Kiombo v Republic (Criminal Appeal E067 of 2021)
[2023] KEHC 1319 (KLR) (14 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1319 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E067 OF 2021

FG MUGAMBI, J

FEBRUARY 14, 2023

BETWEEN

HAMISI TSUMA KIOMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence of Hon V O Adet, SRM dated March 3, 2021 in Sexual Offence Case No 38 of 2020 in the Chief Magistrates Court at Mombasa)

JUDGMENT

1. The Appellant was charged with the offence of Defilement contrary to section 8(1) and (2) of the *Sexual Offences Act* No 3 of 2006. The particulars of the offence were that on March 8, 2020 at [Particulars Withheld] Estate in Mombasa County, he intentionally and unlawfully caused his penis to penetrate the anus of DK, a child aged 6 years old.

2. In the alternative charge, the appellant was charged with the offence of committing an indecent act with a child contrary to Section11(1) of the *Sexual Offences Act* No. 3 of 2006 on which the charge sheet alleged that on the same day and place, he intentionally and unlawfully touched the anus of DK a child aged 6 years old with his penis.

3. The Appellant was convicted on his own plea of guilty on the principal charge and was sentenced to 50 years' imprisonment. He subsequently filed this appeal against the sentence as provided for under section 348 of the *Criminal Procedure Code*. The appeal is set out in his Petition of Appeal filed on January 16, 2023. The Appellant also relies on his written submissions. The prosecution opposed the appeal through the written submissions of its counsel filed on January 20, 2023.

4. The main thrust of the Appellants case is that the sentence of 50 years was harsh and excessive. He submits that the learned magistrate in meting out the sentence failed to take into account the period that the Appellant had already served in custody from his arrest in March 2020 up to conviction in

March 2021, a period of approximately 1 year. It is also his case that the learned trial magistrate failed to consider the mitigation by the appellant as a first time offender. The appellant urges the court to consider the decision in *Ali Abdalla Mwanza v Republic*; Criminal Appeal No 259/2012 in his case that the learned trial magistrate ought to have taken into account the health profile as compiled by the WHO and in particular the life expectancy of males and females in Kenya. It is his case that a 50 years sentence against his current age which he alleges is 27 years of age would result to an excessively harsh sentence. I notice that the appellant states at paragraph 16 of his submissions that this would take him to 97 years of age. While I have no way of confirming the exact age of the appellant as claimed, 50 years plus 27years would be equal to 77 and not 97 years.

5. That said, as the first appellate court it is the duty of this court to analyse 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, this court is at liberty and 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. 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.

7. Recent developments in jurisprudence on sentencing emphasizes on the need for judicial discretion and particularly in sexual offences.

> '...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 (See *Maingi & 5 others v Director of Public Prosecutions & another* [2022] eKLR).

8. 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).

9. 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 *Jared Koita Injiri v Republic*, KSM CA Criminal Appeal No. 93 of 2014).

10. The appellant was provided an opportunity to mitigate in the trial court where he stated that he was remorseful. However, the converse is also true, the appellant has committed a heinous crime, and occasioned severe trauma and suffering to a girl young enough to be his daughter. His actions have demonstrated that around him, young and vulnerable children could be in jeopardy. 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 I would set aside the sentence of 50 years and substitute it with a sentence of 35 years' imprisonment.

11. The appellant urged this court to take into consideration the time spent in custody prior to conviction as provided for under section 333(2) of the *Criminal Procedure Code*. The Court of Appeal in *Bethwel Wilson Kibor vs. Republic* [2009] eKLR stated as follows in this regard:

> " 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 September 22, 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.

12. 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."

13. In the end, 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 sentence the Appellant to 35 years' imprisonment from the date of arrest, being March 8, 2020.

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

F. MUGAMBI

JUDGE