Wamalwa v Republic (Criminal Appeal 188 of 2019)
[2024] KECA 1836 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1836 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 188 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

DECEMBER 20, 2024

BETWEEN

ERICK WAFULA WAMALWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgment of the High Court of Kenya at Bungoma (R.P.V. Wendoh, J.) dated 9th April, 2019 and delivered by (S. N. Riechi, J.) on 20th May, 2019 in HCCRA No. 125 of 2017)

JUDGMENT

1. Erick Wafula Wamalwa, the appellant, was charged before the Senior Principal Magistrate's Court at Webuye with the offence of attempted defilement contrary to Section 9(1) as read with Section (2) of the *Sexual Offences Act*. The particulars of the offence were that on 26th Day of June, 2015 at (particulars withheld) area, (particulars withheld) Location within Bungoma County, he intentionally attempted to cause his penis to penetrate the vagina of VW[1] a child aged 8 years old. He was charged, in the alternative, with committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. The appellant pleaded not guilty to the charges and the matter proceeded to trial, where the prosecution called 5 witnesses. The appellant was, thereafter, placed on his defence, and upon considering the evidence, the trial magistrate found him guilty of the main count, convicted him, and sentenced him to 20 years' imprisonment.

3. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. Upon considering the appeal, the High Court (R.P.V. Wendoh, J.) agreed with the findings of the trial court by upholding the conviction, but interfered with the sentence, reducing it to 15 years imprisonment.

4. The appellant was aggrieved by the decision of the first appellate court, and filed this appeal faulting the learned Judge for failing to evaluate the evidence, failing to note that the appellant was not informed of the right to representation, failing to note that the appellant was convicted on a defective charge sheet, crucial witnesses were never called, the defence evidence was not considered and the sentence meted was harsh and excessive in the circumstances.

5. The facts of the prosecution case as presented before the trial court, and subsequently re-analysed and re-evaluated by the High Court were that, on 26th June 2015 at 3.00 p.m., VW, the complainant herein was on her way to fetch firewood, when the appellant, who was her neighbor, called her with an offer for sugar cane and she went with him. He then removed her clothes, pulled down her underpants and put her on his lap, and put his penis in her vagina. When she screamed, the appellant put his hands on her mouth. EWW (Enos), PW2, who was on his way to his place of work, heard her screams in the sugarcane plantation, went in to see what was happening; and found clothes strewn at the scene; the appellant in a naked state, lying on the child who was half naked. PW2 raised an alarm, rescued VW; took the fleeing appellant's clothes, he then took the complainant to her mother, and informed her what had happened. Together with the complainant's mother, Enos went to the appellant's home, where they found the appellant dressing inside the grandmother's house.

6. The minor's mother, FW, PW3 confirmed that at about 3.00pm, she had sent PW1 to fetch firewood; and when she had not returned by 5.00pm, she got alarmed and went to look for her. She met PW1 in the company of PW2 who had some clothes in his hands; she also noticed that PW1 was crying. PW2 told her, about the screams; and how he found the appellant attempting to have sex with PW1 in the cane plantation. They traced the appellant to his grandmother's house; and found him in the process of dressing up.

7. Busenwa Johnson Masai, PW4, a Senior Clinical Officer at Webuye Hospital examined the complainant and found bruises on the neck but her hymen was intact; and he concluded that there was an attempt to defile.

8. Placed on his defence, the appellant gave unsworn statement. He denied committing the offence, and stated that the child was stealing his sugarcane; and on seeing him, she screamed and ran away; and that is when Enos arrived and enquired what he wanted to do to the child. The appellant further stated that a crowd of people arrived; stripped him of his clothes; and that Enos framed him up with this case. He stated that the child lied and the parents wanted him to pay them but he refused.

9. In support of the appeal, the appellant contends that the prosecution evidence was inconsistent and contradictory regarding the age of the complainant and where the alleged offence occurred. The appellant complains that the sentence meted out was excessive and harsh in the circumstances, was not informed of his right to legal representation, that crucial witnesses were never called, and that his defence was not considered.

10. However, at the plenary hearing, the appellant, who appeared in person, withdrew the appeal on conviction and asked the Court to consider the appeal on sentence only.

11. In reply, Mr. Oyiembo learned prosecution counsel for the respondent, submitted that the sentence meted out was commensurate to the offence as the victim was 8 years old and a neighbour's child as such the sentence of 15 years was not excessive in the circumstances.

12. This being a second appeal, this court is restricted under Section 361(1) (a) of the *Criminal Procedure Code* to considering matters of law only as stated by this Court in *Stephen M'Irungi & Another vs Republic* 1982 – 88 1KAR 360:

> " Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

13. Having considered the record, the grounds of appeal, the submissions of both parties and the Court's mandate, the main issue that falls for determination is whether this Court should interfere with the sentence that was imposed on the appellant.

14. In the instant appeal, the appellant was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9 (2) of the *Sexual Offences Act* which provides:

> 1. A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
>
> 2. A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

15. The appellant was sentenced to 20 years imprisonment by the trial court, which sentenced was reduced to 15 years by the first appellate court on consideration that the appellant was a first offender only aged 26 years; and had benefitted from rehabilitation programmes in prison. The appellant complains that this reduced sentence is excessive in the circumstances.

16. We are keenly aware that an appellate court will not interfere with the sentence meted out, unless it is demonstrated that the trial court acted on some wrong principles or overlooked some material facts. This Court in *Bernard Kimani Gacheru vs. Republic* (2002) eKLR stated thus:

> " 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."

17. Ordinarily, sentencing is a matter that falls within the discretion of the trial court. It is also a matter of fact, and it can only be considered by this Court sitting on a second appeal in circumscribed circumstances. In that regard, the Supreme Court recently reminded this Court of its limited jurisdiction on second appeals in respect to sentences, when it held in *Republic vs. Mwangi; Initiative for Strategic Litigation in Africa (ISLA) & 3 Others (Amicus Curiae)* [2024] KESC 34 (KLR) that:

> " Before further delving into the question of the constitutionality or otherwise of the sentence, we must take cognizance of provisions of Section 361(1) of the *Criminal*

Procedure Code which, in cases of appeals from subordinate courts, explicitly bars the Court of Appeal from hearing issues relating to matters of fact. This section also elaborates that the severity of sentence is a matter of fact and not of law and the Court of Appeal is barred from determining questions relating to sentences meted out, except where such sentence has been enhanced by the High Court ...

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."

18. In the instant appeal, the appellant was sentenced to 20 years imprisonment. This sentence was reduced by the High Court to 15 years imprisonment which the appellant complains is excessive. The penalty provided for the offence of attempted defilement is set out under section 9 (2) of the *Sexual Offences Act*:

    A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.

19. The appellant's lament is not the legality of this sentence, but that it is excessive. Under Section 361(1) of the *Criminal Procedure Code*, the severity of sentence is a matter of fact, and therefore not a legal issue open for consideration by this Court on a second appeal. It follows therefore, that this Court lacks jurisdiction to interfere with the sentence meted out against the appellant, on the ground that the sentence was harsh or excessive. In the circumstances, the sentence is lawful, and there is no reason to interfere with the same. The upshot is that the appeal lacks merit and is dismissed.

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

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR