Gwashe v Republic (Criminal Appeal E002 of 2022)
[2023] KEHC 19360 (KLR) (22 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19360 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CRIMINAL APPEAL E002 OF 2022

A. ONG'INJO, J

JUNE 22, 2023

BETWEEN

HAMISI MTSUNGA GWASHE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the judgment delivered by Hon. D. Odhiambo, Resident Magistrate on 13th January 2022 in Shanzu Magistrates Court S. O. No. 25 of 2020, Republic v Hamisi Mtsunga Gwashe)

JUDGMENT

Background

1. Hamisi Mtsunga Gwashe was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No 3 of 2006. The particulars are that Hamisi Mtsunga Gwashe on the 19th day of February 2020 in Kisauni Sub-County within Mombasa County, intentionally attempted to cause his penis to penetrate the vagina of EK a child aged 4 years.

2. In the alternative count, the appellant was also charged with the offence of indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act* No 3 of 2006.

3. The trial magistrate considered the evidence of the five prosecution witnesses and the evidence of the accused person's witness – a 14-year-old girl namely HS The accused opted to remain silent and say nothing in his defence. He was convicted and sentenced to serve 10 - year imprisonment.

4. The appellant was aggrieved by the conviction and sentence and he preferred the appeal herein on 16 grounds filed on January 27, 2022 by the firm of MK Oyaro & Co Advocates but later when the appellant's advocate did not pursue the appeal and failed to respond to several notices to attend court and file submissions, the appellant filed a notice of motion on January 16, 2023 seeking to amend

grounds of appeal. The court noted on January 26, 2023 that the appellant's submissions were on record and deferred the matter to March 9, 2023 to enable the respondents file their submissions. The appellants amended grounds of appeal are as follows: -

1. That the learned trial magistrate erred in law and fact by giving me a harsh and excessive sentence.
2. That the learned trial magistrate erred in law and fact by failing to consider my mitigation address that I the appellant was a first offender.
3. That the trial court erred in law and fact by failing to take into account the pre-trial custody period in my sentence.

5. The appellant prayed that his appeal on sentence be allowed, sentence reviewed and time spent in remand custody taken into account.

6. This appeal was canvassed by way of written submissions.

Appellant's Submissions

7. The appellant submitted that the trial court failed to consider his mitigation pursuant to Section 216 and 316 of the *Criminal Procedure Code* in order to inform itself as to the proper sentence to be passed. He submitted that the sentence of 10 years may have been justifiable at the time of imposition that the key primary objective of sentencing may never be achieved by that lengthy period of incarceration.

8. The appellant urged the court to exercise the discretion provided under Section 6 of the *CPC* which states that the High Court may pass any sentence authorized by law. The appellant further argued that the prefix 'liable to' should not be construed as mandatory as it connotes that the penalty is only a liability upon the convicted person to serve the same. He relied on the holding in *Swabir Bukhet Labhed v Republic*, CA Cr App No 52 of 2018 to support his position that the trial court was duty bound to put his mitigation into consideration before arriving at the measure of punishment that was commensurate to the offence.

Respondent's Submissions

9. In the submissions dated March 1, 2023, considered the 16 grounds of appeal initially filed by the appellant's advocate and argued that they proved the case beyond reasonable doubt by establishing all the ingredients of the offence of attempted defilement namely that the victim was a child within the meaning of the *Children's act* and that the appellant was positively identified as the assailant and that the overt acts or steps taken by the accused in committing the act of defilement which was not committed.

10. On the ground that the trial court did not bear Section 19 of the *Oaths and Statutory Declarations Act* was not adhered to, the respondent submitted that on September 23, 2020 before the complainant testified, the court conducted voire dire examination, confirm that she did not possess sufficient knowledge and indicated that she was to give unsworn evidence thus Section 19 was fully complied with.

11. Regarding grounds 11, 12 and 14, the respondent contended that Section 9 (2) of the *Sexual Offences Act* provides for the minimum sentence and that the sentence against the appellant was proper and the conviction and sentence should be upheld.

Analysis and Determination

12. This being the first appellate court, this court is guided by the principles in *David Njuguna Wairimu v Republic* [2010] eKLR where the court of appeal held: -

> " The duty of the first appellate court is to analyze and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellant court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything 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 decisions."

13. After considering the grounds of appeal, records of trial court and submissions, issues for determination are: -

    i. Whether the sentence was harsh and excessive

    ii. Whether the appellant's mitigation as a first offender was considered

    iii. Whether the pre-trial custody period was considered in the appellant's sentence

Whether the appellant's mitigation as a first offender was considered**

14. The appellant when asked to give mitigation, he said, "I don't have anything to say." It was therefore erroneous for the trial magistrate to purport to have considered non-existent mitigation. The appellant having failed to give mitigation cannot say that his mitigation was not considered as there was none to be considered.

Whether the sentence was harsh and excessive and whether pre-trial custody period was considered in the appellant's sentence

15. Section 9 (1) and (2) of the *Sexual Offences Act* provides: -

    (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

    (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

16. The appellant was convicted for attempting to defile a 4 years old child. This was a vulnerable and innocent child who deserved the protection of the appellant as an adult. Such children of tender years require protection of the law against predators such as the appellant. The sentence of 10 years may not have been mandatory but it was necessary in the circumstances.

17. The appellant was arraigned in court on February 21, 2020 and released on cash bail on May 27, 2020. He was therefore in custody for a period of 3 months 6 days which period should be deducted from the sentence of 10 years.

18. Of concern to this court is the manner in which defence of the appellant was taken. When he was found to have a case to answer, the defence counsel Ms. Barayan Advocate indicated that the appellant had opted to keep quiet and say nothing in his defence but that he was going to call a witness. The

trial magistrate allowed the said witness 14 years old HS who gave sworn evidence. Section 211 of the *Criminal Procedure Code* provides: -

(1) At the close of the evidence in support of the charge, and after hearing such summing up, submission or argument as may be put forward, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused, and shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross-examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of those witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of the witnesses.

19. Section 306 of the *Criminal Procedure Code* provides: -

(1) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is no evidence that the accused or any one of several accused committed the offence shall, after hearing, if necessary, any arguments which the advocate for the prosecution or the defence may desire to submit, record a finding of not guilty.

(2) When the evidence of the witnesses for the prosecution has been concluded, the court, if it considers that there is evidence that the accused person or any one or more of several accused persons committed the offence, shall inform each such accused person of his right to address the court, either personally or by his advocate (if any), to give evidence on his own behalf, or to make an unsworn statement, and to call witnesses in his defence, and in all cases shall require him or his advocate (if any) to state whether it is intended to call any witnesses as to fact other than the accused person himself; and upon being informed thereof, the judge shall record the fact.

(3) If the accused person says that he does not intend to give evidence or make an unsworn statement, or to adduce evidence, then the advocate for the prosecution may sum up the case against the accused person; but if the accused person says that he intends to give evidence or make an unsworn statement, or to adduce evidence, the court shall call upon him to enter upon his defence.

20. Sections 211 and 306 (3) of the *Criminal Procedure Code* are consistent with the provisions of Article 50 (2) (a) of the *Constitution* of Kenya, 2010 to be presumed innocent until the contrary is proved, Article 50 (2) (i) to remain silent and not to testify during proceedings, Article 50 (2) (l) to refuse to give self-incriminating evidence. Where the accused has exercised those fundamental rights, then the advocate for the prosecution may sum up the case against the accused person. The accused is not expected to call a witness when he has opted to exercise the right to say nothing.

21. In *Andiazi & Another v Republic* [1967] EA 813, it was held that where an accused person elects to make an unsworn statement, he must do so before calling his witnesses. The procedure for conducting a defence is for an accused to give his statement of defence first.

22. It is the view of this court that the appellant having opted to exercise the right to keep quiet and say nothing in defence, it was erroneous for the trial court to allow the minor to testify as his witness more

so without *voire dire* examination being conducted. Such evidence had no probative value as she was adducing evidence to support a non-existence argument about the appellant.

23. In conclusion, this appeal has no merit and the same is dismissed. The appellant has a right to appeal within 14 days.

DATED, SIGNED AND DELIVERED IN OPEN COURT/ONLINE THROUGH MS TEAMS, THIS 22ND DAY OF JUNE 2023

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of: -

Ogwel- Court Assistant

Mr. Ngiri for Respondent

Appellant present in person

HON. LADY JUSTICE A. ONG'INJO

JUDGE