EKK v Republic (Criminal Appeal 386 of 2019)
[2023] KECA 599 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 599 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 386 OF 2019

F SICHALE, FA OCHIENG & LA ACHODE, JJA

MAY 26, 2023

BETWEEN

EKK ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Eldoret (M. Ang'awa, J.) dated 25th June, 2010inHC.CR.A. No. 47 of 2010)

JUDGMENT

1. This is an appeal from the judgment of the High Court of Kenya at Eldoret (M Ang'awa, J). The appellant was charged with the offence of defilement contrary to section 8(2) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. The appellant pleaded guilty to the charge.

2. The facts of the case were that; the complainant was aged 6 years old. She stayed with her grandmother and the appellant who was a family member. She went to school at [Particulars Withheld] Primary School. On March 17, 2010 at around 7 pm she was at home when the appellant asked her to go and light a fire in his house. He then followed her to the house where he held her by the hand and pulled her to the bed. He threatened to beat her if she made any noise. He removed her underpants, removed his trousers and defiled her. The relative who lived with the appellant was away at the time and when he arrived he found the appellant defiling the complainant. The appellant ran away.

3. The complainant's grandmother and neighbours were informed of the incident. The villagers went after the appellant who had escaped to a nearby forest. He was arrested and taken to Kabyego AP camp and later to Kapsowar Police Station. The complainant was taken to AIC Mission Hospital and a P3 form was filled. He was later charged on the strength of the evidence, which included the medical findings.

4. The appellant was convicted on his own plea of guilty and sentenced to life imprisonment.

5. Aggrieved by the sentence, the appellant appealed to the High Court. His appeal was summarily rejected pursuant to Section 352(2) of the *Criminal Procedure Code* leading to the present appeal.

6. The appellant raised six grounds of appeal to wit; the first appellate court erred in law by rendering a summary judgment; in the absence of the appellant; the mandatory life sentence which was inhumane and degrading; the plea was unequivocal; the plea form was missing and the plea was not explained to the appellant in his mother tongue as prescribed under Section 198(1) of the *CPC*; the appellant was not given an opportunity to rethink his plea of guilty nor was he given any warning on the consequences of pleading guilty; and the appellant was tortured and coerced to plead guilty.

7. When the appeal came up for hearing, the appellant appeared in person whereas the respondent was represented by Mr Onkoba. Parties relied on their written submissions which they briefly highlighted.

8. The appellant submitted that his appeal was summarily dismissed in his absence which denied him access to justice in contravention of Article 48 of the *Constitution*. He had requested to proceed with the appeal as a pauper. The appellant further submitted that his rights under Articles 25 (c), 27(1) & (2) and 28 were contravened.

9. The appellant contended that the charge was not read to him in a language he understood as provided for in Section 198(1) of the *CPC*. He further contended that he was not informed of his right to representation as enshrined in Article 50(2) (g) (h). He relied on the case of *Pett v Greyhound Racing Association* [1968] ALL ER 545 to buttress this submission.

10. Citing the case of *Francis Karoki Muruatetu & Another v Republic* [2017] eKLR the appellant submitted that the court had declared the mandatory death sentence unconstitutional.

11. The appellant faulted the trial court for failing to inquire into the situation the appellant was in at the time plea was taken. He alleged to have been tortured and coerced by the police.

12. The appellant further faulted the trial court for failing to follow the guidelines in plea taking as was outlined in the case of *Lusiti v Republic* [1977] eKLR. He submitted that it was bad in law, for a plea of guilty to be entered in a capital offence or in charges that attract mandatory sentences.

13. The appellant urged that, based on the principle of natural justice, he be set at liberty or that a retrial be ordered.

14. The respondent submitted that the appellant entered an unequivocal plea of guilty on March 23, 2010. That under Section 348 of the *CPC* the appellant was barred from appealing against the conviction.

15. Citing the cases of *Adan v Republic* [1973] EA 44, *John Muendo Musau v Repubic* [2013] eKLR and *Obedi Kilonzo Kerero v Republic* [2015] eKLR and Section 207 of the *CPC* counsel submitted that the prosecution complied with the proper procedure of taking a plea of guilty.

16. Counsel submitted that the appellant failed to demonstrate that any of the circumstances in which a plea of guilty can be interfered with, were violated as cited in the case of *Alexander Lukoye Malika v Republic* [2015] eKLR.

17. Counsel further submitted that upon perusal of the record, the court found that the appeal did not merit to proceed to full hearing as provided for under Section 352(2) of the *CPC*. That the record is clear, and that the appellant understood the language used by the court.

18. Counsel pointed out that Section 26(2) of the *Penal Code* gives the trial court discretion to pass a lesser sentence where the prescribed sentence is life imprisonment. He also stated that for an appellate court

to interfere with the sentence imposed, there has to exist sufficient circumstances entitling it to vary such an order. (See: *Nelson v Republic* [1990] EA 599).

19. Counsel submitted that the two courts below did not act on the wrong principle, or overlook some material facts or hand down a sentence which was manifestly excessive.

20. We have carefully considered the record, submissions, authorities cited and the law.

The main issue for consideration is whether the learned Judge of the High Court was right in summarily rejecting the appeal lodged by the appellant.

21. Section 352 of the *Criminal Procedure Code* provides:

> " 352(1) When the High Court has received the petition and copy under section 350, a judge shall peruse them, and, if he considers that there is no sufficient ground for interfering, may, notwithstanding the provisions of section 359, reject the appeal summarily:
>
> Provided that no appeal shall be rejected summarily unless the appellant or his advocate has had the opportunity of being heard in support of the appeal, except in a case falling within subsection (2) of this section;
>
> (2) Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint.
>
> (3) Whenever an appeal is summarily rejected notice of rejection shall forthwith be given to the Director of Public Prosecutions and to the appellant or his advocate."

22. Therefore, summary rejection of the appeal in the present circumstances could only be on the basis that, the appeal did not disclose any grounds for interference with the impugned decision.

23. The grounds of appeal before the High Court were; the appellant pleaded guilty; the appellant was convicted without being warned on the repercussions of his plea; the appellant was convicted without consideration of his torture; and the appellant was convicted without the state of his health and of mind being ascertained.

24. The above grounds were appropriate for summary rejection as the appellant acknowledged that he had pleaded guilty to the charge. The facts as read could not be challenged as no further evidence was adduced. If anything, this was an afterthought as it dawned on the appellant that the offence he was charged with carried the life imprisonment sentence. We are satisfied that the learned Judge was mindful of the strict requirements of Section 352. The appeal was brought solely on the grounds that the appellant's conviction was against the weight of evidence, and that the sentence imposed was manifestly harsh and excessive, and that it was imposed without prior warning.

25. It is trite law that summary rejection of appeals under Section 352 of the *Criminal Procedure Code* is an exceptional power reposed in a Judge of the High Court and should be invoked sparingly and should be exercised in the clearest of cases and, where, on the face of it, there is no merit at all in the appeal in question. It is a power which cannot be exercised with carefree zeal. (See: *Okello v Republic* [2003] KLR 205 and *NKW v Republic* [2003] eKLR).

26. We find that the case herein was very clear, as the appellant confirmed that he had pleaded guilty. The facts of the case were sufficient to prove the offence with which the appellant had been charged. In our considered view, there were no circumstances which could raise any reasonable doubt about the correctness of the conviction.

27. Before we conclude this judgment, we note that the Notice of Appeal is dated July 19, 2018 which was more than 8 years after the High Court had summarily rejected the appeal. Although it was not the duty of this Court to inquire into the reasons why the High Court purported to grant granted leave to enable the appellant move this Court, it would have been interesting to see the basis upon which leave was granted. We say so because the High Court is not clothed with jurisdictional mandate to grant such leave to appeal.

28. In conclusion, the appeal lacks merit and is hereby dismissed.

Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 26TH DAY OF MAY, 2023.

F. SICHALE

.....

JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR