MK v Republic (Criminal Appeal E011 of 2020)
[2021] KEHC 213 (KLR) (10 November 2021) (Judgment)

Neutral citation: [2021] KEHC 213 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL E011 OF 2020

MW MUIGAI, J

NOVEMBER 10, 2021

BETWEEN

MK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal against the sentence of the Senior Resident Magistrate Hon. G.O Shikwe at Kithimani, in Criminal Case No. 15 of 2018 on 24th September 2020)

JUDGMENT

BACKGROUND

1. The Appellant was charged with the offence of Incest contrary to Section 20(1) of the *Sexual Offences Act* No.3 of 2006 the particulars being that on the 10th day of April, 2018 in Yatta Sub-County within Machakos County, being a male person, caused his penis to penetrate the vagina of MKM a female person who was to his knowledge his daughter.

2. The Police also preferred an alternative charge of Committing an Indecent Act with a Child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006 the particulars being that on the 10th day of April, 2018 in Yatta Sub-County within Machakos County, intentionally touched the vagina of MKM a child aged 17 years with his penis.

3. The Appellant pleaded not guilty on both counts, the trial was conducted. In his judgement, the learned Trial Magistrate found the Appellant guilty of the offence of incest and accordingly convicted him as required under Section 215 of the *Criminal Procedure Code* (CPC).

4. The Court record shows that the learned Trial Magistrate considered the Probation Officer's report which recommended for a non-custodial sentence. In the premise, sentenced the Appellant to a custodial sentence of 10 years.

APPEAL ON SENTENCE

5. The appeal herein is against sentence only, the grounds of appeal being that:-

   a. THAT I am first offender hence pray for leniency

   b. THAT I am deeply remorseful repentant and regret my action.

   c. THAT prior to my arrest and subsequent conviction, I was the first born in the family and my family depended and had high hopes on me.

   d. THAT I have learned the value of patience and uprightness.

   e. THAT I pray to court to treat the entire period that I have been in custody as a punishment already enough and reduce the sentence to time served.

   f. THAT I am ready to carry on the newly acquired virtues to the society if given chance.

   g. THAT I also pray for non-custodial or a community based sentence to give me a chance to provide for my family and for the nation building.

   h. THAT may the Honourable court issue any other orders it deems fit in my circumstances of which I promise to abide.

SUBMISSIONS:

6. The Appellant filed two sets of written submissions on 2nd March 2021 and 23rd July 2021.In summary, the Appellant pleads with this court to determine his grounds of appeal based on his mitigation that he is a first offender, he is remorseful after conviction, his age and the court should consider the time already he has served in custody from the date of his arrest on 29th April 2018.

7. It is submitted that the sentence meted against him by the learned Trial Magistrate is manifestly harsh and excessive. According to the Appellant, the 2 years 5 months he spent in remand custody was not considered before he was sentenced.

8. Reliance is placed on Section 333(2) of the CPC and the cases of *Abolfathi Mohamed & Another vs. R Cr. Appeal No. 135 of 2016* and in *Joseph Mwaura Macharia & Others vs. R. Cr. Appeal No. 488 of 2012*. As regards him being a first offender, reliance is placed on the case of *Sebastian Okweru Mrefu vs. R. Pet. No. 151 of 2012* and others. As to whether he is remorseful, it is submitted that he has gone through a lot of agony, dismay and psychological torture as well as his family and friends. He prayed for forgiveness and that be given a chance to start afresh. He urged the court to impose a more lenient sentence or any other lesser or most appropriate sentence. He told this court that his family and friends are ready to accept him back to the society after he was reformed by the Prison administration. The Appellant urged this court to allow the grounds of appeal.

9. On the Respondent's part, Prosecution Counsel Felister Njeru opposed this appeal on the basis that the Appellant was the biological father of the Complainant yet it was not the first time that the Appellant had sexually assaulted the Complainant. Further that the Probation Officer in his pre-sentencing report deemed the Appellant unsuitable for non-custodial sentence. According to Counsel, the Respondent has only served 5 months imprisonment since he was sentenced. Counsel asserted that the proper parameters for sentencing were observed by the learned Trial Magistrate hence the appeal against the sentence lacks merit. The sentence of 10 years imprisonment should be upheld. Counsel urged the Court to dismiss the appeal.

   DETERMINATION

The Court considered both the Appellant's and Respondent's written submissions. The Appellant approached this court on appeal on sentence with regard to (2) issues namely;

a. A non-custodial sentence.

b. Computation of sentence to consider time spent in remand as provided under Section 333(2) CPC.

10. Section 20(1) of the Sexual Offences Act provides that:-

(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

11. The above provision requires the offender to serve a sentence of imprisonment of any length not being less than ten years if the complainant is above the age of 18 years and if the complainant is under the age of eighteen years old to serve life imprisonment.

12. Based on the evidence on record, the complainant, MKM testified that she is 18 years old. The Appellant does not dispute the age of the Complainant. It is therefore clear that under Section 20(1) of Sexual Offences Act, the age of the Complainant is necessary when the court is sentencing the offender.

13. The learned Trial Magistrate meted the Appellant a sentence of 10 years imprisonment taking into account the complainant stated during the hearing that she was 18 years old. The Appellant contends that the sentence is manifestly harsh and excessive.

14. As to whether this court may interfere with the sentence, the case of *Wanjema vs. R. (1971) E.A. 493* Trevelyan J. provides;

> " An appellate court should not interfere with the discretion which a Trial Court has exercised as to the sentence unless it is evident that it overlooked some material factors, took into consideration some immaterial fact, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case."

15. The Court of Appeal in *D W M vs. Republic [2016] eKLR*, while construing the phrase "shall be liable to imprisonment for life" held that:-

> " As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "Shall be liable to imprisonment for life" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment

and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."

16. The Court of Appeal in *Selestine Mureithi Mugo vs. Republic [2020] eKLR* stated that it is now trite since the Supreme Court's decision in Francis Muruatetu & Anor vs. R [2017] eKLR that sentencing is a judicial function and the court should apply its mind to the matter and not merely impose sentence mandatorily prescribed.

17. It follows therefore that despite the indication that the sentence to be meted on an offender under the provision is imprisonment for life, the Trial Court has the discretion taking into consideration factors that include remorsefulness and age of the offender and if the victim is proved to be under 18 years old to impose a lesser sentence in the circumstances.

18. In the grounds of appeal, the Appellant pleads that the court should consider that he is a first offender, he is deeply remorseful, he is the first born in his family which depended on him, he is patient and upright now, he is ready to carry the newly acquired virtues to apply in the society and he should be given a chance to provide for his family and nation.

19. The Supreme Court in *Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR*:

> " [19] In Kenya, many courts have highlighted the principles of sentencing. One such case is the High Court criminal appeal decision in Dahir Hussein v. Republic Criminal Appeal No. 1 of 2015; [2015] eKLR, where the High Court held that the objectives include: "deterrence, rehabilitation, account-tability for one's actions, society protection, retribution and denouncing the conduct by the offender on the harm done to the victim. See The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1."

20. The Trial Magistrate on 24th September, 2020 considered and held as follows;

> " I have considered that the recommendations of the Probation Officer Report (POR) in that the offender is deemed unsuitable for a non-custodial sentence. In the premises, I sentence the offender to a custodial term of ten years."

21. In mitigation, the Appellant asked for forgiveness and pleaded for an opportunity to take care of his 4 small children. The Trial Magistrate took the mitigation into account and imposed minimum sentence of 10 years imprisonment as the complainant stated she is over 18 years.

22. The Trial Magistrate considered the Appellant's mitigation and the Pre-sentence Report by the Probation Officer and found from the evidence adduced in the trial, and the report and mitigation the Appellant was not suitable for a non-custodial sentence. This court upholds the trial magistrate holding on custodial sentence.

23. The Appellant asserted that the court should treat the entire period he spent in custody as enough punishment to him and reduce the sentence. The Appellant contends that the learned Trial Magistrate failed to factor in the period spent in custody as required under Section 333(2) of CPC.

24. The Court of Appeal in *Ahmad Abolfathi Mohammed & Another Criminal Appeal No.135 of 2016 (2018)eKLR* that:

> " 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. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person."

25. It is therefore clear that the learned Trial Magistrate should have noted the time the Appellant spent in custody before sentencing. On the face of the record, I note that the learned Trial Magistrate only took into account the recommendations by the Probation Officer by the pre-sentence Report presented for custodial sentence and sentenced the Appellant to 10 years imprisonment.

26. In the appeal against sentence, the Appellant stated he is now a reformed person and he is remorseful, repentant and regret his actions. The Appellant also deposed that he has now acquired virtues and learned the value of patience and uprightness and prayed for non-custodial sentence.

27. Machakos G. K. Prison has not filed a report to support the Appellant's reformation. What was before the court is the Pre-sentencing report by a Probation Officer wherein the officer concluded that the Appellant had not taken responsibility for his action and was not remorseful hence a custodial sentence is appropriate to assist the Appellant reform.

28. Odunga J. in *KNN vs. Republic [2020] eKLR*, the Learned Judge at paragraph 10 stated as follows with regard to Probation Report;

> " I must however state that the probation report being a report which is not subjected to cross-examination in order to determine its veracity, is just one of the tools the court may rely on in determining the appropriate sentence. It is therefore not necessarily binding on the court and where there is discrepancy regarding the contents of the report and information from other sources such as from the parties themselves and the prison, the court is at liberty to decide which information to rely on in meting its sentence. To rely on the probation report as the gospel truth, in my view, amounts to abdication of the court's duty of adjudication to probation officers. While the report of the probation officer ought to be treated with great respect, it is another thing to accept it hook, line and sinker. It however ought not to be simply ignored unless there are good reasons for doing so."

29. The Learned Judge went on further to state at paragraph 12 that:-

> " ....in undertaking a resentencing the court must consider whether the circumstances of the accused during his/her incarceration have changed for the better or for worse. It is therefore important that not only should a report be availed to the court concerning the position of the victim's family and the offender's family but also the report from the prison authorities regarding the conduct of the offender during the period of incarceration.

30. I note in the Probation Report; the Appellant's aunt and his advocate are in support of a non-custodial sentence but the local administration considers that the security of the Appellant's wife

and complainant would not be guaranteed. According to the officer the Appellant has not exhibited any remorse. The Complainant is opposed to idea of non-custodial sentence since she fears that the Appellant might try again to mistreat her and commit the offence. In the court proceedings the Complainant stated that the Appellant had done the act on her for four months secretly before he was caught. According to the learned Trial Magistrate, the complainant evidence was corroborated by her mother and was believable and unshaken.

31. The Appellant pleads with the court to take into account the period he spent in custody as enough and reduce the sentence. In the Court's view the sentence of 10 years imprisonment for life is not harsh and excessive and it is the minimum for the offence of incest that the Appellant was charged with. It was within the stipulated punishment under Section 20(1) of the Sexual Offence Act. The Court will not disturb the sentence.

32. A report from the Prisons was necessary to be availed to this Court. The Appellant pleads that he is a first offender. According to the Probation Officer, he has no previous conviction record. Despite lack of a report from the Prisons, the Appellant would benefit from remission of his sentence if he exemplifies good behavior while serving his sentence as provided for under Section 46 of the *Prisons Act*, Chapter 90.

33. In *Brown Tunje Ndago vs. Commissioner-General of Prisons [2019] eKLR* it was held;

> "there is no reason why a convict with a determinate or definite prison term should not benefit from remission. For a prisoner, remission is one of the beacons of hope of life outside prison. It is a motivating factor towards reformation. There is no reason why a person who commits murder, robbery with violence or "simple robbery" should be denied remission if they have been sentenced to serve fixed prison terms. It is true that these are indeed very serious offences. They are, however, not the only grave offences. The gravity of the offences cannot be good reason for denying these convicts remission for those convicted of grave offences like sexual offences are entitled to remission of their sentences. It is therefore discriminatory and indeed unconstitutional to deny remission of sentence to a certain category of prisoners serving definite sentences."

34. Under Article 50(2) (p) of the *Constitution* states that:

> "(2) Every accused person has the right to a fair trial, which includes the right-
>
> (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

DISPOSITION

35. According to the Information/Charge sheet, the Appellant was arrested on 29th April 2018 and was brought to Court on 30th April 2018 and thereafter remained in custody until he was sentenced on 24th September, 2020, after a period of 2 years and 5 months in remand.

36. Pursuant to Section 333(2) of the Criminal Procedure Code, the 10- year sentence will be computed to take into account 2years and 5 months and to run from 29th April 2018.

Judgment accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 10TH DAY OF NOVEMBER, 2021.

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

Mutua Koti - Appellant present

Mr. Mwongera - For Respondent

Geoffrey - Court Assistant