, and particularly the decision in *Maingi & 5 others v Director of Public Prosecutions & another* [2022] eKLR) where it was held that:

> '...To the extent that the *Sexual Offences Act* prescribe minimum mandatory sentences, with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fall foul of Article 28 of *the Constitution*. However, the Courts are at liberty to impose sentences prescribed thereunder so long as the same are not deemed to be the mandatory minimum prescribed sentences.

16. In the same vein, sentencing is exercise of discretion by the trial court which should never be interfered with unless the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See *Shadrack Kipkoech Kogo - Vs - R*., and *Wilson Waitegei V Republic* [2021] eKLR). The question begs, was there anything vitiating exercise of discretion by the trial court in imposing a sentence of life imprisonment that was meted out on the Appellant?

17. Of important consideration, the age of the victim of sexual offence is an aggravating factor which the court should always consider amongst others in sentencing (See *Stephen Kimari Gathano v R* [2022] eKLR). It is on record that the appellant took an unfair advantage to satisfy his sexual desires on MMA, a child of only 6 years at the time of the offence. MMA suffered physical injuries. The manner of commission of the offence was cruel and violent. The appellant brutally defiled MMA. The traumatic experience will linger in his life forever- and as he grows older to know exactly the violation he went through, he will live with the shame and great mental trauma caused to him by this savage act of sexual debauchery. This is a serious offence of which extreme societal desire to get rid of society of such

wickedness and sexual perversion has been expressed publicly and formally through *Sexual Offences Act*. See *James Okumu Wasike* (2020) eKLR. The Court considers the offence to be quite egregious.

18. The appellant was provided an opportunity to mitigate in the trial court where he stated that he was the sole bread winner for the family and that he had been in custody for a long time. Recent jurisprudence since *Francis Karioko Muruatetu & Another vs Republic* also points towards balancing more between retributivist and utilitarian theories of sentencing. Factors such as time served in custody, gravity of the offence, criminal history of the offender, character of the offender and the offender's responsibility over third parties should affect the sentence. There is a sound argument also for first-time offenders, for instance, who are not sex pests to be given another chance to make good their mistakes while still ensuring that the sentence is hefty enough to punish and deter others from the heinous crime. (See *BW v Republic* KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR, *Christopher Ochieng v Republic* KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR and in J*ared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014).

19. In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (2) of the *Sexual Offences Act*, and if the reasoning in the Court of Appeal decisions cited above were applied to this provision, it too should be considered unconstitutional on the same basis.

20. The provisions of section 333(2) of the *Criminal Procedure Code* are also critical and as it is the duty of this court to ensure that the sentence meted is lawful. The trial magistrate when sentencing the Appellant ordered that the sentence would run from the date of conviction thereby not taking into account the period served in custody. I am guided by the Court of Appeal in the case of *Bethwel Wilson Kibor vs. Republic* [2009] eKLR. The court stated as follows:

> " By proviso to section 333(2) of *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence".

The *Judiciary Sentencing Policy Guidelines* (2014) also provides guidance on this as follows:

> " 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. For the reasons stated above and so as to also give the appellant an opportunity to be re-integrated back into society and be a productive citizen and having taken into account the circumstances of the offence and the sentencing guiding principles and authorities outlined above and the Appellant's mitigation on appeal and the period spent in pre-trial custody, I uphold the conviction and set aside the life sentence and in lieu thereof sentence him to 30 years' imprisonment. The trial magistrate did not mention whether she took into consideration the time spent by the accused person in custody as required by law. I have perused the trial court record and found that the appellant was arrested on 15th August 2020. The sentence will run from the date he was arrested which is 15th August 2020.

SIGNED, DATED AND DELIVERED AT NAIROBI VIA VIRTUAL PLATFORM THIS 14TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE