MM v Republic (Criminal Appeal 41 of 2017) [2023] KECA 809 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 809 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CRIMINAL APPEAL 41 OF 2017

MSA MAKHANDIA, S OLE KANTAI & PM GACHOKA, JJA

JULY 7, 2023

BETWEEN

MM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from judgment of the High Court of Kenya (B. Jaden, J.) dated 16th July 2014 in Machakos HCCRA No. 36 OF 2013)

JUDGMENT

1. This appeal is from the judgment of Jaden, J. delivered on July 16, 2014, in which the learned Judge upheld the judgment of the trial court which had convicted the appellant for the offence of incest contrary to section 20(1) of the *Sexual Offences Act* and sentenced him to 21 years imprisonment.

2. The particulars of the offence were that on June 16, 2010, in Mwingi District within Eastern Province the appellant being a male person caused his penis to penetrate the vagina of NM a female person who was to his knowledge a daughter. The appellant was arraigned in court and pleaded not guilty and the case proceeded to a full hearing. The prosecution called five witnesses to prove their case against the appellant.

3. An abridged version of their evidence was as follows: PW1 JM, and PW2 MMM, sister and mother to NM respectively, testified that on the 16th June 2010, at 2.00 am, NM a girl aged about three years, and the other members of the family including their father who is the appellant were at home sleeping. They were woken up by cries from NM whereupon PW2 lit a torch. They saw the appellant who had lowered his trousers up to the knees defiling NM. When confronted over the incident by PW2, the appellant just kept quiet. In the morning he left the house at about 5.00 a.m. Later in the day, PW2 reported the incident to the assistant chief who referred her to Kyuso Police Station where she made a report. NM was thereafter referred to Kyuso District Hospital. She was examined by the Clinical Officer, PW4 Muema Mutunga who confirmed that NM was 2 years and 7 months old and that she

had been defiled since the hymen was broken and there was swelling of the vulva. The evidence of PW3, APC David Thiyaini and that of PW5, PC Njoki was to the effect that a report was made to their police station regarding the incident. Thereafter, the appellant was arrested and after investigations, was charged with the offence.

4. When called upon to defend himself, the appellant denied the offence and stated that NM was his own child and therefore he could not have done such a thing. He further stated that NM was examined after a long time, which compromised the evidence. He further stated that he had disagreed with his wife, PW2 over some money. That in July 2010, two village elders went to where he was working and escorted him to the chief's office where he stayed overnight and the following day he was escorted to Kyuso Police Station where he was charged with an offence that he had not committed. According to the appellant, PW2 maliciously had him charged so that she could get him out of the picture and return to her "friend".

5. As already stated, the High Court having evaluated the evidence on record afresh and considered the grounds of appeal and the submissions, upheld the conviction and sentence.

6. The appellant being aggrieved by the decision of the High Court has now lodged a second and perhaps last appeal in this court. In his undated memorandum of appeal, the appellant complains in the main that the learned Judge of the High Court erred in law by: relying on a fatally defective charge sheet contrary to section 214 of the *Criminal Procedure Code*; shifting the burden of proof to him; failing to observe that the crucial witnesses were not summoned to testify; and lastly, relying on contradictory and inconsistent evidence to uphold his conviction.

7. At the virtual hearing of the appeal, the appellant appeared in person whereas Ms. Vitsengwa, learned prosecution counsel appeared for the respondent. Before the formal hearing commenced, the appellant informed us that he was abandoning the appeal on conviction. However, he wished to prosecute the appeal limited to sentence only. Ms. Vitsengwa not objecting to the request, we duly marked the appeal on conviction as abandoned.

8. In support of his appeal on sentence, the appellant submitted that the sentence imposed ought to run from the day he was arrested and not from the date of conviction. That he was never on bond or bail from the date of his arrest to the date of conviction and sentence.

9. On her part, Ms. Vitsengwa was of the opinion that the appellant was praying for orders that are normally granted by the High Court under section 332 of the *Criminal Procedure Code* where the court computes the sentence from the date when an accused was held in custody. That such orders are best granted by the High Court and thus the appellant ought to make the necessary application in that court.

10. Sentencing of an accused person involves the exercise of discretion by the trial court. That discretion must of course be exercised judiciously rather than capriciously, depending on the circumstances of each case. As what is challenged in this appeal is essentially the exercise of discretion by the trial court, this court is normally slow to interfere with that exercise unless it is demonstrated that the trial court acted on the wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In *Bernard Kimani Gacheru v Republic*, Criminal Appeal No. 188 of 2000 (Nakuru) this court stated:

> " It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that

the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

This appeal does not question the sentence imposed in any way, as such the sentence is lawful. However, the appellant argues that the period he was in custody was not considered. From the judgment of the trial court, the record shows that the trial court sentenced the appellant to 21 years but did not state when the sentence was to start running.

11. This Court of Appeal in the case of; *Ahamad Abolfathi Mohammed & another v Republic* [2018] eKLR stated that:

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. That provision provides as follows:
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> > " 333(2) Subject to the provisions of section 38 of the Penal Code (Cap.63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection:
>
> 1. Has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."
>
> The appellants have been in custody from the date of their arrest on June 19, 2012. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned Judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by 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. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants sentence of imprisonment to run from the date of their arrest on June 19, 2012."
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> In the same vein, this court in the case of *Bethwel Wilson Kibor v Republic* [2009] eKLR stated that:
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> > " By proviso to section 333(2) of *Criminal Procedure Code*, where a person sentenced has been held in custody prior to such sentence, the sentence shall take

account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years' period that the appellant had been in custody. The appellant told us that as at September 22, 2009, he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

12. The respondent has argued that the orders sought are a reserve of the High Court under section 322 of the *Criminal Procedure Code* and that the appellant should make the necessary application to that effect. Given the above authorities, we doubt whether this submission is correct.

13. From the record, the appellant was arrested on July 27, 2010 and was thereafter convicted and sentenced on April 20, 2011 to serve 21 years imprisonment. He is asking us to determine that the time of his sentence should start to run from April 27, 2010 when he was arrested. We do not see any difficulty in making such an order based on the authorities cited above.

14. We are satisfied that the trial court did not take into account the period the appellant was held in custody. We therefore order that the sentence imposed of twenty-one (21) years should run from the date the appellant was arraigned in court onApril 27, 2010.

15. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

S. OLE KANTAI

.....

JUDGE OF APPEAL

M. GACHOKA CIArb., FCIArb.

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR