Wambui v Republic (Criminal Appeal 113 of 2021)
[2023] KECA 955 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KECA 955 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 113 OF 2021

AK MURGOR, S OLE KANTAI & PM GACHOKA, JJA

JULY 28, 2023

BETWEEN

ANTONY KURIA WAMBUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Nairobi (L. Kimaru, J.) dated 27th June 2018 in HC.CR. A No. 76 of 2015)

JUDGMENT

1. Anthony Kuria Wambui, the appellant herein, comes before this Court by way of a second appeal, his first appeal having been dismissed by the High Court (L. Kimaru J, as he then was) on 27th June 2018.

2. The appellant was charged with the offence of defilement of a child contrary to section 8(1) as read with section 8(3) of the *Sexual Offences Act*. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the *Sexual Offences Act*. The particulars of the offence in respect of which he was eventually convicted and sentenced were that; On 3rd August 2012 in [Particulars Withheld] slums in Nairobi, within Nairobi area province intentionally caused his penis to penetrate the anus of WMO, a boy aged 12 years.

3. After a full trial in which the prosecution called six witnesses, the trial Magistrate, (V. Wakumile,) found that the prosecution had proved its case against the appellant beyond reasonable doubt and consequently convicted him on the main count of defilement of a child aged 12 years contrary to section 8(1) of the *Sexual Offences Act*, as read with section 8(3) of the same Act. The trial Magistrate after mitigation made the following order:

> " Mitigation noted, accused to serve 20 years imprisonment."

At this juncture, it is important to note that in mitigation the appellant had stated as follows:

> " I have been in custody for two years."

The mitigation will become relevant in this judgment as it is the only ground that arises for determination.

4. The appellant was naturally aggrieved by the conviction and sentence. He, therefore, lodged an appeal in the High Court which was dismissed as already stated earlier in this judgment.

5. In order to contextualize the appeal, we shall give the facts in a summary form. The facts as accepted by the two courts below were that the complainant, WMO (PW1) a boy aged 12 years at the time of the incident, was at a place called [Particulars Withheld] slums playing with a friend. It was around 8 pm and the security lights were on. In his testimony, he stated that he feared going home as it was late and that his father would whip him for returning home late. However, the appellant and another young man offered to escort the complainant home, and upon reaching the main gate, they knocked but it was not opened. The appellant left the complainant and another young child at the gate. The complainant and the other boy decided to sleep in the stalls that were nearby. At around midnight, the appellant went to the place where the complainant and the other boy were sleeping and asked them to go to his house to spend the night. On the way to the appellant's house, the appellant forced the boys to lie down and sodomized them. The complainant managed to run away to his sister's house and he informed her of the sexual assault. The sister informed their mother, and the complainant was taken to hospital and later the case was reported to the police.

6. PW2, the sister to the complainant narrated how the complainant went to her house at about 3am and that he was half naked only wearing a T-shirt. The complainant informed her that the appellant, who they knew as "Bonke" had sodomized him. They then informed their mother PW3 and the matter was reported to the nearby Administration Police camp and thereafter the complainant was taken to the hospital.

7. PW4, Dr. Purity Kajuju treated the complainant at the Doctors Without Borders clinic, in Mathare. She prepared the post-rape care form and the medical report that were produced in evidence as exhibits. PW5, Dr. Joseph Maundu of Nairobi area police examined the complainant and filled out the P3 form. PW6, PC Stephen Ngigi, the investigating officer gave evidence on the reporting of the case and the subsequent arrest of the appellant.

8. In his defence, the appellant denied committing the offence maintaining that he was arrested on August 10, 2012 when walking home and was charged with disorderly conduct. He was released on a cash bail but was re-arrested the following day and charged with defilement.

9. When the appeal came up for hearing through the online digital platform, the appellant appeared in person and the State was represented by Mr. Joseph Kimathi, Senior Assistant Director of Public Prosecutions.

10. In his submissions, the appellant asked us to consider his amended grounds of appeal which were undated but filed on 18th February 2020. In the amended grounds of appeal, the appellant abandoned the appeal against conviction and indicated that he was appealing against the sentence only. In his written submissions, which he highlighted orally, the appellant stated that he was challenging the legality of the sentence under the provisions of article 27 of *the Constitution* and Section 333(2) of the *Criminal Procedure Code*. The appellant also cited the Judiciary Sentencing Policy, which states that when sentencing, a Court ought to take into account the time already spent in custody by an accused person before the conviction. In his oral submissions, the appellant requested us to order that remission

of the time taken in custody be taken into account and that if that is done, he had already served the entire sentence. It is clear from the oral and written submissions, that the issue that the appellant was raising, was taking into account the two years spent in remand, before the conviction and sentence.

11. On his part, Mr. Kimathi for the state opposed the appeal. He stated that the mitigation of the accused, to the effect that he had spent two years in custody had been considered by the court before sentencing.

12. This being a second appeal, only points of law fall for our consideration by dint of section 361(1) of the *Criminal Procedure Code*. On sentence, it is trite that the severity of a sentence is a factual matter under section 361 (1) of the *Criminal Procedure Code.* We note that in his oral submissions, the appellant's argument was that he is entitled to remission for the period spent in custody. Remission of a sentence is an exercise that falls under the ambit of the prison authorities by dint of section 46 of the *Prisons Act*, cap 90 of the Laws of Kenya. Therefore, this ground of appeal would have been summarily rejected as on the face of it, it relates to the severity of the sentence, more particularly the non-factoring of the remission on the period already served in prison and therefore a factual matter under section 361 (1) (a) of the *Criminal Procedure Code*. However, we note that in his written submissions, the appellant has raised the ground differently. He argues that the period of two years he spent in custody was not taken into account by the trial Magistrate in sentencing and that the High Court also erred in dismissing this ground. We note that the appellant is raising an issue of the lawfulness of the sentence, not its severity and therefore this is an issue that deserves our consideration.

13. As already stated earlier in this judgment, the appellant was convicted for defiling a child aged 12 years and sentenced to 20 years imprisonment. We note that section 8(3) of the *Sexual Offences Act* provides that a person who commits an offence of defilement of a child aged between 12 and 15 years is liable upon conviction to a term of not less than 20 years. The appellant in his mitigation only stated that the two years spent in custody should be taken into account. In sentencing the appellant to serve a sentence of the minimum period of 20 years, the trial magistrate stated as follows:

> " Mitigation noted. Accused to serve 20 years imprisonment."

14. This Court addressed the question of what 'taking into account' means in *Ahamad Abolfathi Mohammed & Another v Republic* [2018] eKLR, Criminal Appeal No. 135 of 2016, as follows:

> " Taking into account the period spent in custody must mean considering the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody."

15. The question of whether 'taking into account' the period spent in custody is a mathematical exercise was considered by this court in the case of *Samuel Otieno Francis vs Republic,* Criminal Appeal No. 47 of 2021. This Court quoted with approval the holding by the Supreme Court of Uganda in the case of *Bukenya vs Uganda* (Criminal Appeal No. 17 of 2010) [2012] UGSC 3 (29.1.2013) in which the Court stated thus:

> " Taking the remand period into account is clearly a mandatory requirement. As observed above, this Court has on many occasions construed this clause to mean in effect that the period which an accused person spends in lawful custody before completion of the trial, should be taken into account specifically along with other relevant factors before the court pronounces the term to be served. The three decisions which we have just cited are among many similar decisions of this Court in which we have emphasized the need to apply Clause (8). It does not mean that taking the remand period into account should be done

mathematically such as subtracting that period from the sentence the Court would give. But it must be considered and that consideration must be noted in the judgment."

16. We note that in imposing the minimum sentence of 20 years, the trial Magistrate only indicated 'mitigation considered'. The question that arises is whether by stating that 'mitigation considered', one can say that the trial Magistrate took into account the two years that the appellant had spent in custody before the conclusion of the trial. As this court stated in *Ahamad Abolfathi Mohammed & Another vs. Republic* (supra) it is not enough for a trial court in sentencing to just state that they have taken into account the period spent in custody into account. It is important for the trial court to consider and note that consideration in the judgment, in line with the proviso section 333(2) of the *Criminal Procedure Code*. This means that whereas taking into account the period spent in custody is not a mathematical exercise, the trial court must note in the judgment in clear words that the time spent in custody was considered and the sentence imposed takes that period into account. (See Samuel Otieno Francis vs Republic, (Supra).

17. The question of whether the time spent in custody was considered should not be left to conjecture, like in this appeal. We note that the first appellate court did not address this issue and just held that the sentence of 20 years imprisonment is legal. As already stated, the question on the time spent in custody is a question of law as per section 333(2) of the *Criminal Procedure Cod*e.

18. Consequently, it is our finding and we so hold that this appeal has merit and is allowed to the extent that the sentence that was imposed on March 19, 2015 should run from the date that the appellant was arraigned in court, that is August 13, 2012 as he remained in remand throughout the trial.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY, 2023.

A. K. MURGOR

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JUDGE OF APPEAL

S. OLE KANTAI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR