Wambua v Republic (Miscellaneous Criminal Application E041 of 2023)
[2024] KEHC 12510 (KLR) (15 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12510 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

MISCELLANEOUS CRIMINAL APPLICATION E041 OF 2023

MW MUIGAI, J

OCTOBER 15, 2024

BETWEEN

JOHN KATUNGE WAMBUA ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

JUDGMENT

Chambers Summons

1. Vide an Application filed in Court on 10/07/2023 the Applicant sought the following orders;
    i. That this Court allows the petition of Appeal out of time to enable the Applicant to appeal against the conviction and sentence in the fore mentioned case for justice to prevail.
    ii. That the said Appeal has high chances of success if heard.
2. The Application is supported by the affidavit of the Applicant John Katunge Wambua filed in Court on even date stating that: he was unable to appeal on time as he was waiting for his relatives to hire a lawyer for him but they never did; he was not furnished with the Trial Judgment immediately before the stipulated period hence the delay to lodge his appeal; he now begs for leave to appeal out of time pursuant to Section 349 of the CPC and his appeal has high chances of success if heard and determined.
3. The Application is canvassed by way of written submissions.
4. On 20/9/2023 , the Court granted leave to appeal out of time to the Applicant.
5. The Appellant filed Memorandum of Appeal on 10/7/2023 and raised 10 grounds of Appeal.

Written Submissions

Appellant's Submissions

6. The Trial Magistrate erred in law when he considered conviction in Section 215 of the Criminal procedure Code but failed to consider Section 7 of the same Code whereby, he does not have a mandate all together with the first-class subordinate court to convict a person over seven years for a single charge as a Senior Principal Magistrate without seeking extended jurisdiction from the JSC as provided for in Section 8 of the same Code in denial of Section 221 on committal to High Court for sentence.

7. The Appellant submitted that Magistrate of Subordinate Court of 1st Class has limits as to the extent of custodial sentence to mete out as was decided in the case of *Joseph Ndai Musyoki vs Republic Machakos High Court Criminal Case 14 of 2007*.

8. Reliance is made in the case of Julius Amollo Oremo vs Republic Court of Appeal No.176 of 2010 NBI on sentencing Life Imprisonment instead of 7 years as prescribed by Section 7 of Criminal Procedure Code. The case of Okeno vs Republic was cited on the Appellate Court's role in re-evaluation of evidence.

9. Section 8 of Criminal Procedure Code allows the Judicial Service Commission to extend jurisdiction of subordinate Court.

10. The appeal against the sentence should succeed in its merit for the faults are not of the Appellant but the jurisdiction of the Trial Magistrate.

11. The case of Edwin Wachira & 9 Others vs Republic consolidated with Adan Mak Thulu vs DPP Pet. 90 of 2021; Robert Mwangi vs DPP & Petition No 57 of 2021 Kazungu Kalama Jojwa vs DPP Hon Mativo J(now JA) in Mombasa declared the impugned mandatory minimum sentences discriminatory.

Respondent's Submissions – dated 25/04/2024

12. The Appellant/Applicant appealed to this Court challenging conviction and sentence of the Trial Court on the following grounds:

    1. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding, identification parade was not conducted hence prejudiced the Appellant.

    2. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding, certain crucial prosecution witnesses were not availed.

    3. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding, the salient ingredients of the offence charged failed to suffice during trial.

    4. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding, the Court failed to give due regard to the material contradictions, inconstancies and discrepancies in the prosecution case leading to selective judgment.

    5. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding the charge sheet was fatally defective hence incurable under Section 214 of the Criminal Procedure Code.

    6. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding, prosecution evidence was in variance with the charges.

7. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding, the sentence was harsh and excessive.

8. That the Trial Court convicted and sentenced the Appellant of the offence charged notwithstanding, the prosecution failed to prove their case beyond reasonable doubt

9. That the Superior Court upheld the conviction and sentence of the offence charged without giving due consideration of the Appellants plausible defence, which ought to have been believed under Section 212 of the Criminal Procedure Code.

13. It is submitted that grounds 1 – 4 of the Applicant grounds of appeal do not apply in the circumstances since the Appellant pleaded guilty to the offence charged.

14. On the issue of the charge being defective the defect is curable under Section 382 of the Criminal Procedure Code.

15. The Trial Court convicted and sentenced the Appellant to serve 40 years imprisonment. The sentence is not excessive bearing in mind that the victim's age was 5 years.

16. The Appellant was convicted on his own plea of guilty therefore grounds 8 and 9 of the Appellant Grounds of Appeal do not apply in the circumstances.

17. Reliance is made in the cases of Bernard Kimani Gacheru vs Republic [2002] eKLR. In the case of Mokela vs the State (135/11) [2011] ZASCA 166 and in the case of Ogolla s/o Owuor -vs- Republic [1954] EACA 270.

18. It is finally submitted that in the instant case the sentence is appropriate and not excessive.

Determination

19. The Court considered pleadings and submissions and the issue for determination is on conviction and sentence.

20. The legal principles to be applied in plea taking in all criminal cases were well enunciated in the locus classicus case of Adan vs Republic [1973] EA 445 where the Court held as follows: -

    a. 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.

    b. The accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded.

    c. 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.

    d. If the Accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered.

    e. If there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

21. I have carefully considered the Trial Court record.

    On 3/2/2020, the Accused person was read to the substance of the charge and every element thereof of the Main Charge and Alternative Charge in Kiswahili.

    The Accused person responded as follows;

Main Count

Accused Person - Not True

Alternative Count

Accused Person -Not True

22. The Trial Court entered a plea of Not Guilty on the Main Count & Alternative Count on behalf of the Accused Person. Bond was granted at Ksh 200,000/- with 1 surety and Hearing was slated for 10/2/2020 in Court No 1. All exhibits were returned to the Prosecution.

23. The Prosecutor informed the Trial Court that the matter was a re-trial.

24. On 10/2/2020, the Accused person informed the Court that he wished to change plea from plea of not guilty to guilty. The Prosecutor prayed for time to prepare and the matter was slated for mention on 13/2/2020.

25. On 13/2/2020, the Prosecutor read the Facts to the Accused person and the Court in Kiswahili.

The Accused stated the facts are correct.

Court entered plea of guilty. The Accused was convicted on his own plea of guilty.

26. The Prosecutor indicated the Accused person had no previous records.

27. The Accused person did not offer statement in mitigation and he was found guilty as charged and sentenced to 40 years imprisonment with right of Appeal 14 days.

28. Section 348 of Criminal Procedure Code provides-

No appeal on plea of guilty, nor in petty cases

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.

29. From the above Trial Court record the procedure for taking pleas is provided in Section 207 of the Criminal Procedure Code to be as follows:

> "(1) The substance of the charge 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 plea agreement.
>
> (2) If the accused person admits the truth of the charge otherwise than by 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.
>
> 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."

30. This Court finds that the plea of guilt was unequivocal and the Accused person/now Appellant fully participated in the proceedings.

31. In the case of Wangila v Republic (Criminal Appeal E089 of 2022) [2024] KEHC 3028 the court stated as follows;

> " This court finds that the Appellant's plea was unequivocal. The process before the trial Court was procedural and lawful. The Appellant was not coerced or misled into pleading guilty. He knew what he was doing and despite being warned of the repercussions, he proceeded to plead guilty.
>
> In the circumstances, the conviction was proper. This Court will not entertain the invitation by the Appellant to alter the Trial Court's finding."

32. Therefore, Grounds 1-4 of the Appeal are not relevant/ applicable in these circumstances. The matter did not proceed to full Trial so as to allow the Prosecution present evidence to prove the Appellant committed the offence. Thus in the absence of trial the identification parade evidence calling of crucial prosecution witnesses, ingredients of the offence and contradictions and discrepancies do not apply as the Trial did not commence.

33. On Ground 4 the charge sheet was fatally defective as the Appellant was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8 (4) of *Sexual Offences Act*. The ODPP stated that the minor E.W.M. was aged 5 years old. The ODPP submitted that the proper Section ought to have been Section 8 (1) as read with Section 8 (2) instead of 8 (4) of the *Sexual Offences Act*.

34. Section 382 of the Criminal Procedure Code provides;

> Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons,warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:
>
> Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.

35. The instant case, the Appellant was charged with defilement of a child under 11 years old and in this case aged 5 years old then, the term of imprisonment was/is life imprisonment. The Charge read Section 8 (1) & (4) of *Sexual Offences Act* which attracts 15 years minimum for defilement of child of 16-18 years. The child herein being 5 years he would be charged and if convicted it would be for life imprisonment. Therefore, the defect was to his advantage and not prejudice; 40 years imprisonment rather than life imprisonment.

36. The Appellant submitted relying on Section 7 & 8 & 221 of CPC that he was sentenced by subordinate Court of 1st Class that could only sentence him to 7 years with requisite jurisdiction. The Chief Justice in conjunction with Judicial Service Commission enhances both pecuniary and territorial jurisdiction for Judicial Officers/Magistrates and provides special duties and assignments. These are released as Kenya Gazette Notices/Practice Guidelines. The Senior Principal Magistrate/Trial Magistrate has criminal jurisdiction exceeding 7 years prescribed in the Criminal Procedure Act which has been severally amended and relevant Legal Notices attached.

Sentence

37. The Appellant pointed out that sentence of 40 years was/is harsh and excessive; the sentence was based on defective charge sheet, without the Prosecution proving its case beyond reasonable doubt and without giving the Appellant's defence due consideration. Some grounds raised herein are in relation to a full Trial and therefore are not relevant here as the Appellant pleaded guilty on his own plea of guilt which was unequivocal.

Sentencing Guidelines and Case-law.

38. Nelson vs Republic [1970] E.A. 599, following Ogalo Son of Owuora vs Republic (1954) 21 EACA 270 where the court held;

> " The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. .....unless ..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."

39. In the case of Republic v Jagani and another (2001) KLR 590 the Court stated that the purpose of a sentence is usually to disapprove or denounce unlawful conduct as a means to deter the offender from committing the offence, to separate offenders from society if necessary, to assist in rehabilitation of offenders and in retribution by providing for reparation for harm done to victims in particular and generally to society.

40. In Kennedy Indiema Omuse v Republic Criminal Appeal No.344 of 2006, the court stated that the sentence imposed on an accused person must be commensurate with the moral blameworthiness of the offender and the trial court must first look at the facts and circumstances of the case in their entirety before settling for any given sentence.

Sentencing Guidelines 2016 provide; that during sentencing hearing in determination of sentence there are aggravating and mitigating circumstances to be taken into account

In Pre-Sentencing proceedings the Accused shall have the opportunity to provide mitigation.

Sentencing Guidelines 2023 provide;

Proportionality: The sentence meted out must be proportionate to the offending behavior meaning it must not be more or less than is merited in view of the gravity of the offence.

Accountability and Transparency: The reasoning behind the determination of sentence should be clearly set out and in accordance with the law and the sentencing and

Totality of the Sentence: The sentence passed for offenders convicted for multiple counts must be just and proportionate, considering the offending behavior as a whole.

41. This Court has considered the evidence on record proceedings and decision of the Trial Court and are in accordance with Section 207 CPC and Pre- sentence Proceedings as provided by Section 215 CPC. In the instant case, the Appellant did not provide any statement in mitigation despite the opportunity to do so being availed. The Prosecution confirmed he was a 1st Offender. This a mitigating factor and

also pleading guilty at the earliest opportunity. The Aggravating factors include, targeting of vulnerable group; a child of 5 years old; causing serious psychological effect on the victim.

Therefore, the aggravating and mitigating factors balanced out.

42. In the case of Chigongo Dzuye vs Republic Criminal Appeal at Malindi No 31 of 2022 Gatembu Lessit & Odunga JJA found;

> "In the case before us, the learned Trial Magistrate, in imposing life sentence, stated the offence was serious and the law prescribed minimum sentence for the same. The learned High Court Judge also found that pursuant to Section 8 (2) of the *Sexual offences Act*, the Court was mandated to impose life sentence. Therefore, none of the 2 Courts considered any mitigating circumstances such as the contention by the Appellant that he was a 1st offender which was not challenged by the Prosecution. We cannot be certain that the said sentence would have been imposed if mitigation was considered....."

43. If the Appellant was properly charged under Section 8 (1) & (2) of *Sexual Offences Act* he would have been sentenced to life imprisonment. Instead, as he submitted the charge sheet was defective it read defilement contrary to Section 8 (1) & (4) of the Act yet the child was 5 years old then and not 16-18 years old, the sentence was 40 years.

Disposition

1. In in this instance and by emerging jurisprudence and binding precedent of the above case; the sentence of 40 years is excessive in light of mitigating circumstances and is hereby reduced to 30 years imprisonment from the date of sentence by Trial Court.

2. The Appeal partly fails on conviction and partly succeeds on sentence.

JUDGMENT DELIVERED SIGNED & DATED IN OPEN COURT AT MACHAKOS HIGH COURT ON 15/10/2024 (VIRTUAL/PHYSICAL CONFERENCE).

M.W.MUIGAI

JUDGE