GSO & another v Republic (Criminal Appeal 79 of 2017)
[2023] KECA 44 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 44 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 79 OF 2017

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

FEBRUARY 3, 2023

BETWEEN

GSO ..... 1ST APPELLANT

OMO ..... 2ND APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Siaya (Makau, J.) dated and delivered on 8th July, 2016 in High Court Criminal Appeal No. 61 of 2015)

JUDGMENT

1. The 1st and 2nd Appellants were the 1st and 2nd Accused persons respectively, in the trial before the Principal Magistrate's Court in Ukwala CMCC No. 393 of 2013. They were charged with eight main counts, namely: gang rape contrary to section 10 of the *Sexual Offences Act* No. 3 of 2006; two counts of rape contrary to section 3(1)(c) of the *Sexual Offences Act* No. 3 of 2006; two counts of deliberate transmission of HIV contrary to section 26(1)(b) and 3(1)(c) of the *Sexual Offences Act* No. 3 of 2006; possession of public stores contrary to section 324(2) as read with section 36 of the *Penal Code*; keeping in a building public stores contrary to section 324(2) as read with section 36 of the *Penal Code*; and personating a public officer contrary to section 105(b) of the *Penal Code*. They were also charged with two alternative charges of committing an indecent act with an adult contrary to section 11(a) of the *Sexual Offences Act* No 3 of 2006.

2. The particulars of the offence of gang rape were that on the 21st day of September, 2013 in Ugenya District within Siaya County, the 2nd appellant (OMO) in association with the 1st appellant (GSO), intentionally and unlawfully caused their penis to penetrate the vagina of PAA without her consent. On the other hand, the particulars of the offence of rape were that on the 21st day of September, 2013

in Ugenya District within Siaya County, the 2nd appellant intentionally and unlawfully caused his penis to penetrate the vagina of GAO without her consent.

3. For the purposes of this Appeal, the particulars of the two counts as stated, are the only ones relevant, as will be demonstrated below.

4. On 21/09/2013 at around 9.30 pm, GAO was waiting for a matatu at [Particulars Withheld] stage in Ugenya sub-county while chatting with KO. Another acquaintance, EO, joined them at the bus stage. Shortly thereafter, a motorcycle raced to where the three stood. The rider and the pillion passenger disembarked from the motorcycle and, suddenly, embarked on a seemingly senseless orgy of violence – assaulting the trio with heedless abandon. The violent duo then forced GAO, and adult female, to mount the motorcycle, and rode off with her. On their way, they got involved in a minor accident. Undeterred by the mishap and clearly intent on progressing their felonious intent, they abandoned the motorcycle and forced GAO. to walk up to a certain house, all the while under the credible threat of more violence. The two, then, forced her to get into the house and started whipping her with a nyahunyo. In an extension of their sanguinary methods, they later locked GAO in the house and left.

5. The two individuals in this narrative are the 1st and 2nd appellants.

6. After sometime, the 2nd Appellant came back to the house, asked GAO to undress. He then ordered her to get onto a bed which was in the house. He proceeded to rape her. At some point, some people came by the house and the 2nd appellant menacingly instructed her to keep quiet. When the people left, the 2nd appellant continued raping GAO So callous and unstirred was the 2nd appellant that he would take periodic breaks to go and smoke bhang outside and come back to continue raping her.

7. On that same night, at 10.30 pm, PAA was at the self-same [Particulars Withheld] bus stage chatting with a certain man. As they were chatting, the 1st and 2nd appellants went by and the 1st appellant asked PAA and the man he was with why they were there. The 2nd appellant, then, suddenly announced that he had concluded that PAA was proud and they were going to rape her as apparent punishment for the perceived insolence. The appellants briefly left but came back a short time later on a motorcycle. The 2nd appellant started whipping PAA She fled on foot but the appellants gave chase. They caught up with her and announced that they were going to teach her a “lesson”. The two appellants forcibly carried her into a forest as they whipped her with a nyahunyo. The 1st appellant brandished a knife and commanded PAA to undress. Scared for her life, PAA obliged. The 2nd appellant, then, ordered her to lie down. The 1st appellant proceeded to rape her. Both the appellants, then, forced her to walk further into the forest until they came upon a certain house. There, they found GAO Inside the house, the 2nd appellant raped PAA while the 1st appellant was preparing to rape GAO.

8. As fate would have it, KO, who was with GAO at the [Particulars Withheld] bus stage, upon seeing the kidnap of GAO, rushed and reported at Ukwala Police Station. The Police took action and started looking for the appellants and their victims. Consequently, just as the 1st appellant was preparing to start raping GAO, the Police, who had managed to trace the marauding duo with the help of KO, barged into the house. They found GAO, PAA and the two appellants all naked. They rescued GAO and PAA. The Police also recovered the nyahunyo; a jungle jacket; and military boots from the scene.

9. The appellants were arrested and taken to Ukwala Police Station while GAO and PAA were taken to hospital where they were treated and issued with P3 forms. The appellants were also taken for medical examination.

10. This is the macabre narrative that emerged from the trial at the magistrate’s court in which the two appellants were tried. At the conclusion of the trial, the Learned Trial Magistrate found each of the

Appellants guilty of the charge of gang rape. Additionally, the 2nd Appellant was found guilty of the charge of rape. They were however acquitted of all other six counts they had been charged with and the two alternative charges.

11. On July 8, 2015, the Appellants were each sentenced to serve 15 years imprisonment on the charge of gang rape. The 2nd Appellant was discharged under section 35(1) of the *Penal Code*, with regard to the charge of rape.

12. The Appellants were aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court. The Superior Court dismissed the Appeal and upheld the conviction and sentence.

13. The appellants were initially dissatisfied with the decision of the superior court on both the conviction and sentence and lodged the present appeal against both. They raised four (4) grounds in their homegrown Memorandum of Appeal. However, when they appeared before us for hearing of their appeal, they both withdrew their appeals against conviction – essentially accepting the narrative as it emerged in the trial court as true – and sought to litigate only their appeal against sentence.

14. Both the appellants had filed written submissions as had the state counsel, Mr. Okango. During the virtual hearing, the appellants appeared in person, whereas learned counsel, Mr. Okango, appeared for the state. All the parties relied on their filed submissions save that, as aforesaid, the appellants withdrew their appeal against conviction.

15. In his oral submissions, the 1st appellant narrowed his appeal to only requesting this court to take into consideration the two years he spent in remand custody during the trial of the case. He also prayed that his sentence be reduced. The 2nd appellant, who was out on bond during the pendency of the trial, only prayed for a reduction in sentence. Although they did not expressly say so, the two appellants clearly hoped that our emerging jurisprudence on minimum sentences under the *Sexual Offences Act* would come to their aid.

16. In responding to the appellants' submissions, Mr. Okango agreed with the 1st appellant that the time he spent in remand custody be considered and factored in by this court. He, however, opposed the prayers by the appellants for their sentences to be reduced. He submitted that even in light of the recent pronouncement by the High Court on the discretion of courts as regards sentences in the *Sexual Offences Act*, the circumstances in which the offences were committed in this case justifies the sentence of 15 years imprisonment which was imposed by the trial court and affirmed by the High Court. He strongly urged us not to interfere with the sentence.

17. We have considered the appeal and the grounds urged in support thereof, as well as the submissions of all the parties. This is a second appeal. Our mandate on second appeal is limited to a consideration of matters of law only by dint of section 361(1) of the Criminal Procedure Code. It is only on rare occasions that we interfere with concurrent findings of fact by the two courts below. Section 361 expressly states that severity of sentence alone is a matter of fact. As a principle, this court can only interfere with the sentence by the imposed by the trial court and affirmed by the High Court when it is demonstrated that the two previous courts acted on a wrong principle or overlooked material facts or took in to account irrelevant considerations or on the whole of the sentence was manifestly excessive. See *Ogolla s/o Owuor* (1954) EACA 270 and *Wanjema v. Republic* [1971] E.A. 493.

18. Thiscourt has expressed this principle in *Bernard Kimani Gacheru v. Republic*, Cr App No 188 of 2000 as follows:

> " 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."

19. In the present case, the appellants have explicitly sought to bring themselves within the new jurisprudence challenging the constitutionality of minimum sentences under the *Sexual Offences Act* – see, for example, *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR). The net effect of that jurisprudence, which has been embraced by this court – see, for example, *Joshua Gichuki Mwangi v Republic* [2022] eKLR – is that the second appeals reaching this court seeking the application of the emerging jurisprudence on the question, this court treats the issue as a question of law.

20. In short, upon consideration of the appeal as pared down by the appellants during oral submissions, we agree with Mr. Okango. While it is true that this Court has, on several occasions, concluded that, as a function of proper constitutional appreciation of the role of the court in sentencing, the minimum sentence prescriptions in the *Sexual Offences Act* can no longer be taken as inexorable and inflexible commandments to a sentencing court, "those provisions are indicative of the seriousness with which the Legislature and the society take

> [sexual] offences" as this court held in in Dismas Wafula Kilwake v R [2018] eKLR. It is true, as the court stated in that case, "...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."

21. In the present case, however, the circumstances in which the two appellants committed the offences for which they were convicted do not militate in favour of going below the minimum sentences prescribed by the *Sexual Offences Act* and imposed by the court. As narrated in this judgment, the appellants committed the sexual offences in a depraved, sanguinary and dehumanizing manner. They not only assaulted the victims sexually, but they also inflicted physical pain on the victims by repeatedly whipping them. Further, they raped the victims repeatedly on the same night. As if that is not enough, the record indicates that upon examination, the 2nd appellant was found to be HIV positive – meaning that he ran a high risk of infecting the victims and acted in reckless disregard of that risk. Finally, the impunity with which the appellants carried out their criminal spree does not paint a profile for going below the suggested statutory minimums. Indeed, we think that the appellants were lucky to have escaped with imprisonment for only fifteen (15) years for their atavistic and barbaric transgressions.

22. Consequently, we decline the invitation by the appellants to review downwards the sentence imposed by the lower court and affirmed by the High Court.

23. However, as rightly conceded by Mr. Okango, the 1st appellant is entitled to a discount of the time he spent in remand custody from his prison sentence by dint of section 333(2) of the *Criminal Procedure*

Court which obligates a sentencing court to take into account the time an accused person was in remand prison during the pendency of the trial.

24. Consequently, the sentence of 15 years imprisonment for the 1st appellant will be computed to begin on September 23, 2013 when he was first arraigned in court. For the avoidance of doubt, the sentence of 15 years imprisonment for the 2nd appellant will be computed to begin from the date he was sentenced by the lower court.

DATED AND DELIVERED AT KISUMU THIS 3RD DAY OF FEBRUARY, 2023.

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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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