Mwagumbo v Republic (Criminal Appeal E062 of 2021)
[2023] KEHC 1316 (KLR) (15 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1316 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E062 OF 2021

FG MUGAMBI, J

FEBRUARY 15, 2023

BETWEEN

SAID HAMAD MWAGUMBO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence of Hon. Sandra Ogot, SRM dated 7th April 2021 in Sexual Offence Case No. E024 of 2021 in the Senior Resident Magistrates Court at Msambweni)

JUDGMENT

1. 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 offence were that on diverse dates between June 2020 and March 2021 at Msambweni location of Kwale county within Coast region, he intentionally and unlawfully caused his penis to penetrate the vagina of MOM, a child aged 15 years. 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.

2. The Appellant was convicted on his own plea of guilty on the principal charge and was sentenced to 18 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 28th July 2021. The Appellant also relies on his written submissions. The prosecution opposed the appeal through the written submissions of its counsel filed on 20th January 2023.

3. The main thrust of the Appellants case is that the sentence of 18 years was harsh and excessive. He submits that the learned magistrate in meting out the sentence failed to take into account the role of sentencing in criminal cases and to sufficiently consider his mitigation.

4. Recent developments in jurisprudence on sentencing emphasizes on the need for judicial discretion and particularly in sexual offences. Sentencing is an 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. This was as held in the case of *Shadrack Kipkoech Kogo and Wilson Waitegei V Republic* [2021] eKLR).

5. Likewise, I am also guided by the principles in the Court of Appeal case of *Bernard Kimani Gacheru vs. Republic* [2002] eKLR where it was stated as follows:

> " 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 stated is shown to exist." (emphasis mine).

6. The Appellant was provided an opportunity to mitigate in the trial court where he stated that he was remorseful. He explained that his action was occasioned by anger and bitterness when his wife left him. The learned trial magistrate considered this and the probation report which stated that the Appellant was a first offender. The trial court also noted the Appellants age as well as the complainants age. In addition, the learned trial magistrate expressed herself on the need for a deterrent sentence.

7. It is the duty of this court to ensure that the sentence meted is lawful. I am guided by the Court of Appeal decision in the case of *Bethwel Wilson Kibor vs. Republic* [2009] eKLR where the court reaffirmed the principle that where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody". Similar guidance is contained in the Judiciary Sentencing Policy Guidelines (2014) in the following terms:

> " 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."

8. The learned trial magistrate who sentenced the Appellant did not specifically mention that she had taken into account the period that the Appellant had been in custody. I have perused the trial court record and found that the appellant was arrested on 19th March 2021 and remained in pre-trial custody.

9. In conclusion therefore, having taken into account the circumstances of the offence and the sentencing guiding principles and authorities outlined above, I find no reason whatsoever to vary the sentence. I affirm the sentence save to add that the same will run from the date when the Appellant was arrested which is 19th March 2021.

DELIVERED, DATED AND SIGNED IN OPEN COURT VIA VIRTUAL PLATFORM AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2023

F. MUGAMBI

JUDGE