Isiongo v Republic (Criminal Appeal 140 of 2019)
[2025] KECA 407 (KLR) (28 February 2025) (Judgment)

Neutral citation: [2025] KECA 407 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 140 OF 2019

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

FEBRUARY 28, 2025

BETWEEN

BENJAMIN OCHIENG ISIONGO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Siaya (D. S. Majanja J.) dated 19th February 2018 in HCCRA No. 78 of 2016)

JUDGMENT

1. Benjamin Ochieng Isiongo, ("the appellant"), has challenged the dismissal of his first appeal by the High Court, that he had lodged against his conviction and sentence by the Senior Resident Magistrate's Court at Ukwala, ("the trial court") for the offence of defilement. The particulars of the offence were that on 10th December 2015 within Siaya County, the appellant intentionally caused his penis to penetrate the vagina of M.A.O, a child aged 15 years. He also faced alternative charge of committing an indecent act on M.A.O, the particulars being that on the same day and place, he committed the indecent act by touching the vagina of M.A.O with his penis. At the conclusion of the trial, the trial court found the appellant, guilty of the main count. Upon his conviction he was sentenced to twenty years imprisonment.

2. The prosecution's case albeit in an abridged version was as follows. After a voire dire examination, M.A.O who testified as PW1, was sworn and recounted the events of 10th December 2012 at around 11:00 am when she had gone to grind maize at the local posho mill. On her way back, she encountered the appellant whom she knew as Babu. Despite his entreaties, she did not respond. He followed her, removed the flour from her head, questioning her silence. He then pulled her off the road towards a nearby river, threatened to kill her if she screamed, and proceeded to assault her sexually. She, thereafter, escaped and sought refuge at the house of a neighbour, AOO, PW2.

3. PW2 in turn testified that at around noon, M.A.O came to his house crying and recounted the sexual assault on her by the appellant. PW2 contacted M.A.O's mother, F.A PW3, who immediately came and took her to Ndere Health Centre for treatment and at the same time reported the incident at Ugunja Police Station.

4. The investigating officer, IP Caroline Sagana, PW4, confirmed that PW3 reported the case of defilement at the Police Station. She investigated the case by taking witness statements. Satisfied that the offence had been committed, she preferred the charges against the appellant. During the plenary hearing of the case, she also tendered in evidence M.A.O's birth certificate, showing she was aged 15 years at the time of the incident.

5. PW5, Senior Sergeant Dickson Chebii, facilitated the appellant's arrest on 12th December 2015 at 3:00 am with the assistance of local administration police officers, M.A.O and F.A.

6. PW6, Howard Okeyo, a clinical officer at Ambira Hospital, examined M.A.O. The examination revealed a reddened and painful labia with non intact hymen with a whitish discharge at the vaginal entry. He concluded that there was forceful vaginal entry. He also produced the P3 form in evidence prepared by the clinical officer who examined the appellant, confirming that he had no injuries and was in good mental health.

7. In his unsworn statement of defence, the appellant denied knowledge of the offence and recounted his arrest by administration police officers on 12th December 2015 at 3:00 am and his subsequent examination at Ambira Hospital before he was charged with an offence he knew nothing about. He did not call any witnesses.

8. The trial court as already stated, found the appellant guilty of the main offence, convicted him, and sentenced him to twenty years imprisonment. The appellant was aggrieved by the conviction and sentence, hence proffered an appeal to the High Court at Siaya being Criminal Appeal No 78 of 2016.

9. Having considered the appeal, D. S. Majanja, J. found the appeal devoid of merit and accordingly dismissed it in its entirety.

10. The appellant was again not satisfied with the High Court judgment and has thus preferred this second and perhaps last appeal which, however, is limited to sentence only. In his memorandum of appeal, the appellant blames the High Court for not considering that: he was a first-time offender and expressed remorse; the period he spent in custody while sentencing him in contravention of section 333 (2) of the *Criminal Procedure Code*; at the time of his arrest, he was a young man under peer pressure and lacked legal knowledge; he had participated in several rehabilitation and reform programs within the prison, demonstrating his readiness to reintegrate into society.

11. He reiterated and expounded on the foregoing grounds, when the appeal came up for plenary hearing on the court's virtual platform on 8th October 2024.

12. In response, the respondent through Mr. Okango, learned Senior Principal Prosecution Counsel submitted that the appeal should be dismissed as it does not raise any issues of law. He argued that the issue of sentence was not raised in the High Court and is being improperly introduced at this stage. He cited the Supreme Court's decision in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISI-A) & 3 Others (Amicus Curiae) (Petition E018 of 2023) [2024] KESC 34 (KLR), which held that this Court can only determine issues first raised before the High Court and reaffirmed the legality of mandatory minimum sentences in the *Sexual Offences Act*.

13. The respondent noted that the trial court considered the appellant's mitigation, and sentenced him to 20 years imprisonment, being the minimum sentence under the *Sexual Offences Act*. The sentence was therefore, lawful and justified. Regarding the period spent in remand, counsel acknowledged the legal obligation under section 333 (2) of the *Criminal Procedure Code* for the trial court to consider time spent by an accused in remand custody while sentencing, but hastened to add that the appellant was granted bond shortly after his arrest and arraignment in court and conducted his trial whilst on bond. So that only the days before processing the bond should be considered when computing time for purposes of the period of imprisonment.

14. In this appeal, the appellant is only aggrieved with the sentence. Contrary to the submissions by counsel for the respondent, the issue of sentence was raised and canvassed in the High Court. Accordingly, we have jurisdiction to interrogate it. The principles guiding an appellate court in deciding whether to interfere with the sentence imposed by the trial court were articulated by this Court in the case of Bernard Kimani Gacheru vs. Republic, Cr. App. No. 188 of 2000 wherein it stated the law as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

15. We also draw inspiration from the case of Joseph Mureithi Kanyita vs. Republic [2017] eKLR where this Court stated:

> " In this appeal, the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant."

16. We reiterate that the appellant was convicted and sentenced to a period of 20 years imprisonment which is the minimum prescribed sentence as per the provisions of section 8 (1) (3) of the *Sexual Offences Act*. The sentence was the only one available and therefore legal. We are satisfied that the appellant has not demonstrated any ground to warrant our interference with the sentence imposed. We are also well aware of the decision of the Supreme Court in Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISI-A) & 3 Others (supra), which affirmed the legality of mandatory minimum sentences under the *Sexual Offences Act*. On the whole, we are satisfied that the sentence imposed was proper, legal, and appropriate and we cannot therefore disturb it.

17. However, section 333 (2) of the *Criminal Procedure Code* provides in mandatory terms, inter alia:

> "Subject to the provisions of section 38 of the *Penal Code*, every sentence shall be deemed to commence from and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person

sentenced under sub-section (1) has prior, to such sentence shall take account of the period spent in custody."

18. This Court, in the case of Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR stated that:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333 (2) of the *Criminal Procedure Code*. 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. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

Similarly, in the earlier case of Bethwel Wilson Kibor vs. Republic [2009] eKLR, the Court expressed itself as follows:

> "By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija, J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009, he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

Further, guidance has been provided by the Judiciary Sentencing Policy Guidelines to wit:

> " The proviso to section 333 (2) of the *Criminal Procedure Code* obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

19. We also note that the respondent conceded to this aspect of the appeal. It is clear from the foregoing that, the law requires courts to take into account the period a convict spends in remand custody pending and during trial while sentencing. In this instance, the appellant was arrested on 12th December 2015 and presented to court on 14th December 2015 but was released on bond pending trial on 28th December 2015. By virtue of section 333 (2) of the *Criminal Procedure Code*, this duration of 16 days, when the appellant was arrested and before he was released on bond during trial, ought to have been considered during sentencing. It was not. We would therefore uphold the sentence of 20 years but direct that the period from the date of his arrest and when he was released on bond pending trial being 16 days will be deducted from the period of imprisonment. To that limited extent only, the appeal on sentence succeeds.

DATED AND DELIVERED AT KISUMU THIS 28TH DAY OF FEBRUARY, 2025.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Deputy Registrar