Ogwoka v Republic (Criminal Appeal 171 of 2018)
[2023] KECA 564 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 564 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 171 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MAY 12, 2023

BETWEEN

DANIEL NYAMUSWA OGWOKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Kisii (Okwany, J.) dated on 15th September, 2016 in HCCRA No. 16 of 2015)

JUDGMENT

1. The appellant, Daniel Nyamuswa Ogwoka, was the accused person in the trial before the Principal Magistrate's Court in Kilgoris in Criminal Case No. 946 of 2011. He was charged with the offence of defilement of a girl contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*, No. 3 of 2006. The particulars of the offence were that it was alleged that on the 1st day of November, 2011 in Trans Mara District within Narok County, the appellant intentionally caused his penis to penetrate the vagina of JK, a girl of the age of 6 years. The appellant was also faced with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the victim, date and place of the alternative count were the same as that in the main charge.

2. The appellant pleaded not guilty and the case proceeded to full hearing. At the conclusion of the trial, the learned trial magistrate convicted the appellant and sentenced him to life imprisonment.

3. The appellant was aggrieved by the decision of the lower court and filed an appeal against the conviction and sentence before the High Court.

4. The High Court (Okwany, J.) dismissed the appeal and upheld the conviction and sentence in a judgment dated September 15, 2016.

5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal.

6. We find it unnecessary to list the appellant's grounds of appeal for reasons which shall become obvious shortly. But for record purposes, it is sufficient to state that both the appellant and the prosecution counsel filed their written submissions. During the virtual hearing, the appellant appeared in person, whereas learned counsel, Mr. Okango, appeared for the respondent.

7. During the oral hearing of the appeal, the appellant informed the Court, for the first time, that he had contemporaneously pursued two avenues to ventilate his grievances: On the one hand, he filed this appeal, and, as aforesaid even filed written submissions and was ready to highlight them orally. On the other hand, he confessed that during the pendency of this appeal, concerned about the long waiting period, he had filed a petition for resentencing to the to the High Court following the avenue created by the Supreme Court's decision in *Francis Muruatetu & another v Republic* [2017] eKLR. He revealed that his petition for resentencing was heard by the High Court sitting at Kisii and his sentence of life imprisonment was substituted with a sentence of imprisonment for thirty (30) years.

8. The appellant stated that he now wished to pursue only an appeal against the reviewed sentence imposed by the High Court upon resentencing under the Muruatetu doctrine as he was no longer interested in contesting his conviction. In other words, the appellant hoped that his original appeal against the High Court judgment affirming the lower court's conviction and sentence would mutate and transmogrify into an appeal against the sentence imposed by the High Court after the resentencing hearing in the mode of *Muruatetu Case*.

9. Needless to say, the appellant's hopes are a chimera. The procedural posture of the case, as it stands presently, is that no proper appeal is before us. The appellant functionally aborted his appeal against both conviction and sentence by electing, un- procedurally – we must add - to file a petition for resentencing at the High Court while this appeal was still pending before us. For all intents and purposes, the appeal that was pending before us was extinguished. Similarly, the appellant's hope that he could somehow turn this appeal against his conviction and sentence as affirmed by the High Court in Kisii High Court Criminal Appeal No. 16 of 2015 into an appeal against the sentence (of imprisonment for thirty years) which was imposed by the High Court following his petition for resentencing in Kisii High Court Constitution Petition (Application) No. 24 of 2019 is misguided. Indeed, all the appellant can get from this court is a firm admonition for abusing the court process by simultaneously pursuing two actions in two layers of the court system. His appeal herein stands dismissed. If the appellant wishes to appeal against the sentence imposed in Kisii High Court Constitution Petition (Application) No. 24 of 2019 (the resentencing judgment), he must file a separate appeal against that decision – if, indeed, he can persuade the court that the decision is appealable on its facts and, of course, after overcoming the procedural hurdle of being out of time.

10. Beyond dismissing this appeal, it is necessary, for good order, for this court to pen a few words by way of guidance to the High Court (and appellants) who may find themselves in the same situation as the appellant in the future. These guidelines are necessary because of the real potential for judicial embarrassment and abuse of court which may occur where a shrewd, perhaps dishonest, inmate simultaneously pursues both an appeal before this court and a petition or application for resentencing before the High Court. Such an inmate would end up with two judicial pronouncements from two layers of the court system; and the outcome (especially on sentence) may potentially conflict. Such an eventuality would not only cause judicial embarrassment but would amount to an abuse of the judicial process by allowing an inmate to "game" the system with the hope of cherry picking the outcome that best favours him.

11. In order to guard against this in future cases, we propose the following four guidelines:

    a. Where an appellant has filed an appeal to this court, it is improper for that same appellant to pursue an application or petition for resentencing at the High Court. Such an appellant would have to make an election to either withdraw his appeal to this court or to institute a petition or application for resentencing action.

    b. Where a litigant has filed both an appeal to this court and a petition or application for resentencing at the High Court, the proper course is for the High Court to stay the petition or application before it and have the litigant come before this court toeither progress his appeal or to withdraw it.

    c. In those cases where the High Court has ascertained that the inmate had filed an appeal to this court, the High Court should only proceed with the petition or application for resentencing once it has confirmed vide an order of this court that the appeal which was pending before this court has been withdrawn.

    d. As a matter of good practice, when a High Court is moved by an inmate through a petition or application for resentencing, it should request for certification from the Court of Appeal registry serving the area where the High Court is located attesting that the inmate in question does not have an appeal arising from the same trial pending before the Court of Appeal. The High Court should only proceed with the hearing of the petition or application for resentencing upon certification by the Court of Appeal registry that the inmate does not have an appeal pending before this court or certification that any such appeal has been withdrawn.

12. Needless to say, these guidelines hold, *mutatis mutandis*, in respect to a Muruatetu resentencing petition to a Subordinate Court and a related appeal from the Subordinate Court to the High Court.

13. Following these guidelines will streamline the somewhat confounding spaghetti-like procedural maze that has characterized the appellate criminal justice system since the *Muruatetu Case* was handed down by the Supreme Court. This will not only economize scarce judicial resources but also forestall the erosion of the credibility of the judicial system which might result if inmates are incentivized to pursue multiple avenues in different courts which might result in potentially contradictory sentences.

14. Turning to the appeal before us, we now formally dismiss it.

DATED AND DELIVERED AT KISUMU THIS 12TH DAY OF MAY, 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