Wanyeso v Republic (Criminal Appeal 110 of 2022) [2023] KECA 709 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 709 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 110 OF 2022

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

MAKUMBI SUBUI WANYESO .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Voi (F. Amin J.) delivered on 23rd October 2019 in High Court Criminal Appeal no. 42 of 2018 arising from the original trial in Voi Criminal Case No. 320 of 2009)

JUDGMENT

1. This is second appeal from the judgement of the High Court sitting in Voi in Criminal Appeal No. 42 of 2018. From the judgement of the Magistrates Court, it is indicated that the proceedings leading to the appeal before the High Court arose from a retrial that was ordered by the High Court upon allowing an earlier appeal filed by the Appellant.

2. The appellant, Makumbi Subui Wanyeso, was charged before the Voi Senior Resident Magistrate's Court in Criminal Case No. 320 of 2009 with the offence of Defilement of a Girl Contrary to section 8(1) as read with section 8(2) of the *Sexual Offences Act*. The particulars were that the Appellant on the night of September 11, 2007 at an unknown time in Taveta District within Coast Province, he unlawfully caused his penis to penetrate the vagina of EM, a girl aged 9 years. Based on the same facts he faced an alternative charge of Committing an Indecent Act with a child contrary to section 11(1) of the *Sexual Offences Act*.

3. The appellant pleaded not guilty at the trial and upon conducting a hearing, the Learned Trial Magistrate found him guilty of the offence, convicted him accordingly and sentenced him to life imprisonment, which according to the Learned Trial Magistrate was the prescribed sentence.

4. The prosecution's case was that on September 10, 2007, the Complainant, who had stolen money from her mother, sought an overnight refuge at the house of the appellant. During the night, the appellant removed her pant and penetrated her and in the morning the appellant told her to inform her mother that she had slept in the bathroom. The following morning after she had left for school, the complainant's mother followed her and reported to the school authorities that the complainant had not spent the night at home. It was during her interrogation that the complainant revealed that she had spent the night at the appellant's house where she was defiled by the appellant and that similar incidents had occurred previously.

5. At the instance of the head teacher, the village elder accompanied the complainant to the appellant's house. Upon being traced the appellant reluctantly opened the door to his house where the complainant demonstrated how the appellant had defiled her. The appellant was then arrested and taken to Taveta Police Station from where both the appellant and the complainant were escorted to the Hospital for examination and treatment of the complainant. While the appellant was discharged after examination, the complainant was admitted till September 12, 2007.

6. At the trial the complainant's medical report was produced which revealed that the hymen was missing while the labia minora and labia majora were normal though the vaginal walls were slightly swollen. There were however no lacerations and it was the medical opinion that the complainant was habitually abused.

7. Upon being placed on his defence, theappellant in his unsworn statement, while admitting that the complainant spent the night in his house that night, denied the allegations of defilement stating that he was incapable of committing the offence as he had lost the ability to have sex in 2001.

8. In his judgement, the Learned Trial Magistrate found that the complainant's evidence was consistent and found that the appellant, by permitting the complainant to spend the night in his house instead of informing the complainant's mother, had ulterior motive when he allowed the complainant to sleep on the same bed with him. He therefore found thecomplainant's evidence truthful and convicted the appellant on the main charge.

9. Aggrieved by that decision, theappellant lodged an appeal to the High Court which appeal was dismissed.

10. This appeal was heard on thecourt's virtual platform on February 14, 2023during which the appellant appeared in person from Manyani Prison though, due to mental infirmity, his case was presented by a paralegal, Solomon Ngatia. Learned Counsel, Ms Mwaura, appeared for the respondent. Both the appellant and Ms Mwaura relied on their respective written submissions which they briefly highlighted.

11. Before us the appellant opted to only challenge the life sentence imposed on him. According to him, he has been in custody since 2007 when he was 55 years old but is now aged 70 years old. He contended that he cannot take part in the rigorous rehabilitative activities of prison due to his age and frail body. According to him, he has no strength to compete with the youthful offenders found in prison and the congestion in prison makes him prone to diseases and this is compounded by his weak immune system. He pleaded that it is only best that he be set free to spend his sunset years in his home.

12. It was his case that this case presents exceptional circumstances to compel a court to order an unconditional and absolute discharge as contemplated under section 35 of the *Penal Code*. It was contended that keeping a person aged over seventy (70) years in prison under the harsh prison conditions when he is not a danger even to himself is something that should prick the conscience of humanity and our entire criminal justice system. In support of his submissions the appellant cited the

case of *Wilson Kipchirchir Koskei v Republic* [2019] eKLR and submitted that in the circumstances of his case, his continued incarceration is tantamount to sentencing him to a slow death.

13. Before us it was urged that some elderly inmates are being unnecessarily held in prison despite the fact that their continued incarceration does little to serve the principal purposes of punishment: retribution, incapacitation, deterrence, and rehabilitation. It was argued that for prisoners who no longer pose a public safety risk because of age and infirmity, and who have already served some portion of their prison sentence, continued incarceration may constitute a violation of their right to a just and proportionate punishment. Therefore, alternative forms of punishment should be imposed—for example, conditional release to home confinement under parole supervision— that would serve the legitimate goals of punishment.

14. This court was therefore urged to direct that the appellant be sentenced a definite lenient sentence other than the life sentence which he is currently serving; this order will be just and equitable because it will be in line witharticles 50(2)(p), 27(1)(2), 20(3)(a)(b), 28 and 19(2) of *the Constitution*. In this regard the appellant relied on *Julius Kamau Mbugua v Republic* Nairobi Criminal Appeal No.50 of 2008 on the need to balance the societal needs of the society demanding that those who commit crimes against society be brought to book with a corresponding demand that the punishment meted to such persons should be commensurate to the wrong done. It was submitted that the life sentence imposed on the appellant is not commensurate with the facts and circumstances of this offence.

15. The appellant submitted on the undesirability of life sentence and based on experiences in other jurisdictions, urged thiscourt to find that the fifteen (15) years the appellant has spent in lawful custody is sufficient punishment and that he has atoned for his crime.

16. The respondent's position was that the sentence imposed was legal and hence there was no justification for this courtto interfere.

Analysis and Determination

17. We have considered the submissions made before us.

18. Being a second appeal our mandate is limited bysection 361(1)(a) to consider issues of law only but not matters of fact that have been tried by the first court and re-evaluated on first appeal. In *Njoroge v Republic* [1982] KLR 388 it was held by this court on the said mandate on a second appeal:

> " On a second appeal, we are only concerned with points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence."

19. As to what constitutes "matters of law" in relation to this court's jurisdiction as the second appellate court, the Supreme Court in *Gatirau Peter Munya v Dickson Mwenda Kithinji and others* [2014] eKLR characterised the three elements of the phrase "matters of law" thus:

> " (a) the technical element: involving the interpretation of a constitutional or statutory provision;
>
> (b) the practical element: involving the application of the *Constitution* and the law to a set of facts or evidence on record; and
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> (c) the evidentiary element: involving the evaluation of the conclusions of a trial court on the basis of the evidence on record."

20. Thiscourt however held in *Jonas Akuno O'kubasu v Republic* [2000] eKLR that:

> "It is correct that on first appeal the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the material before the judge or magistrate with such other material as it may decide to admit. The appellate court must make up its own mind not disregarding the judgement appealed from but carefully weighing and considering it... On second appeal, it becomes a question of law as to whether the first appellate court on approaching its task, applied or failed to apply such principles." [Emphasis ours].

21. It was similarly held in *Karani v R* [2010] 1 KLR 73 that:-

> "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."

22. We are also guided by the decision in *Adan Muraguri Mungara v R* CA Cr App No 347 of 2007 where it was held thus:

> "As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by two courts below, unless such findings are based on no evidence at all, or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this court to interfere."

23. It is therefore clear that on second appeal, this court is mandated to make a finding as to whether the first appellate court carried out its legal mandate of re-evaluating the evidence presented before the trial court in arriving at its decision. In this case we have noted from the record that April 6, 2010, the prosecution applied for leave to amend the charge sheet which application was apparently allowed without hearing the appellant. Apart from that while the amended charge sheet was read out to theappellant, his view as to whether he wished to recall any of the witnesses who had testified was not sought. This court in *Yongo v Republic* [1983] KLR 319 at page 324, while discussing section 241(1) (i) of *Criminal Procedure Code* expressed itself as hereunder: -

> "unfortunately, though the magistrate recorded that he had complied with section 214 and that the amended charge was read to theappellant he did not record that the requirement under the second proviso, namely the appellant's right to re-call the witnesses, was also complied with. This he should have done particularly as regards Robert, who gave the only material evidence...We cannot say that this failure to observe the requirements of the section occasioned no prejudice to the appellant in the circumstances of the case..."

24. The said section states that:

    (1) Where, at any stage of a trial before the close of the case for the prosecution, it appears to the court that the charge is defective, either in substance or in form, the court may make such order for the alteration of the charge, either by way of

amendment of the charge or by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case: Provided that -

i. where a charge is so altered, the court shall thereupon call upon the accused person to plead to the altered charge;

ii. where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his advocate, and, in the last- mentioned event, the prosecution shall have the right to re-examine the witness on matters arising out of further cross-examination.

(2) Variance between the charge and the evidence adduced in support of it with respect to the time at which the alleged offence was committed is not material and the charge need not be amended for the variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) and there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary.

25. The said provision was also dealt with by this court in the case of *Harrison Mirungu Njunguna v Republic* Criminal Appeal No. 90 of 2004 (unreported) where it was held that:

> " ...the right to hear the witness give evidence afresh on the amended charge or to cross examine the witnesses further is a basic right going to a root of a fair trial."

26. The appellate court then found the proceedings before the trial court substantially defective and further explained that the failure of the trial court to inform the accused of his rights given to him by law was not a procedural technicality which could be cured under the provisions of section 382 of the *Criminal Procedure Code*.

27. Dealing with that section in Nyeri HC Criminal Appeal No 392 of 2007 - *Peter Maina Macharia v Republic*, the Court expressed itself as hereunder:

> " These two provisions are obviously for the protection of persons facing criminal trials and in paragraph (1) of the proviso, it is clear that the trial court had no option but to read the amended charge sheet to an accused person. The expression employed in the provision is that the court, "shall thereupon call upon the accused to plead to the altered charge." In the circumstances of the present Appeal the Trial Magistrate did comply with the requirement since she called upon the appellant to plead to the amended charge. However, she failed to comply with the more troublesome question of paragraph (ii) of the proviso. The trial court was clearly required to inform the appellant of his right to have the previous witnesses recalled either to give evidence afresh on the amended charge sheet or to cross-examine the witnesses further is a basic right going to the root of fair trial and clearly it was the duty of the trial court to show in its record that she had informed the appellant of that right and to record further what the appellant said in answer to the information...We think the proceedings in the Magistrate's Court were substantially defective. Failure to inform an

> Accused person of his rights given to him by law is not a procedural irregularity which can be cured under the provisions of section 382 of the Code. Accordingly, the Appellant's trial is substantially defective and we must allow his appeal on this ground alone."

28. We are, however, aware of the decision of this court in *Josphat Karanja Muna v Republic* [2009] eKLR where the appellant complained that he had not been given a chance to recall witnesses who had testified and the court stated:-

> " On non compliance with section 214 of the *Criminal Procedure Code*, we observe that as far as the appellant is concerned, the substituted charge at page 5 of the record did not introduce any new matter into the main charge that would have necessitated recalling of witness. All the substituted charge did was to introduce an amended name of the complainant. When he gave evidence, on September 29, 2002, he gave his name as Ben Cheche Gikonyo whereas his name Ben Chege name in the first charge sheet was given as Gikonyo. The amendment only took care of that. That amended charge was read to the appellant and his co-accused and fresh plea taken. That the spirit of section 214 is to afford an accused person opportunity to recall and cross-examine witnesses where the amendments would introduce fresh element or ingredient into the offence with which an accused person is charged. It certainly was not meant to be invoked every time an amendment is made even if such an amendment is only to introduce a correction of name or of a word. Here the name Ben Chege Gikonyo was amended to read Ben Cheche Gikonyo. We do not accept that the non compliance with the provisions of section 214 of the *Criminal Procedure Code* resulted into injustice to the appellant."

29. We must however make it clear that the duty imposed upon the court is to explain to the accused the right to apply for recall of the witnesses who had testified as opposed to the right to recall the said witnesses. The trial court however, retains the discretion whether or not to grant such an application.

30. In the matter before us, we are unable to tell whether the amendment in question prejudiced the appellant or not. Suffice it to state that first appellatecourt did not consider this aspect.

31. In those circumstances, thecourt ordinarily makes an order for retrial. However, this is a matter in which a retrial has been ordered before. In *Muiruri v Republic* [2003] KLR 552, it was held that:-

> " Although some factors may be considered, such as illegalities or defects in the original trial, the length of time elapsed since the arrest and arraignment of the appellant; whether mistakes leading to the quashing of the conviction were entirely the prosecution's making or not; whether on a proper consideration of the admissible or potentially admissible evidence a conviction might result from a retrial; at the end of the day, each case must depend on its own particular facts and circumstances and an order for a retrial should only be made where the interests of justice requires it."

32. In this case we have also considered the age of theappellant.

    He is now 71 years old. Due to the infirmity occasioned by his advanced age, he was even unable to adequately present his appeal before us. A retrial in those circumstances would be clearly futile.

33. What has caused us concern is that those who are convicted for either long periods of time or for indeterminate sentences are left with no possibility of their conditions being reviewed since we do not have parole system in this country. Therefore, such persons are subjected to the vagaries of harsh prison conditions even when it is clear that their continued stay in prison can no longer be justified under any

of the penological grounds and to the contrary, is detrimental to the health of the prisoner and a burden to the prison authorities who have to take care of people who may well be in vegetative state. That the age of an accused person is a factor to be considered in sentencing was appreciated by thiscourt in *Ali Abdalla Mwanza v Republic* [2018] eKLR where it held that:

> "In considering whether the sentence of 40 years was manifestly excessive, we have taken note of the latest health profile for Kenya compiled by the World Health Organization (WHO) data for 2018, on life expectancy which is indicated as 64.4 for male and 68.9 for the females and total life expectancy average as 66.7. of course if one went to the specifics of the causes of death in Kenya, a fair percentage would be due to murders and other homicides but that is perhaps not for us to determine in this appeal although it has a bearing in considering sentencing as a deterrent. It is also trite that every case of sentencing should strictly be considered on its own circumstances as no one individual should be sent to prison purely to send a message to other would be offenders...In this case it is obvious to us if the appellant were to serve the entire 40 years sentence with the above life expectancy of about 67 years, the sentence would go beyond the life expectancy and in that case it would appear manifestly excessive. We say so because the Judge did not impose a death sentence or even a life sentence. When the Judge imposed a term sentence, to us it would appear, it was meant to be lower than life sentence. It is for the aforesaid reasons that we are of the view that if the trial Judge had taken the above matters into consideration, perhaps she would have considered a lesser term than 40 years. In the circumstances we partially allow the appeal and substitute the sentence of 40 years with a term of 20 years from the date of conviction."

34. In allowing an appeal against a decision summarily dismissing an appeal, this court in *Charo Karisa Pembe v Republic* Mombasa Criminal Appeal No. 22 of 1998 expressed itself as hereunder:

> "We think that on account of his age as at the date of his sentence on March 13, 1996, the period of 18 years imprisonment [for manslaughter] was in all the circumstances of the case manifestly excessive and the superior court should not have summarily rejected the appellant's appeal under section 352(2) of the *Criminal Procedure Code*. In the result we allow the appellant's appeal, set aside the order of the superior court summarily rejecting his appeal and admit the same to hearing and under section 3(2) of the *Appellate Jurisdiction Act*, chapter 9 of the Laws of Kenta we reduce the sentence of 18 years imprisonment to one of 4 years which shall run from the date of his original sentence – March 13, 1996."

35. We are in agreement with Ojwang, J (as he then was) in *Yussuf Dahar Arog v Republic* [2007] eKLR that in the exercise of its wide discretion in sentencing the court ought to take into account, inter alia, the ordinary span of life of a human being.

36. In its decision in *Francis Karioko Muruatetu & another v Republic*, Petition No. 15 of 2015 the Supreme Court while identifying the objectives of sentencing as: (i) retribution; (ii) deterrence; (iii) rehabilitation; (iv) restorative justice; (v) community protection; and (vi) denunciation, referred to article 10(3) of the *International Covenant on Civil and Political Rights* of 1966 which stipulates that — "[t]he penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation." In our view, where the continued incarceration of a prisoner no longer serves any of the identified objectives and instead does the opposite by turning our corrective facilities into detention camps, they would fail to meet the objectives of penitentiary institutions.

37. In *Muruatetu Case*, the Supreme Court relied on the case of *Vinter and others v the United Kingdom* (Applications nos. 66069/09, 130/10 and 3896/10) in which the Court held that:

> " 111. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in Bieber and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.
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> 112. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence:
>
> > whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in Wellington – a poor guarantee of just and proportionate punishment."

38. The Privy Council in *Spence v The Queen; Hughes v the Queen (Spence & Hughes)* (unreported, 2 April 2001) (Byron CJ) was of the view that:

> " In order to be exercised in a rational and non-arbitrary manner, the sentencing discretion should be guided by legislative or judicially-prescribed principles and standards, and should be subject to effective judicial review, ..."

39. It is therefore our view that the Attorney General should take legislative measures that would facilitate periodic review of sentences for convict who are either over 70 years of age or who have served sentences of over 20 years imprisonment with a view to determining whether their continued incarceration is still justifiable or legally tenable.

40. We accordingly, allow this appeal and taking into account the period of time already served by the appellant, direct that he be set at liberty unless otherwise lawfully held.

41. We direct that in light of our recommendation above, the Deputy Registrar of this court serves a copy of this judgement on the Office of the Attorney General.

42. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9 TH DAY OF JUNE, 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR