Mwagaha v Republic (Criminal Appeal E059 of 2022)
[2023] KEHC 24291 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24291 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CRIMINAL APPEAL E059 OF 2022

KW KIARIE, J

OCTOBER 24, 2023

BETWEEN

KARISA KADENGE MWAGAHA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(From the original conviction and sentence in S.O. case number. E033 of 2022 of the Principal Magistrate's Court at Kaloleni by Hon. R. Amwayi–Senior Resident Magistrate)

JUDGMENT

1. Karisa Kadenge Mwagaha, the appellant herein, was convicted after pleading guilty to the offence of defilement contrary to section 8 (1) as read with section 8 (4) of the *Sexual Offences Act* No 3 0f 2006.

2. The particulars of the offence are that on diverse dates between August 2022 and October 2022 at Kaloleni sub-county within Kilifi County, intentionally and unlawfully caused his penis to penetrate the vagina of P.K.K, a child aged 16 years.

3. The appellant was sentenced to ten (10) years' imprisonment. He was aggrieved and filed this appeal against both conviction and sentence.

4. The appellant raised grounds of appeal as follows:

    a. That the learned trial magistrate erred in law and fact by failing to sagaciously draw an inference that the appellant's plea of guilty was not unequivocal and as such he was greatly prejudiced.

    b. That the sentence imposed was harsh and excessive since it was applied without considering the antecedents of the appellant or the facts and circumstances of the case.

5. The appeal was opposed by the state through M/S Alice Ochola, learned counsel. She raised the following grounds of opposition:

a. That the plea was unequivocal.

b. That the sentence meted was not excessive nor harsh.

6. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of *Okeno v Republic* [1972] EA 32.

7. In the leading case of *Joseph Marangu Njau v Republic* [2015] eKLR the Court of Appeal stated:

> Whereas all the perils a guilty pleader embraces may not much matter in petty offences or in mere infractions which do not present much risk to life or liberty, much is at stake in the offences that attract more serious penal consequences. In the case before us, the balance of the appellant's natural life stood to be spent behind bars upon conviction.

Cognizant of the ever-present dangers of misjustice [sic] in guilty pleas, the courts have been vigilant to act upon and to uphold them only when they are clear, express, unambiguous and unequivocal. When a plea of guilty is challenged as not having been entered unequivocally, it becomes a matter of law that permits the superior courts to entertain appeals notwithstanding Section 348 of the *CPC* aforesaid. The predecessor of this Court considered and authoritatively laid down the manner in which pleas of guilty should be recorded and the steps which should be followed, in the decades-old case of *Adan v Republic* [1973] EA 445, as follows;

> " (i) the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
>
> (ii) the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
>
> (iii) the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
>
> (iv) if the accused does not agree with the facts or raise any question of his guilt his reply must be recorded and change of plea entered;
>
> (v) if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

In the instant case, I will endeavour to establish if the plea adhered to the laid down procedure as indicated in the case of *Adan* (*supra*).

8. When the appellant was given a chance to mitigate, this is what he told the court in Kiswahili:

> I have nothing to say apart from that I am a first offender.

9. Though he contended that the proceedings ought to have been interpreted into Mijikenda language, I am persuaded that the appellant understood Kiswahili. Secondly, there is no language called Mijikenda. There are nine different, though related, languages. Thirdly, this was brought out in submission and was not one of the grounds of appeal. The appellant cannot be allowed to amend his grounds of appeal through the back door.

I find that the appellant understood the charge against him and that the trial court complied with the procedure of recording a plea of guilty.

10. Section 348 of the *Criminal Procedure Code* provides as follows:

> No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

I will therefore endeavour to establish the legality of the sentence bearing in mind that an appellate court would interfere with the sentence of the trial court only where there exists, to a sufficient extent, circumstances entitling it to vary the order of the trial court. These circumstances were well illustrated in the case of *Nillson v Republic* [1970] E.A. 599, as follows:

> The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364.

11. Section 8 (4) of the *Sexual Offences Act* provides as follows:

> A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

12. In the instant case the minor was aged sixteen years. The prescribed sentence is mandatory and any other sentence would be illegal. The prosecution did not seek the enhancement of the sentence or issue an appropriate notice to the appellant. I therefore have no basis to interfere with the sentence. The appeal is therefore dismissed.

DELIVERED AND SIGNED AT HOMA BAY THIS 24TH DAY OF OCTOBER 2023

KIARIE WAWERU KIARIE

JUDGE