Dimo v Republic (Criminal Appeal 144 of 2019)
[2025] KECA 536 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 536 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 144 OF 2019

MSA MAKHANDIA, HA OMONDI & LK KIMARU, JJA

MARCH 21, 2025

BETWEEN

FREDRICK ODHIAMBO DIMO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Siaya written by (D. S. Majanja, J.) and delivered by (T. W. Cherere, J.) dated 19th February 2018 in HCCRA 49 of 2016)

JUDGMENT

1. Fredrick Odhiambo Dimo, the appellant herein, was charged in Ukwala Senior Resident Magistrate's court with the offence of gang rape contrary to section 10 of the *Sexual Offences Act*. The particulars were that on 30th July 2015 at Ugenya sub county of Siaya County, having common intention to penetrate the vagina of EAP[1], a child aged 13 years was in the company of WOM, who intentionally caused his penis to [1] Initials used to protect her identity penetrate the vagina of the minor. The appellant denied the charge, was tried; convicted; and sentenced to 15 years imprisonment.

2. The appellant then appealed to the High Court, arguing that his conviction was based on insufficient, unreliable and discredited evidence, and that the prosecution did not prove its case. In dismissing his appeal, the learned judge held that although the minor was defiled by another person, the appellant was part of the scheme in facilitating for the eventuality.

3. Dissatisfied with the outcome, the appellant then lodged this second appeal on grounds that:

    a. the learned judge erred in law and facts by not considering that the medical evidence adduced in court was too weak hence exonerated me from the alleged offence.

    b. the 1earned judge erred in law and fact by not considering his defense evidence which was cogent enough to deserve an acquittal.

c. the learned judge erred in law and fact by basing his conviction and sentence on evidence that was marred with contradictions and inconsistencies.

d. the learned judge erred in law and fact by convicting and sentencing him on mere allegations whereby no investigation were carried out; and if it was carried out, then it was shoddy.

4. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. This being a second appeal, this Court is mindful of its duty as a second appellate court, that a 2nd appeal must only be confined to points of law and this Court will not interfere with concurrent findings of the two courts below unless based on no evidence. The test to be applied on a second appeal is whether there was any evidence on which the trial court could find as it did. See Karingo & 2 Others vs. Republic [1982] eKLR.

5. A summary of the evidence that was presented at the trial, and evaluated and analysed by the High Court begun with EAP, testifying as PW1, that on 29th August 2015 she escorted her cousin, who was the appellant's daughter, to their home where she spent the night. The next day as PW1 was preparing to go home, the appellant stopped her and told her to stay. PW1 recalled that the appellant and one Boyi kept on staring at her and later at around 6.00pm the appellant requested PW1 to accompany him to the shops and on the way the appellant grabbed her by the neck and took her to a nearby house where he left her with Boyi, who proceeded to sexually assault her. Later on, the appellant came and took her back home.

6. Judith Okoth, the Clinical Officer who testified as PW2 examined PW1, and found strangulation marks on her neck. She also observed bruises on both labia and the hymen was broken; a whiteish discharge from the genitals; and a vaginal swab revealed epithelial cells. PW2 formed the opinion that there was penetration.

7. PW3, Corporal Nixon Lukwa of Ukwala Police Station, acted on the report and arrested the appellant.

8. RA who lived with PW1 confirmed that she left for her uncle's place and did not return home; the next day she went to look for PW1 and found her in the company of the appellant, who pretended to be drunk. PW1 narrated to her how the appellant took her to a certain house where she had the sexual encounter.

9. The appellant when put on his defence denied committing the offence. He testified that on 30th August 2015 he left PW1 at his mother's house, in the company of other children; and went to his own house where his friends had come to console him on the loss of his wife. PW3 called him later and asked to meet the appellant at his mother's house and when he got there PW1 was not there and on asking where she was, she was told that she had left with Boyi. The appellant went looking for PW1 and found her in Boyi's house and he took PW1 to her grandmother.

10. The appellant called three witnesses; SAD, DW2 the appellant's mother testified that PW1 passed by her house, requested for a sweater, then left to go and look for PW1 at the mentioned house; thereafter the appellant arrived looking for PW1 but she was not present; her 10 year old granddaughter HAO, DW3 (who is the appellant's daughter) told the trial court that while they were harvesting rain water in the company of PW1 and one Sharon, a certain man arrived and begun talking to PW1; PW1 then requested them to go back to the house; and thereafter left with the same person, who was not known to DW3.

11. FAO, DW4, a daughter in law to DW2, was visiting, and she too testified that the complainant left with a certain man; then later the appellant arrived and said he was looking for her.

12. The High Court in its considered opinion held that there was no doubt that PW1 was sexually assaulted by one Boyi; pointing out the essence of gang rape is that there must be more than one perpetrator who acts in association with others, even though not all of them carry out the actual rape or defilement. In determining whether the appellant was part of the scheme to take the PW1 to Boyi, the learned judge traced the chain of events, from the moment the appellant asked PW1 to accompany him to the shops, how while on the way turned on her, strangled her and threatened her before taking her to a house where Boyi defiled her. The learned judge concluded that the appellant was complicit and affirmed the appellant's conviction and sentence.

13. At the plenary as well as in his written submissions, the appellant pursued the appeal on sentencing only, on the basis that under the provisions of section 333(2) of the *Criminal Procedure Code*, the two courts below, ought to have taken into consideration the period he spent in remand custody while awaiting trial; and ought to have directed the same be factored in computing the period to be served. The State did not oppose this prayer.

14. Section 333(2) of the *Criminal Procedure Code* provides:

> 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.
>
> It is clear from the above proviso that the law requires courts to take into account the period the convict spent in custody.

15. The provisions of section 333(2) of the *Criminal Procedure Code* was the subject of the decision in Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR where this Court held 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."

16. This Court in Bethwel Wilson Kibor vs. Republic [2009] eKLR 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."

17. According to The Judiciary Sentencing Policy Guidelines:

> " 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".

18. This Court is well guided by the above authorities. We take note that the appellant has been in custody since his arrest which was on 26th September 2015, and pursuant to section 333(2) of the CPC, the sentence will commence from 26th September 2015 when the appellant was arrested.

The upshot of this is that the appellant's appeal on sentence is allowed to that limited extent.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 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

DEPUTY REGISTRAR