



**Kioko v Republic (Criminal Appeal 93 of 2020)
[2023] KECA 759 (KLR) (22 June 2023) (Judgment)**

Neutral citation: [2023] KECA 759 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CRIMINAL APPEAL 93 OF 2020
AK MURGOR, S OLE KANTAI & GWN MACHARIA, JJA
JUNE 22, 2023**

BETWEEN

MWANZIA KIOKO APPELLANT

AND

REPUBLIC RESPONDENT

(Being an appeal against the Judgment of High Court at Kitui (L.N. Mutende, J.) delivered on 9th February 2016 in Nairobi HCCA No. 87 of 2015)

JUDGMENT

1. The appellant, Mwanzia Kioko was charged with the offence of unnatural offence contrary to section 162 (a) of the *Penal Code*. The particulars of the charge were that on April 5, 2009 in Mwingi District within the former Eastern Province, the appellant had carnal knowledge of GK (PW2), against the order of nature.
2. He pleaded not guilty and during the trial, the prosecution called 5 witnesses, while the appellant testified and called one witness. After hearing the evidence, the trial court found the appellant guilty and convicted him of the offence and sentenced him to serve 15 years' imprisonment.
3. He was dissatisfied with the conviction and the sentence, and appealed to the High Court. Upon considering the appellant's appeal, the trial judge upheld the conviction and enhanced the sentence from 15 years to 21 years' imprisonment.
4. The appellant was aggrieved by the High Court's decision, and filed this appeal on grounds that the ingredients of unnatural offence, under section 162 (a) of the *Penal Code*, were not proved beyond reasonable doubt; that he was convicted without the trial court appreciating that his fundamental rights under article 49 (1) (i) of the *Constitution* were violated, by police holding him in cells for more than the prescribed period as stipulated by the law; that the conviction was not based on a first report by the complainant (victim); that the evidence was contradictory; that the court applied the wrong



legal principles; that the medical examination procedures were not followed; that essential witnesses were not called to testify; that the charge sheet was defective; and that the trial court disregarded his alibi defence.

5. When the appeal came up for hearing on a virtual platform, the appellant who appeared in person from Kamiti Maximum Prison orally informed us that the appeal was against sentence only; that the 1st appellate court had enhanced his sentence without duly notifying or warning him and as a consequence, the sentence was unlawful. He further submitted that he was remorseful and had learnt a lot from prison; that his parents had died while he was in prison and that he was required at home to take care of his siblings.
6. Learned prosecution counsel for the State, Mr Mureithi submitted that the enhancement of the sentence to 21 years was explained by the first appellate judge to the appellant, and was therefore lawful.
7. But before addressing the issue of the sentence, the brief facts of the case that led to the conviction were that on the April 5, 2009 at about 1.00 pm, V (PW 1), GK's mother left him at her shop and went to a meeting which ended at 4.30 pm. When she arrived home at 5.30 pm she met GK and his younger brother, and GK was crying. Where he was sitting was wet, and she saw that the back of his trousers had a blood stain. She also examined his anus, and saw a wound. GK told her that the appellant had taken him from the shop to a shamba, removed his pants, told him to lie on his stomach and then he felt a sharp thing entering his buttocks. PW 1 took GK to hospital the next day, and reported to the police. The appellant was later arrested, by PC Henry Maina, (PW3), who received the report of sodomy and saw the blood stained trousers.
8. After a *voir dire* examination, GK, (PW2) a boy aged 5 years gave unsworn evidence, that on April 5, 2009, his mother, took him to his grandmother where she left him, and went to attend a meeting; that the appellant took him from the shop, removed his trousers, urinated, then sodomised him. After he told his mother, she washed him and took him to hospital the next day, where Thomas Gichobi PW 5, a Clinical Officer at Migwani District Hospital examined him, and found that there was mucoid discharge and a bruise around the anal region. He also observed that GK's trousers had some blood stains. He produced the treatment notes from Kithyoko Health Centre and Migwani Hospital and P3 form.
9. The appellant in his defence stated that GK's mother was his female friend; that she had told him to sell his land and migrate to her parents' home at Makindu. He refused, and she threatened him with dire consequences. He denied sodomizing GK.
10. As stated earlier, the appellant abandoned the grounds of appeal on conviction, and sought to pursue the appeal against the enhancement by the High Court of the sentence imposed by the trial court from 15 years to 21 years.
11. The predecessor of this court, in the case of *Ogolla s/o Owuor v Republic*, [1954] EACA 270, pronounced itself on the issue of sentence thus;

“The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (*R v Shershowsky* (1912) CCA 28TLR 263).” See also *Omuse v R* (supra) while in the case of *Shadrack*



Kipkoeb Kogo v R, Eldoret criminal appeal No 253 of 2003 the Court of Appeal stated thus:-

“..sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also *Sayeka v R* (1989 KLR 306)”

12. As to whether the procedure adopted by the High Court in enhancing the sentence was lawful, this court in the case of *JJW v Republic* [2013] eKLR addressed the process of enhancement of a sentence thus;

“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.”

13. In the case of *Sammy Omboke & another v Republic* [2019] eKLR this court expressed;

“...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 them 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”.

14. In the case of *Gushashi Lelesit v Republic* [2016] eKLR it was explained that;

“ [t]he obligation on an appellate court to forewarn or caution an appellant before enhancing a sentence imposed against him by a trial court is not anchored on any legal provision but in practice that has now gained such notoriety that it is proper that an appellant be warned of the consequences of proceeding with his appeal in circumstances where such proceeding may likely result in the sentence being enhanced to his disadvantage. It is simply to enable him to weigh the options available and then make a decision that suits his best interests, especially in circumstances where like in the instant appeal an appellant is disadvantaged for not being schooled both in the law and legal procedures he may be confronted with during the course of the trial of his appeal.”



15. At the conclusion of the judgment of the High Court, the learned judge expressed that the sentence imposed was not in accordance with the law, and set aside the sentence of 15 years and substituted it with a sentence of 21 years' imprisonment.
16. However, prior to the commencement of the appeal, the record does not disclose that the prosecution filed a notice to enhance the sentence or a cross appeal in that respect. In addition, the appellant was not warned by the court of the possibility of his sentence being enhanced, and he was not afforded an opportunity to decide whether to proceed with his appeal or not. In effect, the procedure adopted to enhance the sentence was unlawful, and we find it necessary to interfere with that decision.
17. In the result, the appeal against the sentence succeeds and is allowed. The sentence of 21 years imprisonment imposed by the High Court is set aside and the sentence of 15 years imprisonment imposed by the trial court is reinstated.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

A.K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

G.W. NGENYE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

