Esinyen v Republic (Criminal Appeal 256 of 2019)
[2023] KECA 152 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 152 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 256 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

FEBRUARY 17, 2023

BETWEEN

PETER MORU ESINYEN ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An a appeal from the judgement of the High Court (CW Githua, J) at Eldoret delivered on 10th May, 2014 in HCCRA No. 149 of 2012)

JUDGMENT

1. This is the second appeal by the Appellant Peter Moru Esinyen, arising from the judgement of the High Court at Eldoret by Githua, J, delivered on May 10, 2014. The Learned Judge considered the appeal before her, found that the Appellant was properly convicted, and dismissed the appeal on both conviction and sentence, as pronounced against him by the trial court, for the offence of defilement contrary to section 8 (1) as read with 8(2) of the *Sexual Offences Act*. The Appellant had been convicted and sentenced to life imprisonment by Hon B Mosiria.

2. The particulars of the offence were that between 8th and August 9, 2012 in Nandi County, the Appellant intentionally caused his penis to penetrate the anus of AKS (name redacted), a child aged ten years.

3. The back drop of this case briefly stated is that AKS, who was then 10 years old and in standard four at [Particulars Withheld] Primary School, left home on August 8, 2012 in search of his friend but did not find him. He reached Lessos trading center at about 6p.m and the Appellant, who was known to him by the nickname of Gia Moja and who used to wash cars at the center, called him and chatted him up until 7.30 p.m. The Appellant then advised him that it was too late for him to go home and offered him a meal and a place to sleep for the night in his house and leave for home the following day.

4. According to the minor, when they got to the Appellant's house, the Appellant removed his pair of trousers and that of the minor and ordered him to lie down facing down. The minor complied and the Appellant inserted his penis in to his anus. The minor cried out in pain whereupon the Appellant threatened to beat him, and actually boxed him in the shoulder. The minor testified that the Appellant defiled him about 10 times through the night.

5. The Appellant allowed him to visit the latrine outside the house at about 5a.m but without his trousers, to make it difficult for him to escape. While outside the minor escaped. He found a watch man, one Kosgei, who listened to him and took him to Lessos Police Station to report the incident. The police accompanied him back to the Appellant's house where they found and arrested the Appellant and also recovered the minor's trouser. The minor was taken to the hospital and treated.

6. After the minor had testified, the Appellant who had initially pleaded not guilty, opted to change his plea. The charges were read and every substance thereof explained to him in Kiswahili, a language which the Appellant understood and he responded that the charges were true. As a result, a plea of guilty was entered and the matter was put off to be mentioned on the August 13, 2012, for the exhibits to be availed.

7. On the August 13, 2012, again, the charge was read over and explained to the Appellant in Kiswahili and he still responded that the charge was true. The facts of the charge were read to him and he responded that they were true. The minor's long trouser that was recovered in the Appellant's house on the material day, P3 forms in respect of the minor and the Appellant, the minor's Birth Certificate, medical report and the age assessment report were all produced in evidence.

8. The Appellant was thus convicted on his own plea of guilty. In mitigation he asked the court to forgive him for the offence he committed, and volunteered that he should be imprisoned if he repeated the offence. He was sentenced to life imprisonment.

9. The first appeal was dismissed in the High Court as stated elsewhere in this judgement. The Appellant wishing to have a second bite at the cherry filed this second appeal before us. His complaints cumulatively, are that the judge in the first appeal failed to discharge the mandate of a first appellate court as required by law. He faulted the Superior Court on several grounds. Specifically, that the plea was not unequivocal, the Court misdirected itself on the principles and procedure of taking plea, the Appellant did not understand the charges, and that the Court failed to consider the sentencing guidelines given by the Supreme Court in the decision that the Appellant just termed as Francis Muruatetu on mandatory sentences.

10. This appeal was canvassed by way of written submissions.

    Both parties filed undated written submissions and orally highlighted them during plenary hearing. The Appellant appeared in person, while the State was represented by Learned Counsel, Mr MK Rop.

11. The Appellant submits that the record from the trial court does not indicate whether he understood the language used in court. He also argues that being unpresented, it was important for the presiding magistrate to allocate the case another hearing date, to accord him time and facilitate him with the material to prepare a defence.

12. He further submits that the record does not indicate who read the charge to him and that this is important because it is the role of the trial magistrate to read all the facts and to explain clearly to the Appellant, every element of the charge.

13. The Appellant contends that after the facts were read the magistrate did not explain them to him, thus this Court should find that the plea was not unequivocal. He refers to this Court's decision in

Bilshar Abdi v Republic [2010] eKLR, where the Court explained why the charge should be explained to an accused person in a language he understands. He argues that the elements of an offence are not complete if the sentence, especially if it is a severe and mandatory sentence, is not brought to the attention of the accused person. Further, that the principles set out in *Adan v Republic* [1973] EA 445, were not followed.

14. On sentence, he complains that he was convicted under section 8 (2) of the *SOA*, and handed a sentence of life imprisonment which is defined in mandatory terms and the Judge confirmed the said sentence. It was his argument that the Courts are now called upon to use their discretion when imposing a sentence. He relies on this Court's decision in *Paul Ngei v Republic* [2019] eKLR and *Dismas Wafula Kilwake v Republic* [2018] eKLR.

15. On his part learned Counsel Mr Rop, submitted that the Appellant was convicted on his own plea of guilty and is therefore, barred by section 348 of the *Criminal Procedure Code* from appealing against conviction, except as to the extent or legality of the sentence.

16. Counsel urged this Court to find that the procedure for plea taking provided under section 207 (1) of the *Criminal Procedure Code* was properly followed and that the plea was unequivocal. That page 4 of the record of appeal indicates that the substance of the charge was read to the Appellant in a language that he understood which is Kiswahili, to which his response was "it is not true". That the Appellant later changed his plea to a plea of guilty at page 9-11 and the same procedure was followed.

17. Further, that the Appellant had sufficient time to reflect on the charge facing him, when the prosecution applied for and were given time to avail the exhibits before the facts were presented. The Respondent asserted that the trial court was guided by the guidelines laid down in *Adan v Republic* (1973) EA 445 in the plea taking process.

18. On sentence, they relied on this Court's decision in Criminal Appeal No 84 of 2015; *Joshua Gichuki Mwangi v Republic*, to urge that the Court has the discretion in the sentence to be awarded.

19. This is a second appeal. By dint of the provisions of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with the decision of the superior court on facts unless it is demonstrated that the trial court and the first appellate court considered matters they ought not to have considered or that they failed to consider matters they should have considered or that looking at the evidence as a whole they were plainly wrong in their decision, in which case such omission or commission would be treated as matters of law. (See *Karani v R* (2010) 1 KLR 73).

20. Having considered the record of appeal, the submissions of the parties, the authorities relied on and the law, we are of the view that the only two issues that need to be resolved in this case are:

    a) Whether the Appellant's plea of guilt was unequivocal, and

    b) Whether the mandatory life sentence meted upon the appellant is unconstitutional

21. The Appellant was convicted of defilement in accordance with Section 8(1) of the *SOA* on his own plea of guilt, and sentenced to life imprisonment in accordance to Section 8(2) of the *SOA* by the trial court. It is his argument that the court's record does not indicate that the language used was one that he understands, and he was not warned of the consequences of his plea of guilt. As such, the plea was equivocal. On the other hand, the Respondent argues that the charge, the particulars and facts thereof were read and explained to the Appellant in a language that he understands, that is Kiswahili. It is therefore their contention, that the plea of guilty entered by the magistrate was unequivocal.

22. The Superior Court was alive to this issue. The grounds of his appeal in the Superior Court were that his plea of guilty was equivocal since he was mentally and physically unwell, at the time he pleaded

guilty. That he did not understand the charges and since the hearing of the case commenced on the same day he took plea, he was not given ample time to prepare his defence.

23. At paragraph 12 of the judgement, the learned Judge addressed the Appellant's concerns that the plea was equivocal as quoted below:

> " First the appellant did not complain to the trial court that he was unwell before he took his plea and secondly, the manner in which he cross examined the complainant after he gave his evidence on the same day leaves no doubt that the appellant's mental faculties were alert and functional. The questions he put to the complainant shows that he fully understood the complainant's evidence. He would not have followed the complainant's evidence if he was indisposed as alleged. Besides, there is no evidence in the P3 form filled in respect of the complainant to suggest that he was unfit to plead. In the circumstances, I am satisfied that the plea of guilty in this case was unequivocal."

24. The manner of recording a plea is provided for in Section 207(1) and (2) of the *Criminal Procedure Code* as hereunder:

> (1) The substance of the charge shall be stated to the accused person by the court, and he shall be asked whether he pleads not guilty, guilty or guilty subject to a plea agreement;
>
> (2) If the accused person admits the truth of the charge otherwise than by a plea agreement his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there appears to it sufficient cause to the contrary:
>
> Provided that after conviction and before passing sentence or making any order the court may permit or require the complainant to outline to the court the facts upon which the charge is founded.

25. The foregoing section was explained by the often cited decision in *Adan v Republic* (*supra*), where the guidelines for recording a plea of guilty were set out. In *Ombena v Republic* [1981]eKLR, this Court adverted to the said case as follows:

> " In Adan v Republic [1973] EA 445, the Court of Appeal laid down in the simplest and plainest terms the manner in which pleas of guilty should be recorded and the steps which should be followed. It is appropriate to set out the holding in full — 'Held:
>
> i. the charge and all the essential ingredients of the offence should be explained to the accused in his language or in a language he understands;
>
> ii. the accused's own words should be recorded and if they are an admission, a plea of guilty should be recorded;
>
> iii. the prosecution should then immediately state the facts and the accused should be given an opportunity to dispute or explain the facts or to add any relevant facts;
>
> iv. if the accused does not agree with the facts or raises any question of his guilt his reply must be recorded and change of plea entered;

v. if there is no change of plea a conviction should be recorded and a statement of the facts relevant to sentence together with the accused's reply should be recorded."

26. On perusal of the record of appeal, the Appellant's initial plea is at page 4 and was recorded as follows:

> " Before: Hon B. Mosiria (PM)
>
> Pros: IP Bosire CC: Chepkoech Accused: Present
>
> Interpretation: Kiswahili It is not true
>
> Court: Plea of not guilty entered"

From the above it appears that the Appellant was asked which language he understands and he stated Kiswahili and thus it was recorded. In our view that is the reason why the interpretation was into Kiswahili and not in any other language.

27. On page 8 of the record of appeal, the following is recorded by the trial magistrate:

> " Accused: I do pray for the court to forgive me for the offence I committed.
>
> The charges read over and explain to accused person in Kiswahili a language he understands and he replies; true Court: plea of guilty entered"

The learned magistrate therefore, recorded the Appellant's admission of the commission of the offence for which he was charged.

28. The record indicates that on August 13, 2012, the charge was read and explained to the Appellant again in Kiswahili. Further, that the prosecutor explained to the Appellant the facts of the case at length and the record captures the Appellant responding that those facts were true.

29. In *Alexander Lukoye Malika v Republic* [2015] eKLR,this Court identified the situations in which a conviction based on a plea of guilty can be interfered with as follows:

> " A court may only interfere with a situation where an accused person has pleaded guilty to a charge where the plea is imperfect, ambiguous or unfinished such that the trial court erred in treating it as a plea of guilty. Another situation is where an accused person pleaded guilty as a result of mistake or misapprehension of the facts. An appellate court may also interfere where the charge laid against an accused person to which he has pleaded guilty disclosed no offence known to law. Also, where upon admitted facts the Appellant could not in law have been convicted of the offence charged."

Our instant case does not fall under any of the circumstances provided in *Alexander Lukoye Malika* (*supra*).

30. We agree with the learned Judge that the Appellant did indeed understand the plea and we are of the view that section 207 (2) of the *Criminal Procedure Code* and the requirements in *Adan v Republic* (*supra*) were met.

31. Turning to the constitutionality or otherwise of section 8(2) of the *SOA* on minimum mandatory sentence the said section provides that:

> " A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life".

32. A lot has been decided on this subject, and the common ground is that life sentence-imposed upon an accused person is not unconstitutional in itself. What is unconstitutional is its mandatory nature. The mandatory nature of the sentence is found to be unconstitutional because the judicial authority as provided by Article 159 of the *Constitution* is usurped by the legislature.

33. The Court of Appeal in South Africa also frowned on mandatory sentences that place a limitation on Judicial discretion. In *S v Toms* 1990 (2) SA 802 (A) at 806(h)-807(b), the South African Court of Appeal (Corbett, CJ) held that:

> " the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."

34. In *Ropas Furaha Ngombo v Republic* [2019] eKLR, this Court quoted with approval its decision in *Dismas Wafula Kilwake v Republic*, Criminal Appeal No 129 of 2014, where it stated:

> " In principle, we are persuaded that there is no rational reason why the reasoning of the supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the *Sexual Offences Act*, which do exactly the same thing"

35. In the instant case the trial magistrate sentenced the Appellant as provided in law to life imprisonment. The first appellate court reaffirmed the sentence. In our view, the sentence meted out was commensurate to the heinous nature of the offence and the brutality with which it was committed by the Appellant against a defenseless child.

In the end we find that there is no merit in the appeal and we accordingly dismiss it on both conviction and sentence.

DATED AND DELIVERED AT ELDORET THIS 17TH DAY OF FEBRUARY, 2023

F. SICHALE

JUDGE OF APPEAL

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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR