Chepkech v Republic (Criminal Appeal 34 of 2019)
[2023] KEHC 23344 (KLR) (12 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23344 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CRIMINAL APPEAL 34 OF 2019

AC MRIMA, J

OCTOBER 12, 2023

BETWEEN

JONAH CHEPKECH ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arising out of the conviction and sentence of Hon. D. Wangeci, (Senior Resident Magistrate) in Kitale Chief Magistrate's Court Sexual Offence No. 130 of 2017 delivered on 26th April, 2019)

JUDGMENT

Introduction:

1. The Appellant herein, Jonah Chepkech, was charged before the Chief Magistrates Court at Kitale in Sexual Offence No. 130 of 2017 (hereinafter referred to as 'the criminal case') with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act*. The particulars of the offence were that on 31st October, 2017 at (Particulars withheld) Location within Trans-Nzoia County, the Appellant intentionally caused his penis to penetrate into the vagina of RCC, a child aged 13 years old.

2. In the alternative, the Appellant was charged with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. The particulars of the offence were that on the same day and in same place, the Appellant intentionally caused contact between his penis and the vagina of RCC, a child aged 13 years old.

3. The Appellant denied the charges and he was tried. After a full trial, the Appellant was found guilty of defilement and was convicted accordingly. He was then sentenced to a prison term of 30 years.

The Appeal:

4. The Appellant was utterly aggrieved by the conviction and sentence. He initially lodged an appeal against both the conviction and sentence, but later abandoned the appeal on conviction and pursued the appeal on sentence.

5. In his Petition of Appeal, the Appellant challenged the sentence as being excessively harsh and extremely punitive. He urged this Court to set it aside and substitute it with a lenient and preferably non-custodial sentence.

6. The Appellant also filed written submissions in buttressing the above grounds.

7. The Respondent on its part relied on the proceedings at trial and submitted that the sentence was lawful and fair in the circumstances of the case.

Analysis:

8. This is an appeal against sentence.

9. The High Court in *Wanjema v. Republic* (1971) EA 493 laid down the general principles upon which the first appellate Court may act on when dealing with an appeal on sentence. An appellate Court can only interfere with the sentence imposed by the trial Court if it is satisfied that in arriving at the sentence the trial Court did not consider a relevant fact or that it considered an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. However, the appellate Court must not lose sight of the fact that in sentencing, the trial Court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate Court should be slow to interfere with that discretion.

    1. This Court has considered this matter with caution and care. The trial Court conducted the sentencing proceedings. The Appellant did not tender any mitigations. No Pre-sentence Report was called for.

    2. The Court then sentenced the Appellant to 30 years imprisonment.

12. Sentencing is a crucial part in the criminal process and the administration of justice. It is also discretionary. In exercising the discretion, a sentencing Court is called upon to be guided by a raft of considerations. Such are discussed at length in the *Sentencing Guidelines* published on 29th April, 2016 vide Gazette Notice No. 2970 by the Hon. The Chief Justice of the Republic of Kenya who is also the Chairperson of the National Council on the Administration of Justice (NCAJ) and in case law including the Supreme Court in Petition No. 15 of 2015 *Francis Karioko Muruatetu & another v Republic* [2017] eKLR.

13. This Court takes the position that even though sentencing remains discretionary on the Court and that the Court is not obliged to call for a Pre-sentence report, such a report, depending on the circumstances of a case, may greatly aid the Court in meeting the aims of sentencing. (See the *Francis Karioko Muruatetu & another v Republic* case (*supra*).

14. The *Probation of Offenders Act* as amended by Act Number 18 of 2018 defines 'pre-sentence inquiry reports' as follows: -

> Pre-sentence inquiry reports" means 'the reports on accused persons or offenders prepared by probation officers under this Act or any other law in force for purposes of criminal justice administration.

15. The significance of pre-sentence report, as can be discerned from The Probation and After Care Guidelines for Social Investigations and Pre-sentence Reports, cannot be gainsaid. It serves the following purpose;

Pre-sentence reports provide advisory information to the Courts with a view to the court making sentencing verdicts, including decisions on alternative measures to imprisonment.

The investigations are conducted with the aim of collating verifiable information and for writing various assessment reports including pre-sentence reports.

In sentencing decision making, social investigations help in:
Formulating plausible theoretical explanations of the criminal behaviour of an offenderUnderstanding the personality of the offender beyond the crime committedDeveloping a basis for intervention/ rehabilitationIdentifying resources required to effect change Identify and arrange for partnership with organizations which can aid the process of eventual rehabilitationGain knowledge of the culture and resources available in the local communitiesPropose cogent measures necessary to address the identified 'needs' and forestall any risk of reoffending, including through an appropriate sentence.

16. In Consolidated Petition No. 97, 88 of 2021 and 90 of 2021 and 57 of 2021, *Adan Maka Thulu -vs- Director of Public Prosecutions and, Kazungu Kalama Jojwa -vs- The Director of Public Prosecutions*, the Court spoke to sentencing in the following manner:

> .... As was held in Poonoo -vs- Republic, SCA 38 of 2010, sentencing an offender is not the mechanical application of letters and numbers in a formulaic table. It is the human deliberation of what is just punishment.
>
> ...the fifth principle is that a citizen ..... has a right to put in plea on mitigation to show that the imposition of the .....sentence is not warranted in his case. If the Court in considering all the facts and circumstances of the case comes to the conclusion that indeed is the case, the court would be perfectly entitled to read down the sentence .....

17. From the foregoing, this Court finds that, this was a case calling for the consideration of a Pre-sentence report before sentencing.

18. Having found as much, the following orders of this Court do hereby issue: -

    a. A Probation Report be availed to enable this Court determine whether the impugned sentence ought to be interfered with or not and for further orders.

    b. This matter is hereby fixed for a Mention on a date to issue.

    It is so ordered.

DELIVERED, DATED AND SIGNED AT KITALE THIS 12TH DAY OF OCTOBER, 2023.

A. C. MRIMA

JUDGE

Judgment delivered virtually and in the presence of: -

Jonah Chepkech, the Appellant in person.

Miss Kiptoo, Learned Prosecution Counsel instructed by the Office of the Director of Public Prosecutions for the Respondent.

Regina/Chemutai – Court Assistants.