Mwanzia v Republic (Criminal Appeal 230 of 2014)
[2023] KECA 420 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 420 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 230 OF 2014

F SICHALE, LA ACHODE & WK KORIR, JJA

APRIL 14, 2023

BETWEEN

JOSEPH WAMBUA MWANZIA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the sentence of the High Court at Nakuru (Mulwa J) on 10th October 2014 In HCCA No. 67 of 2011)

JUDGMENT

1. The Appellant Joseph Wambua Mwanzia was charged, tried and convicted of the offense of defilement contrary tosection 8(1) as read with 8(3) of the *Sexual Offences Act* (SOA). The particulars were that on the January 6, 2010 in Narok North District within Rift Valley Province (as it was then), the appellant unlawfully and intentionally caused his penis to penetrate the vagina of COM a girl aged 14 years.

2. This being a second appeal, we are guided by the provisions of Section 361 (1)(a) of the *Criminal Procedure Code*, elaborated by this court in the case of *Karani v. R* (2010) 1 KLR 73 as follows:

> " 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."

3. The prosecution called 5 witnesses to advance their case and to aid in carrying out our mandate, we have briefly summarized the facts of the case and the evidence that was tendered as set out below.

4. PW1 was on her way to her uncle's place when she met the appellant and went with him to his house. Once they got to his house the appellant forced her to undress and proceeded to defile her, causing injury to her buttocks and waist. Thereafter the appellant took her to another house where he defiled her yet again. She was subsequently rescued by her brother (PW2) and one other person and taken to the hospital.

5. PW2, RBO, is the said brother of PW1 who testified that after being informed that PW1 was missing, he traced her to the appellant's house with the help of the village elders. PW3, BM is her father and he said he was with the village elders when they questioned the appellant about the whereabouts of PW1 and he admitted to holding the girl in his house.

6. PW4, Henry Onyancha Tora, a health care worker at Nairagie Enkare Health Centre, testified that on examining PW1, he observed a recently broken and lacerated hymen and confirmed that she had been defiled. PW5, PC Paul Kimutai Kibyegon was the officer on duty at Nairagie Enkare Police Station on January 10, 2010, when two members of the public brought the appellant to the station accusing him of defilement. He re-arrested the appellant.

7. At the close of the prosecution case the appellant was placed on his defence. He gave an unsworn testimony in which he denied the charges and stated that he was framed because of a grudge between him and PW3. He also denied that he had a house at Nairagie Enkare town. It was his testimony that on the material day, he left his house to go to work at 6.00 am and on returning he found PW3 waiting for him and making the accusations.

8. The trial court considered the evidence and found the appellant guilty. He was convicted accordingly and sentenced to 15 years imprisonment. Being aggrieved by the sentence, the appellant preferred an appeal to the High Court against the sentence and by a judgment delivered on October 10, 2014, Mulwa J dismissed the appeal and enhanced the sentence to 20 years.

9. The appellant preferred this second appeal before us, predicated on a single ground in his Memorandum of Appeal, that the learned Judge erred in law by enhancing the sentence from 15 years to 20 years without any cross-appeal or a notice of enhancement. That by so doing the learned Judge failed to comply with section 354(2) of the *Criminal Procedure Code* thereby occasioning a miscarriage of justice to the appellant.

10. The appeal was canvassed by way of written submissions. The appellant acting in person filed his submissions on 9th November 2022 and urged that the enhancement of his sentence was unprocedural since he was neither warned about the possibility of enhancement of sentence, nor given a chance to withdraw his appeal in the circumstance. He also contended that his appeal was with the intention that the sentence would be reduced and that he would not have otherwise filed it if he thought the sentence would be enhanced. He cited the case of *MW v R* CA No 81 of 2017 eKLR, where the court stated as follows:

> "While still on this we may add also that to adjust, without any warning or notice, the 40 years imprisonment term to life when the least the appellant expected when he moved the first appellate court was a reduction if not an acquittal was itself unwarranted."

11. The appellant also referred us to the case of *JJW v Republic* CA No 11 of 2013 eKLR, where the court reiterated that the appellant should be informed of the possibility of enhancement of sentence before the hearing, or at the commencement of the hearing of the appeal. In emphasizing that the enhancement was illegal, the appellant also cited the case of *Sammy Nyaboke & another v Republic*

(2019) eKLR to posit that it was improper for the judge to enhance his sentence even though the prosecution counsel stated that his initial sentence was improper but did not file a cross-appeal.

12. The respondent on the other hand submitted that sentencing is discretionary, balanced upon all the relevant facts. To advance this assertion they cited the case of *Joseph Mureithi Kanyita v. R* Cr App No 188 of 2000. It was the prosecution's contention that the enhanced sentence was appropriate considering the seriousness of the offense.

13. We have considered the record of appeal, the submissions by both parties, and the case law relied on. The issue of law that arises for our determination is whether the enhancement of the sentence was procedural.

14. In sentencing the appellant to 15 years imprisonment, the trial court stated as follows:

> " Accused is convicted under section 8(1)(3) of the *Sexual Offences Act*. The complainant was aged 15 years at the time of the offense. This is an offense that is prevalent in this area and should be discouraged. A deterrent sentence is called for."

15. During the hearing of the first appeal, the state which was represented by Mr. Nyakira pointed out that the initial 15 years sentence was not proper and legal because the victim was 14 years at the time the offense was committed and that the trial magistrate ought to have sentenced the appellant to 20 years in accordance with the provisions of the SOA. In her judgment, the learned Judge addressing the issue of sentence stated:

> " The above section 8(1) as read with section 8(3) of the *Sexual Offences Act* No. 3 of 2006, imposes a minimum sentence upon conviction to a term of 20 years. The *Sexual Offences Act* is a statute of strict interpretation, and the court has no option but to strictly comply with its provisions upon conviction. In this regard, the trial court erred in law' in sentencing the appellant to 15 years imprisonment. I proceed to enhance the sentence imposed upon the appellant to 20 years imprisonment as per the law provided."

16. Section 354(3) of the *Criminal Procedure Code* empowers the first appellate court to enhance, or alter the nature of the sentence imposed by the trial court. This provision was expounded by this court in *JJW v. Republic* (2013) eKLR as follows;

> " It is correct that when the High Court is hearing an appeal in a criminal case, it has powers to enhance sentence or alter the nature of the sentence. That is provided for under Section 354 (3) (ii) and (iii) of the *Criminal Procedure Code.* However, sentencing an appellant is a matter that cannot be treated lightly. The court in enhancing the sentence already awarded must be aware that its action in so doing may have serious effects on the appellant. Because of such a situation, it is a requirement that the appellant be made aware before the hearing or at the commencement of the hearing of his appeal that the sentence is likely to be enhanced. Often times this information is conveyed by the prosecution filing a cross-appeal in which it seeks enhancement of the sentence and that cross-appeal is served upon the appellant in good time to enable him prepare for that eventuality. The second way of conveying that information is by the court warning the appellant or informing the appellant that if his appeal does not succeed on conviction, the sentence may be enhanced or if the appeal is on sentence only, by warning him that he risks an enhanced sentence at the end of the hearing of his appeal."

17. Further, the case of *Sammy Omboke & another S v Republic* (2019) eKLR to which the appellant referred us discussed the jurisdiction of the first appellate court on the enhancement of sentences and held thus;

> " In the instant appeal, there was no cross-appeal by the prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then (sic) could be enhanced; and there was no notice of enhancement. Guided by the judicial pronouncements of this Court above, we find that the learned judge erred in enhancing the sentence meted out on the appellants. In the absence of a cross-appeal and notice and or warning the judge had no jurisdiction to enhance the sentence."

18. The respondent herein referred us to the case of *Joseph Mureithi Kanyita v R* in Cr App No 188 of 2000 without specifying whether it was in High Court or Court of Appeal. However in *Joseph Mureithi Kanyita v Republic* (2017) eKLR, this court contemplated a similar situation and held as follows:

> " In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant.

19. We have anxiously gone through the entire record of appeal, and it is apparent that the State neither filed a cross-appeal against the sentence, nor served any notice of enhancement upon the appellant. The record also indicates that at no time did the court direct the State to inform the appellant of the possibility of applying for enhancement of the sentence, nor did the court so warn him in its own cognizance. In the premise therefore, it is our view that the trial court, having already considered the severity of the offense, and all other factors and exercised its discretion in imposing the sentence that it did upon the appellant, the sentence can only be revised upwards on appeal by the State or upon prior notice being given to an appellant of the possibility of enhancement of the sentence. Therefore, the learned judge had no jurisdiction to review the sentence in the absence of such cross-appeal, or notice of enhancement.

20. We therefore find that the first appellate court erred in enhancing the sentence. Accordingly, we allow the appeal and set aside the sentence of 20 years imprisonment imposed by the first appellate court and reinstate the original sentence of 15 years imprisonment that was imposed by the trial court.

It is so ordered.

Dated and Delivered at Nakuru this 14th Day of April, 2023

F. SICHALE

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

.....

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR