Gitonga v Republic (Criminal Appeal 160 of 2017)
[2024] KECA 1069 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KECA 1069 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CRIMINAL APPEAL 160 OF 2017

W KARANJA, J MOHAMMED & LK KIMARU, JJA

JULY 26, 2024

BETWEEN

GILBERT GITONGA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Meru (the then S. Chitembwe, J.) dated 15th September 2017 and delivered by A.Mabeya, J. on 5th October 2017 in HC Criminal Appeal No. 2 of 2017)

JUDGMENT

1. The appellant, Gilbert Gitonga, was convicted and sentenced to 20 years' imprisonment for the offence of defilement contrary to Section 8(1) & (4) of the *Sexual Offences Act*.

2. The particulars of the charge were that on 11th June, 2014 in [Particulars Witheld] District within Meru County the appellant intentionally caused his penis to penetrate the vagina of PG (name withheld) a child aged 12 years.

3. The appellant pleaded not guilty to the charge and the prosecution called six (6) witnesses in support of the said charge.

4. PG (PW1) gave sworn evidence and testified that she was in class 4 and knew the appellant as her neighbour. She testified that on 11th June, 2014 at 6:00 p.m she was fetching water in front of a bathroom when the appellant appeared from behind, closed her mouth and nose and dragged her to the bathroom, closed the bathroom door and defiled her. It was her testimony that she screamed when the appellant let go of her mouth when he picked his clothes and run away. It was PW1's further testimony that after the ordeal, she put on her clothes and went to report to the landlady who she refered to as her grandmother, named CK (PW2). It was PW1's testimony that PW2 took her to the appellant's house and that he (the appellant) was found inside his house and was taken out by members

of the public, handcuffed and the Chief was called. PW1 testified further that she was taken to hospital for treatment and that the police took away the clothes she had worn at the time she was defiled.

5. CK (PW2) testified that she was the landlady and that the appellant was her tenant as well as PW1 and her family. PW2 testified that on the material day, PW1 went to her while crying and informed her that she was at the water point when the appellant held her and took her inside the bathroom. PW2 testified further that on enquiring what happened, PW1 refused to divulge further details. PW2 further testified that she went to the appellant's house and asked him what he had done to PW1. PW2 testified that PW1 narrated to her what the appellant had done to her. It was PW2's further evidence that in the process of getting information from the appellant members of the public gathered around them and subsequently called the Chief. PW2 testified that the appellant was arrested by members of the public who were present.

6. In cross-examination PW2 testified that since PW1 was crying she checked her private parts and saw that she was bleeding. It was PW2's further testimony that she took PW1 to the hospital for examination and treatment. PW2 testified further that the appellant had rented and lived in her rental house for three months while PW1 and her family had rented and lived in PW2's rental house for 9 months.

7. FM (PW3) testified that he is PW1's father and that she was aged 14 years and was in primary school in class 4 at the time of testifying. PW3 testified that he recognised the appellant as his neighbour living on the same plot with him. That on the material day, he was not at home but was called by PW2's daughter and later called by the Chief and requested to hurry home and on arrival, he found the appellant handcuffed. Further that the Chief asked him to find out what had happened to his daughter, PW1, and on enquring, PW1 narrated to him that the appellant had defiled her in the bathroom.

8. Saberina Kaimatheri (PW4) was a clinical officer from Kanyakine District Hopsital who testified and produced the P3 form for PW1. PW 4 also produced the treatment notes. It was her evidence that PW1's pant had a white discharge, that PW1 took a day to seek treatment and was treated at Mikumbune District Hopsital. PW6 testified that her observation was that PW1's hymen was broken, her vagina was bleeding and that she had bruises on the vulva. It was PW6's evidence that from her observation, she formed the opinion that PW1 had penetrative sexual intercourse.

9. Joel Muriungi Kirima, the Chief, testified as PW5. It was his testimony that he recognised the appellant and PW1 and testified that on the material day, he received a call from one of his community members urging him to go to a place called market junction and upon arrival, he found PW1 crying while in pain and the appellant was also present and had been arrested by members of the public. It was PW5's testimony that on enquiring, PW1 informed him that the appellant had accosted her in the bathroom and defiled her. PW5 further testified that he called the Officer Commanding Station (OCS) of Nkubu Police Station who sent his officers to the scene and the appellant was taken to Nkubu Police Station while PW1 was taken to the hospital.

10. Cylene Mueni No. xxxxx (PW6) testified that she was attached at Nkubu Police Station and that the file was investigated by her colleagues who were transferred to other stations. PW5 testified that after investigation the appellant was charged with the offence of defilement. PW5 produced the dress and pant that PW1 wore on the material day.

11. After the close of the prosecution case, the appellant was found to have a case to answer and was put on his defence. He gave a sworn evidence but called no witness. The appellant denied committing the offence. It was his evidence that at the material time he was not at the scene. He testified that the testimony of PW1 was untrue as he could not hold PW1's mouth and nose and at the same time undress and also remove her clothes with his two hands only. It was his further testimony that he and

the Chief (PW4) were not on good terms. It was his further testimony that he also differed with PW3 over bhang as PW1's father gave PW1 bhang to sell to customers in her father's absence. The appellant further testified that there were contradictions in the prosecution evidence, one being the age of the complainant as she was said to be 12 years in some instances and 13 years in other instances.

12. The appellant further testified that the Clinical Officer, PW4 testified that he examined PW1 after 5 days but it was not stated when PW1 was treated.The appellant admitted that he was a neighbour to PW1 and that PW2 was their landlady. It was his testimony that on the material day he was at lmenti Tea Factory from 8.00am upto 6.30pm and was arrested at his home at 7.30pm.

13. The appellant was aggrieved by the conviction and sentence and appealed to the High Court at Meru (S. Chitembwe, J.). In a judgment dated 15th September, 2017 and delieverd on 5th October, 2017, the High Court confirmed the appellant's conviction and upheld the sentence.. In upholding the conviction and sentence the 1st appellate court held that the evidence of PW1 was believable and was corroborated by the evidence of PW2 and PW4. The High Court also found that the defence raised by the appellant raised no doubt on the prosecution case and consequently found the conviction to be proper and the sentence lawful.

14. Dissatisfied by the judgment of the High Court, the appellant lodged a second appeal to this Court against both the conviction and sentence.

Submissions

15. At the hearing of the appeal, the appellant was acting in person while learned counsel, Ms. Nandwa was representing the State. The appellant had filed amended grounds of appeal raising grounds, inter alia:

    i. That the mandatory minimum sentence imposed fetters the discretion of courts in meting out sentences;

    ii. whether the trial court and the 1st appellate Court had legitmate power to give the appellant the benefit of being a first offender;

    iii. whether the sentence of twenty (20) years imprisonment was to run from the period that the appellant was in remand as provided by section 333(2) of the *Criminal Procedure Code*

    iv. That this Court be pleased to reduce the sentence imposed by the trial court and upheld by the 1st appellate court and the same to begin from the time the appellant was in custody as provided by section 333(2) of the *Criminal Procedure Code*.

16. On the basis of the amended grounds of appeal, the appellant informed the Court that he wished to abandon the appeal against conviction and is only appealing against sentence. The appellant submitted that the provision of Section 8(3) of the *Sexual Offences Act* gives a mandatory minimum sentence in which the two courts below had no other option but to impose the prescribed punishment depriving them of their legitimate power of discretion. The appellant further submitted that Section 216 of the *Criminal Procedure Code* provides for a court to consider evidence as it thinks fit in order to inform itself properly before passing a sentence. The appellant asserted that in the circumstances, the mandatory sentence prescribed is a direct violation of the power given to court under Section 216 of the Criminal Procedure Code. The appellant further submitted that the mandatory sentence imposed prevented consideration by the court of the peculiar circumstances of the case in order to arrive at an appropriate sentence. The appellant further submitted that a mandatory sentence reduces the court's

sentencing to a level of a rubber stamp, placing reliance in the case of *S vs. Mofokeng* 1999(1) SACR 502 (W) at 506 (d), where Stegmann, J. opined that:

> "For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."

17. The appellant relied on the case of *S vs Mchunu and Another*(AR24/11) [2012] ZAKZPHC 6, where the Kwa Zulu Natal High Court held that:

> "It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:
>
> > '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 over-riding ones.'
> >
> '. . . it is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'

18. The appellant further submitted that he was not given the benefit of being a first offender and that the sentence imposed on him was not ordered to begin from the time he was in remand as provided by Section 333(2) of the *Criminal Procedure Code*. The appellant prayed that the sentence be reduced to a lesser severe punishment which he will be able to serve and be set at liberty. The appellant urged as follows:

> The appellant urged this Court to allow the appeal against sentence.

19. Ms. Nandwa, learned counsel for the State opposed the appeal and submitted that the prosecution proved its case beyond reasonable doubt and that all ingredients of the offence of defilement, that is, age of the complainant, penetration and identity of the perpetrator were proved. Counsel submitted that PW1 testfied that she was 14 years at the time of the incident, she was taken for age assessment a year after the incident and it was estimated that her age was between 14 -15 years. Counsel further submitted that through the evidence of PW1, PW2 and PW4 it was proved that there was penetration. On identification of the perpetrator, counsel submitted that the appellant was positively identified by PW1 through recognition. Counsel further submitted that PW1 testified that the appellant was her neighbour, a fact confirmed by PW2 who was the landlady of both PW1's family and the appellant. Counsel asserted hat the appellant also acknowledged that PW1 was his neighbour. Further, PW3's evidence corroborated that of PW1 that the appellant was their neighbour and was well known to them.

20. On the sentence, counsel submitted that the sentence imposed on the appellant was lenient considering that the appellant took advatange of the fact that PW1 was a school going child and he was physically stronger than her. Further, that the appellant took advantage of the fact that that no one was in the

vicinity and he defiled PW1 in the bathroom. Counsel relied on this Court's case of *Bernard Kimani Gacheru vs Republic* [2002] eKLR on the issue of sentencing that:

> "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."

Counsel urged this Court to dismiss the appeal for lack of merit.

Determination

21. We have considered the record of appeal, the submissions, the authorities cited and the law. As this is an appeal against sentence, the issue for determination is whether this Court should interfere with the sentence meted on the appellant by the trial court and upheld by the High Court.

22. Section 8(1)& (3) of the *Sexual Offences Act* provides that:

> "
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> 8
>
> (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.
>
> (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."

23. The guiding principle for interfering with sentencing by an appellate court were set out in the case of *Ogolla s/o Owuor vs. Republic* [1954] EACA 270, where the predecessor of this Court stated that:

> "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."

24. Further, this Court, in *Bernard Kimani Gacheru vs. Republic* [2002] eKLR restated the principle guiding appeal on sentence that:

> "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 "

25. The appellant was sentenced by the trial court to twenty (20) years' imprisonment on 11th January, 2017. The appellant maintains that the trial court and the 1st appellate court did not take into consideration the period he was in remand custody in imposing sentence. The appellant relied upon

Section 333(2) of the *Criminal Procedure Code* and this Court's decision in *Ahamad Abolfathi Mohamed* [2018] eKLR.

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

> "(2) 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 subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

27. Further, the Judiciary Sentencing Policy Guidelines provides:

> "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."

28. The proviso of Section 333(2) of the *Criminal Procedure Code* was highlighted by this Court in *Ahamad Abolfathi Mohammed's case* (*supra*) that:

> "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."

29. As regards the issue that the mandatory sentence fettered the trial court's discretion in sentencing, we note that this issue has been litigated upon before this Court and the High Court on several instances. In *Dismas Wafula Kilwake vs. Republic* [2019] eKLR this Court stated as follows:

> "...we hold that the provisions of section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

30. Prior to sentencing at the trial court, the Prosecutor informed the court that the appellant had no previous records. In mitigation, the appellant stated as follows:

31. In sentencing the appellant, the trial court stated as follows:

> "Accused was charged under Section 8(1) 8(4) of the *Sexual Offences Act* No. 3 of 2006 sub section (4) provides:
>
> > "A person who commits on offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."
>
> The evidence on record proved that (sic) complainant was 13 years at the time of the incidence. The accused was supposed to be charged under section 8(1) as read with 8(3). Where his sentence would have been 20 years his sentence under 8(4) is 15 years. Having discretion to mete out a sentence of not less than 15 years. I hereby sentence (sic) accused to 20 years imprisonment. 14 days right of appeal explained."
>
> The 1st appellate court dismissed the 1st appeal for lack of merit.

32. On the issue of failure to consider the period the appellant was in custody during sentencing, we note that this issue was well articulated by this Court in the case of A*hamad Abolfathi Mohamed & Ano. Vs Republic* (*supra*). From the record, the appellant took plea before court on 13th June, 2014 and was sentenced on 11th January, 2017. It is notable that on 13th June, 2014 the appellant was granted bond of Kshs. 200,000 with a surety of a similar amount. He was not able to raise the bond. From the record, the period that the appellant spent in custody does not appear to have been taken into account during sentencing by the trial court and the 1st appellate court did not address this issue. The proviso to Section 333(2) of the *Criminal Procedure Code* was therefore not taken into consideration by the two courts below.

33. As to severity of the sentence meted on the appellant, the sentence is prescribed under Section 8(1) and (3) of the *Sexual Offences Act*. This Court in *Francis Nkunja Tharamba vs. Republic* [2012] eKLR held that:

> "...sentencing is a discretionary act of the trial court even though the limits such as the maximum sentences and in some cases the minimum sentences are prescribed by law, nonetheless, as to the exact sentence to be pronounced upon a convicted person, the trial court has in most criminal cases, the discretion to decide. That being the case, in law, the appellate court should not intervene in such an exercise of discretion by an inferior court unless, it is demonstrated to it that the trial court has not exercised that discretion properly in that it has failed to consider matters it should have considered or that it has considered matters it should not have considered or that looking at the entire decision, it is plainly wrong. These are the situations in law where the appellate court can intervene in the trial court's exercise of discretionary power such as that of sentencing. The next principle that the appellate court should adhere to when considering an appeal on sentence is that when the sentence is lawful, the appellate court should not interfere."

34. In the circumstances and by virtue of Section 8(1) and (3) of the *Sexual Offences Act* and the cirucmstances in which the offence occurred, we find that the sentence of 20 years imprisonment meted on the appellant is the lawful sentence and is not harsh and excessive.

35. In view of the foregoing, we are not inclined to disturb the sentence meted out on the appellant by the trial court and upheld by the 1st appellate court. Consequently, we dismiss the appeal against sentence.

In line with the proviso of Section 333(2) of the *Criminal Procedure Code*, the custodial sentence of 20 years shall be calculated from the date when the appellant was first arraigned before the trial court.

DATED AND DELIVERED AT NYERI THIS 26TH DAY OF JULY, 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

L. KIMARU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR