Lekandie v Republic (Criminal Appeal E002 of 2023)
[2023] KEHC 23168 (KLR) (4 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23168 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KABARNET

CRIMINAL APPEAL E002 OF 2023

RB NGETICH, J

OCTOBER 4, 2023

BETWEEN

BENSON LEKANDIE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An Appeal on mitigation against sentence only of 20 years imprisonment meted upon the Appellant by Honourable J. Wanjala (CM) by a Judgement delivered at Kabarnet Chief Magistrate's Court in sexual offences Criminal case No. E049 of 2021)

JUDGMENT

Background

1. The Appellant, Benson Lekandie, 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 being that the appellant on the 15th day of April, 2021 at around 1800 hours in Baringo South Sub-County within Baringo County, intentionally caused his penis to penetrate the vagina of VN a child aged 14 years.

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 being that on the 15th day of April,2021 at around 1800hours in Baringo South Sub- County within Baringo County the appellant intentionally touched the vagina, breasts and buttocks of VN a child aged 14 years with his penis.

3. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. The prosecution availed 5 witnesses in support of the charges against the accused and after full trial, the Appellant was convicted of the main charged and was sentenced to serve twelve (20) years imprisonment.

4. Being aggrieved by the sentence passed by the trial court the appellant filed this appeal to this court setting out the following grounds: -

   i. That he is a first offender and thus begs for leniency.

   ii. That he did not plead guilty at the trial.

   iii. That he has a child that was born out of this crime to take care of.

   iv. That the said child's life is in danger after they were chased away by the parents.

   v. That the Honourable court be persuaded by the Rulings in the High court petitions No. E017 of 2021 at Machakos by Justice Odunga and Petition No. 97 of 2021 at Mombasa by Justice Stephen Githinji and Mativo.

   vi. That this Honourable court find that he is not interfering with the conviction but the sentence only.

   vii. That this Honourable court has the original jurisdiction under article 165(3)(a)(b) to review sentence and substitute it with an appropriate sentence as prayed herein.

   viii. That the sentencing policy guidelines published in 2016 by the Kenyan Judiciary established the mitigating circumstances that would lessen the custodial sentence.

   ix. That more grounds to be adduced at the hearing hereof.

5. The appellant prayed that this Honourable court be pleased to allow his appeal, set aside the sentence and review it to a lesser term of sentence and/or such other orders the court may deem fit to grant.

6. The appeal was canvassed by way of written submissions wherein the appellant filed written submissions on the 13th June, 2023. When the matter came up before court on the 5th July, 2021, the appellant informed the court that he agrees with the conviction and that his appeal is on the sentence meted upon him by the trial court. He urged the court to reduce his sentence and submitted that he was remanded for 7 months.

7. The State Counsel Ms Ratemo submitted orally in court that the sentence imposed against the appellant was 20 years imprisonment for the offence of defilement of a child aged 14 years. She submitted that the mandatory minimum sentence is 20 years imprisonment and the trial court in sentencing the appellant indicated the same. She submitted that this court had no discretion to reduce the sentence.

8. The State Counsel further submitted that the trial court exercised the right principles in sentencing the appellant and urged this court to dismiss this appeal. She submitted that the Appellant was arraigned in court on 22nd July, 2021 where he pleaded guilty at first and was granted mention on the 27th July, 2021 when he changed plea and was remanded from 22nd July, 2021 up to 29th July, 2021 a period of 7 days.

Analysis And Determination

9. In view of the fact that the Appellant has abandoned appeal on conviction, I consider the following as issues for determination: -

   a. Whether the sentence imposed was harsh and excessive

   b. Whether the application is entitled to remission as provided by section 333 (2) of the *CPC*.

10. Article 165(6) and (7) of the *Constitution* and section 362 as read together with section 364 of the *Criminal Procedure Code* provided for supervisory powers of the High court over the subordinate courts. Section 362 of the *Criminal Procedure Code* provide as follows:-

> " The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of any such subordinate Court."

11. In my view, section 362 should be read together with section 364 of the *Criminal Procedure Code* which specifies the orders the court can make in its discretion if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by sections 354, 357 and 358 of the *Criminal Procedure Code* if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

12. Sentencing is the discretion of the trial court but such discretion must be exercised judiciously and not capriciously. The discretion should be exercised within statutory provisions. In the case of *Shadrack Kipchoge Kogo v Republic* Criminal Appeal No. 253 of 2003(Eldoret), the Court of Appeal stated as follows:-

> " Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred"

13. I note that section 8(1), (3) of the *Sexual Offences Act* provides as follows:

> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (3) A person who commits am offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

14. The victim herein is a minor aged 14-year-old and was school going girl. There is no doubt that the accused who was/is an adult took advantage of her. The illegal act of the accused has no doubt left the minor with long lasting and the psychological effect. The trial court imposed the minimum sentence provided by statute which is twenty (20) years imprisonment. In my view the sentence impose herein was proper and unlawful.

15. On whether the trial court considered time spent in custody, section 333 (2) of the *Criminal Procedure Code*. Section 333 (2) is in the following terms:

> " Subject to the provisions of section 38 of the *Penal code* (cap 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

16. In the case of *Ahamad Abolfathi Mohammed & Another v Republic*, [2018] eKLR, the Court of Appeal when dealing with an appeal in which the High Court was faulted for, *inter alia*, substituting the sentence imposed on the appellants by the trial court and ordering that it shall take effect from the date of conviction by the trial court stated as follows:-

> " By dint of section 333 (2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. .... We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

17. Record show that the learned Trial Magistrate did not indicate that she had taken into account the period the Applicant had spent in custody during the trial; she did not order that the said period will form part of his sentence.

18. From the Records, the appellant first took plea on the 22nd of July, 2021 wherein he pleaded not guilty to the 1st count but pleaded guilty to the 2nd count and the matter was fixed for mention for facts on the 27th of July, 2021. On the 27th of July, 2021, the appellant requested that the charge be read over to him a fresh where upon he pleaded not guilty to all the charges and was granted bond of Kshs.300,000/ = with one surety.

19. On the 29th July, 2021, the file was brought to court for bond approval where a surety appeared in court and his application to stand surety was allowed hence the appellant was released on bond accordingly. The accused was out on bond till the 13th July, 2022 when he was brought under warrant of arrest and the court upon hearing both the appellant and the prosecution, cancelled the bond and ordered that the accused remain in custody until the case is determined.

20. The case was heard to its logical conclusion and the matter was finally determined on the 21st December, 2022. It is therefore clear that the appellant was in remand from 13th July, 2022 when his bond was cancelled up to 21st December, 2022 when the case was determined which is a period close to 6 months. This was not mentioned by the trial court.

21. Since section 333(2) of the *Criminal Procedure Code* is couched in mandatory terms, the period spent in custody must be factored in his sentence.

Final Orders: -

1 Appeal on sentence is hereby dismissed.

2 Period the appellant served in remand to be reduced from the sentence imposed by the trial court.

JUDGMENT DELIVERED, DATED AND SIGNED IN VIRTUALLY AT KABARNET THIS 4TH DAY OF OCTOBER 2023.

RACHEL NGETICH

JUDGE

In the presence of:

Mr. Kemboi - Court Assistant.

Ms Ratemo for State.

Appellant present.