Otieno v Republic (Criminal Appeal E016 of 2022)
[2024] KEHC 13542 (KLR) (25 October 2024) (Judgment)

Neutral citation: [2024] KEHC 13542 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CRIMINAL APPEAL E016 OF 2022

MS SHARIFF, J

OCTOBER 25, 2024

BETWEEN

GEOFFREY MUMIA OTIENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the conviction and sentence contained in the judgment of Hon J. MITEI (SPM) in Maseno Senior Principal Magistrate's Courts Criminal Case No. E023 of 2022 delivered on 20th April, 2022)

JUDGMENT

A. Case Background:

1. The Appellant was charged and convicted of the offence of defilement contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*, 2006. The particulars of the offence are that on 27th March, 2022 at about 1700HRS in Kisumu West Sub County within Kisumu County, the accused intentionally and unlawfully caused his penis to penetrate the vagina of AA a child aged 14 years.

2. The appellant faced an alternative charge of committing indecent act with a minor contrary to section 11(1) of the *Sexual Offences Act*, 2006. The particulars are that on 27th March, 2022 at about 1700HRS in Kisumu West sub county within Kisumu county, the accused intentionally and unlawfully touched the vagina of AA.

3. The appellant was convicted on his own plea of guilty of the offences and sentenced to 20 years imprisonment.

4. On mitigation, the appellant claimed that he was a first time offender, was unmarried and that the sex was requested for by the minor.

5. Being dissatisfied with the said judgment, the appellant lodged an appeal on the following grounds;

a. That the learned Magistrate erred in law and in fact in convicting the appellant on equivocal plea of guilty.

b. That the learned magistrate erred in law and in fact in reading the charge in Kiswahili and the facts in English without satisfying herself that the appellant understood the Kiswahili and English languages.

c. That the learned Magistrate erred in law and in fact by failing to take the necessary steps to ensure the appellant understood each and every ingredient of the charge.

d. That the learned Magistrate erred in law and in fact in relying on baptismal card as proof of age of the victim despite ordering an age assessment report on the victim.

e. That the sentence netted out on the appellant was harsh and excessive in the circumstances.

6. The respondent filed written submissions whilst the appellant did not.

B. Respondent's submissions

7. The respondent submitted that the conviction for the offence of defilement was based on the accused's voluntary and unequivocal plea of guilty and that the plea was properly recorded.

8. The respondent submitted that the charges were read out to the appellant in Kiswahili, a language he is proficiently conversant with.

9. The Respondent asserted that the learned Magistrate took the necessary steps to ensure that the appellant understood each and every ingredient of the charge and further warned the accused of the offence and afforded him sufficient time to reconsider his plea.

10. The Respondent affirms that the trial court properly evaluated the evidence as to age and satisfied beyond reasonable doubt that the age was 14 years then.

11. The Respondent submitted that the sentence imposed on the appellant was neither unlawful nor excessive and emphasized that using provisions of Odunga J. in Petition E017 of 2021.

Issues for consideration:

12. Upon consideration of the facts of this case, the grounds of appeal and submissions made by the parties, the following issues are pertinent for consideration:

i. Whether the plea of guilty that was recorded by the trial court was unequivocal;

ii. Whether the age of the victim was proved beyond reasonable doubt;

iii. Whether the sentence meted was harsh and excessive.

Analysis and Determination

13. As a first appellate court, this court is obligated to revisit and re-evaluate the evidence afresh, assess the same and make its own conclusions. This was asserted in the case of Pandya v R (1957) EA 336.

14. The appellant was convicted on his own plea of guilty wherefore the matter did not proceed on for trial.

Whether the plea of guilty recorded by trial court was unequivocal

15. The procedure for taking plea is provided under section 207 of the Criminal Procedure Code which states as follows;

> "(1) The substance of the charge shall be stated to the accused person by the court, and it shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement.
>
> (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:
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> Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded."

16. The law and practice related to the taking and recording of pleas of guilt was stated in the following iconic paragraph in the decision in Adan v Republic (1973) EA 445 at 446.

> "When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilty, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

17. The court is guided by the decision of the appellate court in the case of Alexander Lukoya Maliku – vs- Republic [2015] eKLR where the Court of Appeal stated that a first-time appellate court may only interfere with a guilty plea if the plea taken is ambiguous, imperfect, unfinished or that the trial court erred in treating it as a guilty plea or in instances of misapprehension or mistake or where the charge disclosed no offense known in law.

18. The records of the trial shows that the charge was read in Kiswahili and the accused answered in the same language, Kiswahili. The accused was further given time to think about his plea of guilty and possibly change it if need be. The accused affirmed his stance and was convicted on his plea of guilty. It is the finding of this court that the plea taking was done properly and in accordance to the Section 207 of the criminal procedure code.

19. On the issue of age of the victim, in defilement cases, proof of age is key in determining the conviction and sentence. In the case of Elias Kaingu Kasomo -vs- Republic Criminal Appeal 504/2010, the Court of Appeal held as follows:-

> " Age of the victim of the sexual assault under the *Sexual Offences Act* is a critical component. It forms part of the charge which must be proved in the same way as penetration in the cases of rape and defilement. It is therefore essential that the same be proved by credible evidence for the sentence to be imposed upon conviction will be dependent on the age of the victim...."

20. In the case of Edwin Nyambaso Onsongo v Republic [2002] eKLR, in which the court cited the case of Mwolongo Chichoro Mwanyembe v Republic, Mombasa Criminal Appeal No. 24 of 2015 (UR) the Court of Appeal held that

> " The question of proof of age has finally been settled by recent decisions of this court to the effect that it can be proved by documents, evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents, guardian or medical evidence among other forms of proof".

21. In the present case, the prosecution relied on a baptismal card as proof of age of the victim. This is in line with the above decision by the Appellate court in Mombasa in the Mombasa criminal appeal No.24 of 2015. This court concludes that the age was properly proved and is beyond reasonable doubt.

22. In an appeal on sentencing, it is important to set out the circumstances under which an appellate court interferes with the sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in S vs. Malgas 2001 (1) SACR 469 (SCA) at para 12 where it was held that:

> " A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate."

23. Similarly, in Mokela vs. The State (135/11) [2011] ZASCA 166, the Supreme Court of South Africa held that:

> " "It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served".

24. in S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6, Kwa Zulu Natal High Court held that:

> " It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in S v Scott-Crossley 2008 (1) SACR 223 (SCA) at para 35:
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> > " Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'
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> The judgment continues:
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> > " . . . [i]it is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society".

25. The Courts have always frowned on mandatory sentences that place a limitation judicial discretion. In S vs. Toms 1990 (2) SA 802 (A) at 806(h)-807(b), the South African Court of Appeal (Corbett, CJ) held that:

> " The infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

26. In my view, although there is nothing to prevent the courts from meting the statutory mandatory sentence in appropriate circumstances after taking into account the mitigation, the trial court erred in asserting that it is bound to mete out mandatory minimum sentence provided for by the *Sexual Offences Act*, 2006. The trial court failed to exercise its judicial discretion in sentencing contrary to the principle of separation of powers and judicial independence as enshrined under article 160(1) of the *Constitution* of Kenya, 2010.

27. Accordingly, I hereby dismiss the appeal on both conviction and sentence.

28. Orders accordingly

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF OCTOBER, 2024.

M. S. SHARIFF

JUDGE