Mwangangi v Republic (Criminal Appeal 27 of 2017)
[2023] KECA 820 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 820 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CRIMINAL APPEAL 27 OF 2017

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JULY 7, 2023

BETWEEN

MUTUKU WAMBUA MWANGANGI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgement of the High Court of Kenya at Voi (M. Muya J.) dated and delivered on 7th May 2015 in High Court Criminal Appeal No. 150 of 2014 arising from the original trial in Wundanyi Criminal Case No .163 of 2010)

JUDGMENT

1. Mutuku Wambua Mwangangi ('the appellant') has challenged the dismissal of his first appeal by the High Court, which he had lodged against his conviction for the offence of defilement and the sentence of 20 years imprisonment imposed by the Resident Magistrate at Wundanyi (hereinafter 'the trial Court'). The particulars of the offence were that on diverse dates between August 4, 2009 and 31st November 2009 at *[Particulars witheld]* Village, *[Particulars witheld]* location in Taita District within Coast Province, the Appellant had unlawful carnal knowledge of MA a girl aged 15 years. In the alternative, the Appellant was charged with the offence of indecent assault on a female contrary to section 11 (1) of the *Sexual offences Act*, No. 3 of 2006.

2. The facts that gave rise to this appeal in summary are as follows. The complainant, who testified as PW1 in the trial Court, stated that between August 4, 2009 and 31st November 2009, she stayed in Mtongwe with her sister and the Appellant, who was her sister's husband. That on several occasions while she was asleep, the Appellant went to her room and had sex with her between August to October 2009. That in the month of September 2009, PW1's sister found the appellant having sex with PW1, and upon realising that PW1 was pregnant, the appellant asked her to procure an abortion. When PW1 refused, she was chased away to stay with her grandmother in Majengo, and on examination was found to be six months pregnant.

3. The matter was reported to the community policing officers by PW2 and the Children's Department by PW3, and the Appellant was arrested. The report of the defilement by PW1 was recorded by PW4 at the police station. PW5 upon examining PW1, filled a P3 form that was produced as an exhibit and which showed PW1 was pregnant, and PW1 stated that she later gave birth to a still born male baby in April 2010. The appellant on his part testified that on August 21, 2009, PW1 beat his children and his wife beat her, and that he then went away on transfer and did not see PW1 again until March 5, 2010, when he was arrested and charged with the offence. He also stated that he had a grudge with his in laws since they were opposed to his marriage.

4. The trial Magistrate (Hon. Orenge K.I. RM) after finding that the case against the Appellant had been proved, and considering his mitigation, convicted him for the offence of defilement and sentenced him to imprisonment for 20 years on May 12, 2011.The appellant was aggrieved by the finding of the trial Court and preferred an appeal to the High Court being Criminal Appeal No 150 of 2014. The High Court, after taking additional evidence, in its judgment dated and delivered on May 7, 2015 was satisfied that the conviction was safe and the sentence was legal, and dismissed the appeal.

5. The appellant was dissatisfied with the decision in the High Court and proffered the instant appeal. The appeal was first listed for hearing on November 16, 2022, the appellant indicated that he had substantially served his sentence, and the only ground of appeal he was pursuing is that of reduction of his sentence, and particularly that the time he served in remand be considered. The Court thereupon sought a report from Manyani Prison where the appellant is incarcerated, on the computation of his sentence. We heard virtually on January 24, 2023, the Appellant, was present in person, appearing virtually from Manyani prison, while learned Prosecution counsel, Mr. Mwangi Kamanu, holding brief for Mr. Mulamula appeared for the respondent. The appellant made oral submissions and reiterated that he was requesting the court to remove the 1 year and 8 months left of his sentence because he was a reformed man, and since he was in remand from 2010 until when he was sentenced in 2011.

6. Mr. Kamanu relied on written submissions dated January 10, 2023 and while citing the provisions of section 8(1) as read with section 8(3) of the *Sexual Offences Act* and section 333 of the *Criminal Procedure Code*, and with reliance on the Judiciary Sentencing Policy Guidelines of 2016 and various judicial decisions on the objectives of sentencing, urged that the sentence of 20 years imprisonment is safe within the law, and that this Court should not interfere with the sentence unless it was demonstrated that it was manifestly excessive, illegal, improper or founded or based on misrepresentation of material facts. Additionally, that the trial court considered the appellant's mitigation when sentencing the appellant to 20 years imprisonment.

7. The role of this court as a second appellate court was set out in *Karani vs R* (2010) 1 KLR 73 as follows:

> " This is a second appeal. By dint of the provision of section 361 of the Criminal Procedure Code, we are enjoined to consider only matters of law. We cannot interfere with decision of the superior Court on fact 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 matter they should have considered or that looking at the evidence as a whole they were plainly wrong decision, in which case such omission or commission would be treated as a matter of law."

8. After receiving this Court's directions, the Officer in Charge at Manyani Maximum Prison, one SP Evans Muthoka in a letter dated December 28, 2022 addressed to the Deputy Registrar of this court confirmed that the period the Appellant was in custody prior to his conviction was not factored in

computing the term of his sentence, for the reason that none of his documents indicated that this should be done, and that he would comply if it is so ordered by this court.

9. It is a requirement of the law that the time spent by the accused person in custody should be a consideration in sentencing as confirmed by this court in Bethwel *Wilson Kibor vs. Republic* [2009] eKLR, and section 333 of the *Criminal Procedure Code* provides as follows in this regard:

> "(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
>
> (2) Subject to the provisions of section 38 of the *Penal Code* 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."

10. Likewise, the Judiciary Sentencing Policy Guidelines also provide as follows:

> "7. 10 The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed.
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> 7. 11 In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

11. We have taken into account these sentencing principles, and also note that the Appellant in his mitigation in the trial court had indicated that he had been in remand for a long time. We therefore find that the appellant has raised a valid issue of law as regards his sentence, to the extent that the period he spent in custody ought to have been taken into account in assessing his sentence. This appeal is therefore found to be partially merited, only to the extent that the period between March 9, 2010 and May 12, 2011 that the appellant spent in custody prior to his conviction be taken into account in computing the appellant's sentence of 20 years' imprisonment.

12. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY 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