Omuko v Republic (Criminal Appeal E030 of 2023)
[2024] KEHC 15355 (KLR) (5 December 2024) (Judgment)

Neutral citation: [2024] KEHC 15355 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYAMIRA

CRIMINAL APPEAL E030 OF 2023

WA OKWANY, J

DECEMBER 5, 2024

BETWEEN

ZACHARY GEKONGE OMUKO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(From the Original Judgment and Sentence at the Principal Magistrate's Court in Keroka, MC (SO) E084 of 2022 delivered by Hon. B.M. Kimtai, Principal Magistrate on 21st November 2022)

JUDGMENT

1. The Appellant was convicted on his own plea of guilty for 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 charge were that, on diverse dates between 13th and 20th November 2022 at Moreremi Sub-location in Masaba South Sub-County within Kisii County, intentionally and unlawfully caused his genital organ namely penis to penetrate the vagina of C.K.O. a child aged 14 years.

2. The Appellant was, upon conviction, sentenced to serve thirty (30) years imprisonment. Aggrieved by the trial court's decision, he filed the instant appeal challenging both the conviction and sentence. He listed the following grounds of appeal in the Petition of Appeal: -

    1. That the Appellant pleaded guilty.

    2. That the learned trial magistrate erred in law and fact by convicting the Appellant without warning him of the consequences of pleading guilty given the weight of the case.

    3. That the learned trial magistrate equally erred in both law and fact by failing to comply with Article 50 (2) (a), (b), (e), (g), (h) and (k) of *the Constitution*.

4. That the learned trial magistrate faulted both in law and fact by notwithstanding (sic) that the Appellant did not understand which language was used in interpretation.

5. That the sentence was harsh and excessive given the nature of the sentence.

3. The Appellant also filed supplementary grounds of Appeal wherein he listed the following grounds: -

    1. That the trial magistrate erred both in law and fact when convicting the accused person by relying on the facts adduced in court which facts were not proved to the required standards of law given that the accused person pleaded guilty to the alleged charges.

    2. That the judgment of the court was a nullity as the trial proceeded without the court warning him that he had a right to a fair and impartial trial as enshrined in *the constitution* as per Article 50 (2) (h) i.e. the right to be represented by an advocate.

    3. That the appellant was not accorded a fair and impartial trial as guaranteed by Article 25 (c) of *the Constitution* as the trial commenced without the court having received a report as to his mental fitness to stand trial or prove to the court that his plea of guilty was voluntary.

    4. That the sentence awarded was highly excessive and punitive.

    5. That the sentence is illegal given that the complainant was 14 years and the learned trial magistrate lost directions by going against what the act stipulates.

4. The Appeal was canvassed by way of written submissions which I have considered.

5. The Appellant submitted that the trial court erred in failing to establish if he was fit to stand trial because of his age and the fact that he was intoxicated at the time of his arrest. He contended that his guilty plea was not unequivocal because he did not understand the charges against him as he had been made to understand that he would not go to jail if he pleaded guilty. He further submitted that he was not accorded the right to legal representation under Article 50 (2) of *the Constitution* in light of the seriousness of the offence. He argued that the sentence of 30 years imprisonment was harsh and excessive.

6. The Respondent, on the other hand, submitted that the Appellant was duly and repeatedly informed of the seriousness of the charge and the consequences of a guilty plea. The Respondent noted that the Appellant ably tendered his mitigation before the trial court before he was sentenced. The Respondent maintained that the Appellant fully understood the nature of the proceedings before the trial court.

7. On the legality of the sentence, the Respondent submitted that since the minimum sentence for the offence in question is 20 years imprisonment, 30 years imprisonment sentence was legal and appropriate. It was the Respondent's case that Section 348 of the Criminal Procedure Code does not allow appeals on conviction where an appellant pleads guilty to the offence.

8. This being a first appeal, this court is required to re-examine all the evidence that was tendered before the trial court, analyse and evaluate it and arrive at its own conclusions. The court must however bear in mind the fact that it neither saw nor heard the witnesses testify, a benefit which the trial court had. (See Okeno vs. Republic (1972) EA 32). Evidence was not presented before the trial court as the Appellant pleaded guilty to the main count. This court will however still be required to scrutinize the lower court record with a view to determining if the guilty plea was properly recorded.

9. I have considered the Record of Appeal and the rival submissions by the parties herein. The main issues for determination are:-

i. Whether the plea of guilty was unequivocal.

ii. Whether the sentence was legal and appropriate

i. Whether the Plea of guilty was unequivocal

10. Section 348 of the Criminal Procedure Code provides that: -

> 348. 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 and legality of the sentence.

11. In the case of Olel vs. Republic [1989] KLR 444, it was held that:-

> " Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the Criminal Procedure Code (cap 75) does not merely limit the right of appeal in such cases but bars it completely."

12. Section 207 (1) and (2) of the Criminal Procedure Code stipulates as follows on the manner in which plea should be recorded: -

> (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 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:
>
> 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.

13. The Court of Appeal discussed the manner in which a plea of guilty should be recorded in Ombena vs. Republic (1981) eKLR thus: -

> " In Adan v Republic [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full —
>
> 'Held:
>
> (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 raises 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 this case it is not certain that the prosecutor stated the facts, or that the appellants were given an opportunity to dispute or explain the facts or to add any relevant facts. The bald record that the prosecutor said "Facts are as per charge sheets", and that the charge was read over and explained a second time, is not in our view sufficient to enable us to be satisfied that the pleas were unequivocal. In the Adan case the court said, at p 447:

> "The statement of facts serves two purposes: it enables the magistrate to satisfy himself that the plea of guilty was really unequivocal and that the accused has no defence and it gives the magistrate the basic material on which to assess sentence. It not infrequently happens that an accused, after hearing the statement of facts, disputes some particular fact or alleges some additional fact, showing that he did not really understand the position when he pleaded guilty: it is for this reason that it is essential for the statement of facts to precede the conviction."
>
> We are aware of how busy magistrates and judges are in this part of the world and it may be that the record does not do full justice to the proceedings as they were conducted. However, we have to judge by the record as it is. In this case we are not satisfied that the pleas of the appellants can be safely accepted as unequivocal pleas of guilty, or that the convictions can safely be allowed to stand."

14. In the instant case, the trial court recorded the plea as follows:

21/11/2022

Before: Hon B.M. Kimtai – P.M.

DPP- Ogada

Court Assistant – Matano

Accused Present

Translation – Eng/Kiswahili/Ekegusii

The substance of the charge(s) and every element thereof has been stated by the court to the accused person in the language that he/she understands, who being asked whether he/she admits or denies the truth of the charge(s) replies in Kiswahili: -

Accused – It's true.

Court – Accused warned of pleading guilty and the sentence the charge attracts. The plea is read over to him a second time.

Accused – It's true.

Court – Accused informed of the consequences of pleading guilty to the charge and the sentence the said charge attracts for a third time. Plea to be read to him.

Accused: It's true.

Ogada – (Facts are read)...............

Accused - Facts are correct

Court – Plea of guilty and convict on own plea

Ogada - No records.

Accused on Mitigation – I have never been imprisoned before. I pray for forgiveness.

Court – I note the accused is a first offender and consider his mitigation. However, such incidences of men preying on young girls should be put to a stop. Accused is hereby sentenced to serve 30 years' imprisonment.

Right of Appeal – 14 days

B.M. KIMTAI – P.M. – 21/11/2022

15. From the above extract of the trial court's proceedings, it is clear that the Appellant was duly informed of the substance of the charge that he was facing. He responded to the charges in Kiswahili language. The proceedings also indicate that the interpretation was from English/Kiswahili and Ekegusii. I note that the particulars of the charge and the consequences of a guilty plea were explained to the Appellant at least three times and that he maintained a guilty plea in all the three instances.

16. My finding is that plea was properly recorded and that the trial court went to a great length to ensure that the Appellant fully understood the nature of the charges that he was facing by explaining to him the likely dire consequences of a guilty plea.

17. In Alexander Lukoye Malika vs. Republic [2015] eKLR the Court of Appeal identified the circumstances under which a court may interfere with a guilty plea as follows:-

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

18. I find that this case does not satisfy any of the conditions set out in the above cited case for the alteration of a guilty plea and the subsequent conviction. I am satisfied that the guilty plea was unequivocal.

19. The appellant has alleged breach of his rights to fair trial under article 50 of *the Constitution*. The said article stipulates as follows, at sub-article (2)(b)(g)(h) and (j) thereof: -

50

(2) Every accused person has the right to a fair trial, which includes the right-

(b) to be informed of the charge, with sufficient detail to answer it;

(g) to choose, and be represented by an advocate, and to be informed of this right promptly.

(h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of his right promptly.

(j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.

20. A perusal of the trial court's proceedings reveals that as respects sub article 2 (b), it is clear that the charge was read to the Appellant. As I have already stated in this judgment, he admitted the said charge and the facts were also read out to him whose particulars he confirmed to be correct. The charge sheet is on the file and it clearly discloses the parties and the offence charged.

21. The contents of a charge sheet are provided for under 134 Criminal Procedure Code which provides as follows:

> Every charge or information shall contain, and shall be sufficient if it contains, a statement of specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the offence charged.

22. I find that the charge that was read to the appellant was proper and complied with section 134 Criminal Procedure Code.

23. As regards sub article 2 (g), it is required that the trial court informs the accused person of his right to counsel promptly so that the accused can make an informed decision whether not to procure the services of an advocate or may qualify to apply for legal aid from the committee on legal aid. *Chacha Mwita vs. Republic Criminal Appeal No 33 of 2019*, Mrima J. held as follows on the above right.

> " Courts have dealt with the need to avail such information to an accused person to enable him/her make a choice on legal representation. In Pett v Greyhound Racing Association (1968) 2 All ER 545 Lord Denning presented himself thus: -It is not every man who has the ability to represent himself on his own. He cannot bring out the point in his own favour or the weakness in the other side. He may be tongue-tied, nervous, confused or wanting in intelligence. He cannot examine or cross-examine witnesses. We see it every day. A Magistrate says to a man; 'you can ask any questions you like;' whereupon the man immediately starts to make a speech. If justice is to be done, he ought to have the help of someone to speak for him and who better than a lawyer who has trained for the task. In South Africa in Fraser v ABSA Bank Limited (66/05) (2006) ZACC 24; 2007 (3) SA 484 (CC); 2007 (3) BCLR 219 (CC) the Constitutional Court had the following to say: -Without the recognition of the right to legal representation in section 26(6), the scheme of restraint embodied in POCA might well have been unconstitutional. However, the right embodied in section 35(3)(f) of *the Constitution* does not mean that an accused is entitled to the legal services of any counsel he or she chooses, regardless of his or her financial situation....In Kenya, the Supreme Court in Petition No 5 of 2015 Republic -vs- Karisa Chengo & 2 others [2017] eKLR while dealing with various aspects of the right to a fair hearing under article 50 of *the Constitution* stated as follows: -the right to legal representation......under the said article, is a fundamental ingredient of the right to a fair trial and is to be enjoyed pursuant to the constitutional edict without more.

24. In the instant case, the Appellant pleaded guilty to the offence and this means that the case did not proceed to full trial. My understanding of the decision in the above cited case is that legal representation would have been necessary if the matter had proceeded to full hearing. I am not persuaded that the Appellant was prejudiced in any manner during the trial as he opted to admit the charge even in the face of advice by the court on the consequences of his guilty plea. My humble view is that, in the circumstances of this case, informing the Appellant of his right to legal representation would have served no useful purpose. Moreover, under sub-article 2 (h), one would only be entitled to an advocate assigned by the state, at state expenses, if it is demonstrated that substantial injustice would result. This

means that the said right is not automatic but is qualified in that one has to demonstrate that injustice will be suffered.

25. In David Njoroge Macharia vs. Republic (2011) eKLR the Court of Appeal expounded on the issue of what constitutes substantial injustice as follows:-

> " Article 50 of *the Constitution* sets out a right to a fair hearing, which includes the right of an accused person to have an advocate if it is in the interests of ensuring justice. This varies with the repealed law by ensuring that any accused person, regardless of the gravity of their crime may receive a state appointed lawyer if the situation requires it. Such cases may be those involving complex issues of fact or law; where the accused is unable to effectively conduct his or her own defence owing to disabilities or language difficulties or simply where the public interest requires that some form of legal aid be given to the accused because of the nature of the offence. We are of the considered view that in addition to situations where "substantial injustice would otherwise result". Persons accused of capital offences where the penalty is loss of life have the right to legal representation at state expenses."

26. In the instant case, I reiterate that no trial was conducted that would have necessitated the requirement of the presentation of the Appellant's defence as he pleaded guilty to the charge. Furthermore this was a straightforward charge of defilement that did not involve any complex issues that would have required interpretation by legal counsel. I find that in the circumstances of this case, the issue of legal representation does not arise as the Appellant was clearly determined to admit his guilt even in the face of consistent caution from the trial magistrate.

27. I further find that the Appellant's claim that he was not fit to stand trial due to intoxication was merely a diversionary tactic as the record shows that he was arrested on 20th November 2022 and presented in court on 21st November 2022 when he took plea. My take is that even assuming that the Appellant was intoxicated at the time of his arrest, it is most unlikely that he was still intoxicated at the time that he took the plea.

ii. Whether the sentence was appropriate

28. Section 8 (3) of the *Sexual Offences Act* provides thus: -

    (3) A person who commits an 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.

29. It is trite that sentencing is at the discretion of the trial court and that an appellate court will not ordinarily interfere with the exercise of such discretion unless it is shown that by a trial court acted on some wrong principle or overlooked some material factor. This is the position that was taken in Nelson vs. Republic [1970] E.A. 599, where the court relied on the decision in Ogalo Son of Owuora vs. Republic (1954) 21 EACA 270 and held 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."

30. In the present case, I note that the trial court considered the Appellant's mitigation and the seriousness of the offence before passing the 30 years' imprisonment sentence. This Court is aware of the principles which should govern it when considering whether or not to disturb a sentence by the trial court. In R vs. Ratilal Amarshi Lakhani [1958] EA 140, 141, it was held thus: -

> " It has been laid down in India that the High Court does not exercise the power of enhancing a sentence in every case in which the sentence passed is inadequate. The mere fact that the High Court would itself, if it had been trying the case, have passed a heavier sentence than that which the trial Court has passed is no reason for enhancing the sentence. . The High Court will interfere only where the sentence passed is manifestly and grossly inadequate. R vs. Inderchand (1934) 36 Bom L R 174. The same principle guides this Court when exercising the power of enhancing sentences imposed, as was in R vs. Inderchand under the penal Code.

31. Judiciary Sentencing Guidelines (2016) stipulate as follows at paragraph 21 thereof where an accused person pleads guilty: -

    21. Accused Persons Pleading Guilty

        21.1 The overall objective of the criminal justice system is to convict those who have committed offences. Thus persons pleading guilty contribute towards meeting this objective as well as enabling the victim to obtain justice without unreasonable delay. It also protects a victim from re-victimisation that may occur during trial. Pleading guilty also saves the court's time

32. Paragraph 28.3 of the said guidelines further outlines mitigating circumstances which ought to lessen the term of a custodial sentence as follows: –

    5. Age, where it affects the responsibility of the individual offender.

    6. Playing of a minor role in the offence.

    7. Being a first offender.

    8. Remorsefulness.

    9. Commission of a crime in response to gender-based violence.

    10. Pleading guilty at the earliest opportunity and cooperation with the prosecution and the police.

33. Paragraph 23.9 further expounds on how the court should balance both mitigating and aggravating circumstances thus: -

    (4) Presence of both aggravating and mitigating circumstances: Where both exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.

34. I have considered the rights of the victim and the aggravating circumstances on the one hand against the rights of the Appellant and the mitigating circumstances on the other hand. I find that, by pleading guilty to the offence, the Appellant saved the court the time and resources that could have been spent

on a full trial. I also note that the Appellant was a first offender and that he was an elderly man aged 60 years as at the time he committed the offence.

35. It is my considered view that even though the sentence of 30 years imprisonment is legal, it is nonetheless excessive and harsh in the circumstances of this case. I therefore find merit in the Appellant's appeal on sentence. I find guidance in the decision in the case of S vs. Scott-Crossley 2008 (1) SACR 223 (SCA) at para 35 wherein it was held that: -

> " 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 overriding ones. ....It is trite that it is in the interest of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society."

36. In the end, while I dismiss the appeal against the conviction, I find that the appeal, on sentence, is merited and I therefore allow it and set aside the sentence of 30 years imprisonment and substitute it with a sentence of 20 years imprisonment.

37. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 5TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE