Yegon v Republic (Criminal Appeal 28 of 2019)
[2024] KECA 1845 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1845 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 28 OF 2019

MA WARSAME, JM MATIVO & WK KORIR, JJA

DECEMBER 20, 2024

BETWEEN

GILBERT CHERUIYOT YEGON ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kericho (M. Ngugi, J.) dated 21st February 2017 in HCCRA No. 21 of 2017)

JUDGMENT

1. Gilbert Cheruiyot Yegon, the appellant herein, was convicted of the offence of defilement contrary to section 8 (1) as read with 8 (3) of the *Sexual Offences Act*. The particulars of the charge were that on 12th and 13th October 2016 in Sigowet Soin Sub-County within Kericho County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of JC a child aged 13 years. Upon his conviction, he was sentenced to serve 20 years imprisonment. He unsuccessfully challenged the decision before the High Court. He is now before us challenging the sentence only on the grounds that the same is harsh and excessive; and that the trial court did not consider the provisions of section 333 (2) of the *Criminal Procedure Code* (CPC) when passing the sentence.

2. When the appeal came up for hearing on 1st July 2024 through the virtual platform, the appellant appeared in person while the prosecution was represented by learned State counsel, Mr. Omutelema. The parties had filed written submissions which they relied upon with the appellant briefly highlighting his mitigation at the hearing.

3. The appellant's submissions were undated. Therein, the appellant referred to the case of *Thomas Mwambu Wenyi v Republic* [2017] eKLR, to point out the importance of sentencing in the trial process. The appellant referred to the objectives of sentencing as outlined in the Judiciary Sentencing Policy Guidelines and submitted that the circumstances of the commission of the offence did not

warrant a custodial sentence of 20 years. He submitted that considering that he was 20 years at the time of the commission of the offence, this Court should be guided by the decision of the High Court in *Francis Opondo v Republic* [2017] eKLR and impose on him the least severe sentence. Relying on the decision in *Ali Abdalla Mwanza v Republic*, Mombasa Criminal Appeal No. 259 of 2012, the appellant argued that considering his age at the material time, the sentence imposed upon him was equivalent to life imprisonment. Finally, the appellant submitted that having been held in custody from the time of his arrest, the pre-sentence detention period ought to have factored in his sentence. In support of this proposition, he placed reliance on section 333 (2) of the *CPC* and the decision of this Court in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR. In conclusion, the appellant urged that we allow his appeal and place him on community service.

4. In opposition to the appeal, learned State counsel Mr. Omutelema through the submissions dated 28th June 2024 asserted that all the elements of the offence were proved and the trial court and the first appellate court correctly rendered themselves in the matter. In opposition to the appeal against sentence, counsel urged that the term of 20 years' imprisonment was not only lawful but also not excessive or harsh.

5. This being a second appeal, section 361 (1) (b) of the *CPC* bar us from entertaining appeals against sentence unless the subordinate court had no jurisdiction to pass the sentence or the sentence was enhanced by the first appellate court. Additionally, sentencing is a matter of discretion by a trial court and an appellate court must not replace its views on sentence with those of the trial court unless there are concrete grounds for doing so. This position of the law was recently restated by the Supreme Court in *Republic v Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) thus:

> " Thus, the Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction."

6. In this case, it is the appellant's contention that the sentence handed to him was harsh and excessive. He also contends that he was entitled to the least severe punishment prescribed under the law. Section 8 (3) of the *Sexual Offences Act* provides as follows:

> " 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."

7. In *Republic v Mwangi* (*supra*), the Supreme Court affirmed the legality of the minimum sentences under the *Sexual Offences Act* by holding that:

> " Mandatory sentences leave the trial court with absolutely no discretion such that upon conviction, the singular sentence is already prescribed by law. Minimum sentences however set the floor rather than the ceiling when it comes to sentences. What is prescribed is the least severe sentence a court can issue, leaving it open to the discretion of the courts to impose a harsher sentence."

8. It follows from the foregoing that "imprisonment for a term of not less than twenty years" as provided under section 8 (3) of the *Sexual Offences Act* was the least severe sentence that could be imposed upon the appellant by the trial court. It therefore follows that there is no merit in the appellant's assertion that he was not given the least severe sentence. This ground of appeal is therefore without merit.

9. As regards the appellant's claim that the time spent in pre-sentence custody was not factored into his sentence, the record discloses that the appellant was released on bond on 4th November 2016 hardly two weeks after he was presented to the trial court for plea. He remained on bond throughout the trial until the judgment was delivered on 6th July 2017. The appellant was promptly sentenced upon the delivery of the judgment and it cannot therefore be said that he was in custody prior to his sentencing. He could not therefore have benefited from the proviso to section 333 (2) of the *CPC* which is only applicable to persons held in custody during the trial and prior to sentencing.

10. In short, the appellant's appeal is without merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAKURU ON THIS 20TH DAY OF DECEMBER, 2024.

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR