JOO v Republic (Criminal Appeal 120 of 2018) [2024] KECA 559 (KLR) (23 May 2024) (Judgment)

Neutral citation: [2024] KECA 559 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 120 OF 2018

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

MAY 23, 2024

BETWEEN

JOO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Siaya (Makau, J.) dated 28th April, 2016 in HCCRA No. 24 of 2015)

JUDGMENT

1. The appellant, JOO, was arraigned before the Senior Principal Magistrate's Court, Siaya, charged with a single count of incest contrary to section 20(1) of the *Sexual Offences Act*. He pleaded guilty to the charge whereupon he was sentenced to life imprisonment.
2. Dissatisfied with both the conviction and sentence, the appellant approached the High Court sitting at Siaya with an appeal. In short, his appeal complained that his plea of guilty was equivocal; and the sentence imposed was manifestly harsh and excessive.
3. In a judgment delivered on 28th April, 2016, the High Court (Makau, J) dismissed the appeal on both conviction and sentence. Still dissatisfied, the appellant is before this Court with a second appeal. Like at the High Court, in his self-crafted memorandum of appeal as well as in his submissions, the appellant raises the self-same two grounds of appeal as follows:
    a. That the learned Judge erred in law and fact when he upheld the conviction and sentence of life imprisonment "but failed to note that the sentence awarded was in mandatory form [and, therefore] the court did not exercise discretion but failed to appreciate recent developments....and constitutional provisions..."

b. That the learned Judge erred in law and fact in upholding the conviction and sentence yet his plea of guilty was not unequivocal.

4. The appellant filed written submissions in support of his appeal. The State did not file any submissions but learned prosecution counsel, Mr. Onanda, appeared during the hearing of the appeal and the Court granted him leave to orally oppose the appeal. During the plenary hearing, the appellant wholly relied on his written submissions.

5. We have carefully considered the record of appeal; the contending submissions by the appellant and the State; and the law. This is a second appeal. As such, our jurisdiction is limited under Section 361(1) of the *Criminal Procedure Code* to matters of law only. See *Samuel Warui Karimi vs. Republic* [2016] eKLR.

6. Both the two issues raised by the appellant – whether his plea of guilty was unequivocal and whether the mandatory sentence imposed on him is lawful – are legal issues and are, therefore, properly before us for determination.

7. The procedural background to this appeal is as follows. The appellant was arraigned before the learned magistrate, Hon. M.S. Kimani, on 14th July, 2015. The record shows that the substance of the charge and every element thereof was read over and explained by the court to the appellant in Dholuo language, which he affirmed he was fluent in. Upon being asked to state how he pleaded, the appellant told the court in Dholuo: “It is true.”

8. The facts, as reproduced in the proceedings, were read over and translated in Dholuo to the appellant whereupon he informed the learned magistrate that the charges were not correct. The learned magistrate proceeded to enter a plea of not guilty. Since the victim, who was a minor, was in court, the learned prosecutor requested the court if it could immediately take the evidence of the minor. The learned magistrate, aware that she was proceeding on transfer and would not be in a position to conclude the hearing, referred the case to the Head of Station (Court 1) for directions and possible reallocation.

9. The case was mentioned before the Hon. H. Wandere the same day (14th July, 2015). The charges were read afresh in English and translated to Dholuo to the appellant. Again, the record indicates that the appellant answered in Dholuo: “It is true.” The facts were read to him a second time, in great detail and translated to Dholuo. The prosecutor produced the age assessment report as proof of the age of the survivor; and the discharge summary from the hospital where the survivor was treated as well as the P3 form as proof of the fact of penetration respectively.

10. Upon being asked the truthfulness of the facts as read to him, the appellant stated in Dholuo: “I admit the facts.” The learned magistrate, then, proceeded to enter a plea of guilty. She, then, asked the appellant to offer his mitigation – which he did. The sentence was subsequently imposed.

11. Before us, the appellant argues that the plea was, in fact, equivocal. The appellant argues that the steps that should be taken in recording a guilty plea, as laid down by this Court in *Adan v Republic* [1973] EA 445 were not followed. In particular, he says that the record is not clear what language was used; that he was not cautioned before he pleaded guilty; and that the record does not show that the findings of the doctor on penetration were recorded as part of the facts as read out to him – that it is not enough to merely produce the documents without incorporating their findings in the record to make up part of the record.

12. We have reproduced at length the procedural history of the case at the trial court because we believe that the record clearly shows that the correct procedure in recording a plea of guilty was followed. First,

the record is quite clear that the charge was read to the appellant in English and translated into Dholuo. Second, the record shows that after initially stating that the facts were not correct before Hon. M.S. Kimani, the file was referred to Hon. Wandere, and, this time, after the facts were read a second time, the appellant stated in Dholuo that he admitted the facts.

13. There is simply no parsing of the record that can lead to any other conclusion other than that the appellant was fully aware of the charges he was facing; what the context of those charges were; and what the essential facts made up the context and charges. It is, also, quite clear that the appellant's plea of guilt was voluntary, knowing, categorical, and unequivocal.

14. What of the "innovative" argument by the appellant that the plea of guilty should be deemed equivocal because the facts, as recorded, did not incorporate the doctor's findings on penetration? It fails both on its factual incorrectness as well as on the legal force of the argument. First, the record reads as follows: "The doctor concluded that the hymen was not intact. There was evidence of penetration." There cannot be any clearer incorporation of the doctor's findings than this. Second, there is no requirement in our law that the doctor's findings must be formalistically incorporated in the facts as read to an accused person who has pleaded guilty to a sexual offence. The requirement is that the facts should clearly and truthfully establish the offence charged. In this case, the offence was incest with a minor. The facts only needed to clearly demonstrate that there was a prohibited relationship between the appellant and the survivor; that the survivor was a minor; and that the appellant penetrated the minor. The facts, as read, are dripping with these essential facts.

15. We, therefore, find that the appellant's plea of guilty was informed, voluntary, and unequivocal and affirm the High Court's finding on conviction.

16. We will now turn to the grievance against sentence. The appellant complains that both the learned magistrate and the learned Judge erred by sentencing him to a mandatory sentence. He argues that they did not exercise discretion because they wrongly treated the penalty in section 20 of the *Sexual Offences Act* as mandatory – but that our recent decisions have clarified that the sentences in the *Sexual Offences Act* are, in fact, not mandatory. He also complains that he was not permitted to mitigate; and that if he had mitigated, it is likely that his sentence would have been different.

17. We begin with the appellant's last complaint: that he was not permitted to mitigate. That claim is plainly inaccurate. The record is quite clear that the learned magistrate gave him an opportunity to mitigate after the prosecutor informed the court that he was a first offender. The appellant then stated the following "in mitigation":

> " I am all alone in my home. No body to help me. I pray for a non-custodial sentence."

18. The record also shows that, contrary to the appellant's claim, the learned magistrate considered his mitigation. The court stated:

> "Mitigation considered. Although the Accused is a first offender, the offence committed is serious. This was his daughter aged below 18 years of age. He has robbed her of her innocence in a most vile manner. A custodial sentence is most appropriate to send out a warning to all other people out there who would commit similar offences. He pleaded guilty to the charge and also to the facts as read by the state counsel. Accused will serve a life jail term (sic). Right of appeal 14 days."

19. It is plain that the trial court considered both the appellant's mitigation as well as the mitigating factors in the case i.e. the fact that the appellant was a first offender and had pleaded guilty to the charge. It is also clear that in so doing, the court considered what was the appropriate sentence to impose,

exercised its discretion, and imposed a sentence of life imprisonment. It is, therefore, not true that the court considered the sentence under section 20 of the *Sexual Offences Act* as mandatory in imposing the sentence that it did. To this extent, the appellant's reliance on our emerging jurisprudence on mandatory sentences is simply misguided. His case does not fit the mould here: the trial court took in mitigation; considered it; and then fashioned the sentence that it judicially considered was appropriate given the circumstances of the offence, the offender and the survivor.

20. We are unable to say that the sentence imposed was manifestly excessive or harsh given the factors the learned magistrate pointed out. Instead, we agree with the respondent that the objective seriousness of the case and the aggravating circumstances make the life sentence a commensurate sentence.

21. However, we note that our most recent jurisprudence has declared life imprisonment unconstitutional due to the indeterminate nature of the sentence. See *Frank Turo v. Republic* - Kisumu Criminal Appeal No. 157 of 2017 and *Evans Nyamari Ayako v. Republic* – Kisumu Criminal Appeal No. 22 of 2018. In the *Evans Nyamari Ayako Case*, this Court, in applying Articles 27 and 28 of the *Constitution* to sentencing, declared that life imprisonment means a determinate sentence of thirty (30) years imprisonment.

22. Consequently, it is only to the limited extent of translating the indeterminate sentence of life imprisonment imposed here to a determinate sentence of thirty (30) years imprisonment that we allow the appellant's appeal. In that regard, in accordance with our decision in *Evans Nyamari Ayako v Republic* (*supra*), translating life imprisonment to a term sentence of 30 years' imprisonment, we allow the appellant's appeal on sentence only to the limited extent of substituting the sentence of life imprisonment that was imposed on the appellant with a term sentence of 30 years' imprisonment. The sentence of 30 years shall be computed to begin on 14th July, 2015 in accordance with section 333(2) of the *Criminal Procedure Code* since the appellant has been in custody since that day.

23. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF MAY, 2024

HANNAH OKWENGU

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JUDGE OF APPEAL

H.A. OMONDI

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR