Keter v Republic (Criminal Appeal 25 of 2014)
[2023] KECA 1440 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1440 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CRIMINAL APPEAL 25 OF 2014

F SICHALE, FA OCHIENG & WK KORIR, JJA

NOVEMBER 24, 2023

BETWEEN

JOSEPH KIPKORIR KETER ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nakuru, Wendo, J), dated 23rd May, 2014 In HC. CRA NO. 148 OF 20143)

JUDGMENT

1. The appellant herein Joseph Kipkorir Keter was charged with the offence of defilement C/S 8(1) as read with S.8(2) of the *Sexual Offence Act* Cap.3 of 2006. He pleaded not guilty and at the conclusion of his trial conducted by E.Boke, the then Principal Magistrate, Naivasha, he was found guilty of the offence charged and sentenced to 25 years imprisonment. This was on 09/07/2013. Aggrieved by the outcome, the appellant exercised his undoubted right of appeal by filing his first appeal at the High Court.

2. The learned Judge (Wendoh J), in a judgment rendered on 23/05/2014 revised the sentence in view of the fact that the victim of the defilement was 10 years old, and enhanced the appellant's sentence to life imprisonment. The appellant was dissatisfied with the said outcome and hence this appeal.

3. In undated supplementary grounds of appeal, the appellant listed the following 4 grounds faulting the Judge for:

    i. Enhancing the sentence from 25 years(sic) to life imprisonment without him being afforded a warning;

    ii. Upholding the conviction based on "doubtful" and "suspicious exhibits".

iii. Convicting him when the charge against him was not proved beyond reasonable doubt; and finally,

iv. Failing to give due regard to his unrebutted defence.

4. On 22.05.2023 the appeal came up before us for hearing. The appellant who was acting in person wholly relied on his undated written submissions. On the other hand, Miss Kisoo learned Counsel for the respondent relied on the written submissions dated 09/05/2023.

5. In the applicant's written submissions, he urged us to find that the enhancement of his sentence from 25 years to life imprisonment cannot stand as no prior warning of the enhancement had been given to him; that the child immunization card used to prove the age of PW1 as being 10 years bore a different name (BW) and not NW, the complainant listed on the charge sheet; that no penetration was proved as rapture of the hymen per se was not conclusive proof that PW1 was defiled and finally, that he was framed by his wife who wanted him out of reach so that she could sell his cows.

6. In opposing the appeal, the respondent contended that the appellant was sentenced to 25 years imprisonment as the trial court had erred in coming to the conclusion that PW1's age was not proved, that PW1's age was proved by her own testimony and that of her father(PW2) to be 10 years; that the discrepancy on the immunization card on the names was not fatal and that the 1st appellate court was justified in enhancing the sentence which otherwise was an unlawful sentence. On the question as to whether the penetration was proved, we were urged to find that the appellant's complaint in his first appeal was confined to the issue of sentence and not conviction and hence we were urged to disregard this ground.

7. We have carefully considered the record, the rival oral submissions, the authorities cited and the law.

8. This being a second appeal our mandate is as stipulated in S.361 of the *Criminal Procedure Code* which provides: -

> " 361
>
> (I) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section". on a matter of fact, and severity of sentence is a matter of fact; or, gainst sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no power under section 7 to pass that sentence."

Section 361 of the *Criminal Procedure Code* has been enunciated in several decisions of this court such as: *David Njoroge Macharia v Republic* [2011] eKLR sums up the said mandate. In the said decision, it was stated:

> "Only matters of law fall for consideration and the court will not normally interfere with concurrent findings of fact by the two courts below unless such findings are based on no evidence, or are based on a misapprehension of the evidence, or the courts below are shown demonstrably to have acted on wrong principles in making the findings. (see also *Chemagong v Republic* [1984] KLR 213)."

9. Firstly, PW1 testified that she was 10 years old. She told the trial court that the appellant"...used to come to my place to do bad manners to me. He did it to me on many occasions. He could remove my pants and did bad manners to me here (pointing at the vagina). I bled from there (pointing at the vagina). He inserted his penis into my vagina"

10. The father of PW1 who testified as PW2 also told the trial court that PW1 was "aged 10 years almost 11 years". The immunization card that was produced as exhibit II gave the date of birth of BW as 26/12/2000. PW1's name on the immunization card was given as NW. No explanation was made as regards the discrepancy on the name on the immunization card vis – a-vis the name of PW1, as stated on the charge sheet.

    In our view this may have been a mistake on the immunization card, which mistake was not fatal.

11. Be that as it may, PW1 and her father(PW2) gave the age of PW1 as 10 years. PW1 was able to tell the court during voire dire examination that she was 10 years old and of school going age, albeit nursery. Her father also indicated that PW1 was 10 years old going to 11 years. In the decision of *Mwalango Chichoro Mwanjembe* (2016) eKLR cited to us by the respondent it was held: -

> "The question of proof of age has finally been settled by recent decisions of this Court to the effect that it can be proved by documentary evidence such as a birth certificate, baptism card or by oral evidence of the child if the child is sufficiently intelligent or the evidence of the parents or guardian or medical evidence, among other credible forms of proof. It has even been held in a long line of decisions from the High Court that age can also be proved by observation and common sense. See *Denis Kinywa v R*,Cr Appeal No 19 of 2014 and *Omar Uche v R*,Cr App No 11 of 2015. We doubt if the courts are possessed of the requisite expertise to assess age by merely observing the victim since in a criminal trial the threshold is beyond any reasonable doubt. This form of proof is a direct influence by the decision of the Court of Appeal of Uganda in *Francis Omuroni v Uganda*, Crim Appeal No 2 of 2000. We think that what ought to be stressed is that whatever the nature of evidence presented in proof of the victim's age, it has to be credible and reliable."

12. In our view, PW2 was best placed to state the age of her daughter. Further, we note that the appellant did not in cross- examination of PW1 and that of PW2 question the age given by PW1 and PW2. The discrepancy on the immunization card may not have been explained but in our view nothing turns on this given the fact that PW1 and PW2 testified on the age of the appellant.

13. As regards the complaint that the charge against the appellant was not proved to the required standard and that his defence was not considered, we note that the appellant's appeal in the first appellate court was against sentence only. Indeed, Wendo, J, stated as follows in the introductory part of her judgement:- "He filed this appeal on 23/07/2013, and the grounds of appeal disclose that he only appealed against the sentence. In court he maintained that his appeal is only against the sentence"

14. In *Alfayo Gombe Okello v Republic*(2010)eKLR Criminal Appeal No.203 of 2009 this court held:-

> " ....the issue was not raised since the trial began and was only raised for the first time in this second appeal. The appellant gave no reason for failure to do so earlier. We must therefore find, and we now do so, that it was not raised at the earliest opportunity although it could and should have.
>
> (18) In line with that finding, we are disinclined to address matters where there is no opinion by the two courts below on new issues

15. We therefore decline the invitation to determine an issue that was not raised in the first appellate court as the learned Judge cannot be faulted for having failed to address an issue that was not placed before her.

16. Lastly, and of crucial importance is the contention by the appellant that he was not afforded a warning before his sentence was enhanced. It is common ground that upon conclusion of the trial the appellant was sentenced to 25 years imprisonment and not 20 years as indicated in the supplementary grounds of appeal. This sentence was subsequently enhanced to life imprisonment. In our view, whether the High Court had the power to enhance sentence, given the fact that PW1 was 10 years is neither here nor there as this power can only be exercised after giving the appellant notice of enhancement.

17. In *J J W v R* [2013] eKLR this court held as follows on enhancement of a sentence by the High Court:

> "In this appeal, the prosecution did not urge enhancement of sentence and did not file cross appeal to that effect. The court did not warn the appellant of that possibility or in any case there is no record of such a warning if any was issued, yet all of a sudden, in the judgment, the learned judge enhances the sentence from seven years to ten (10) years. The need for prior information to be given to the appellant in such a situation is to enable him to prepare and argue his side of the case as regards such intended enhancement. In this case, the enhancement of the appellant's sentence to ten (10) years was done without affording him opportunity of persuading the court against such a proposal. We have perused the Memorandum of Appeal that was before the first appellate court and we note that save for a small part in passing, the appellant did not specifically appeal against sentence in that court and hence the need to inform him of the possibility of enhancing the sentence.
>
> We agree with Mr. Abele that the enhanced sentence was unlawful. It calls for our interference. The appeal on conviction is dismissed. The appeal on sentence is allowed to the extent that the enhanced sentence of ten (10) years imprisonment is set aside and in its place the original sentence awarded by the subordinate court of seven (7) years is reinstated with effect from the date the subordinate court awarded it."

18. Similar sentiments were expressed in the decision of *Sammy Amboke & another v R* [2019] eKLR where the question of enhancement of sentence by the first appellate court was addressed prosecution for enhancement of sentence before the High Court nor was there a warning to the appellants by court that the sentence meted upon then (sic) 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."

19. In the appeal before us the State did not file any cross-appeal against sentence and neither did a notice of enhancement of sentence served upon the appellant.

20. Accordingly, we find that the first appellate court erred in enhancing the sentence. The upshot of the above is that allow this appeal against sentence by setting aside the sentence of life imprisonment imposed by the first appellate court. We reinstate the sentence of 25 years imposed by the trial court.

21. Those shall be the orders of this court.

DATED AND DELIVERED AT NAKURU THIS 24TH DAY OF NOVEMBER, 2023.

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR