Wanjala v Republic (Criminal Appeal 136 of 2014)
[2022] KECA 1041 (KLR) (23 September 2022) (Judgment)

Neutral citation: [2022] KECA 1041 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CRIMINAL APPEAL 136 OF 2014

PO KIAGE, M NGUGI & F TUIYOTT, JJA

SEPTEMBER 23, 2022

BETWEEN

KEN WANJALA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from an order of the High Court of Kenya at Bungoma (Mabeya J.) dated 3rd April 2014 in High Court Criminal Appeal No. 4 of 2014)

JUDGMENT

1. The appellant has filed this second appeal to challenge the summary rejection of his appeal by the High Court, as well as his conviction for the offence of defilement by the Bungoma Chief Magistrate's Court. He had been charged in Bungoma CMCC No. 95 of 2014 with the offence of defilement contrary to section 8(1) as read with section 8 (2) of the *Sexual Offences Act* No. 3 of 2006. The particulars of the offence are that on January 13, 2014 at Choke village within Bungoma County, he intentionally caused his penis to penetrate the vagina of GNM, a child aged 5 years. The appellant pleaded guilty to the offence and was sentenced to life imprisonment.

2. Following his conviction, the appellant filed Criminal Appeal No. 4 of 2014 before the High Court of Kenya at Bungoma. In an order dated April 3, 2014, Hon. Mabeya J summarily rejected the appeal under section 352 of the *Criminal Procedure Code*, leading to the present appeal.

3. In the memorandum of appeal dated October 2, 2014, the appellant faults the decision of the High Court on the basis that the High Court erred in summarily rejecting his appeal as it failed to find that the name of the complainant that appears on the charge sheet and the Exhibit No. 1 are different persons. He also faults the court for not appreciating that the age of the complainant was never determined hence the conviction and sentence are contrary to the provisions of the *Sexual Offences*

Act. The appellant prays that his appeal be allowed; the orders dismissing his appeal be set aside; and that he be set at free.

4. At the hearing of the appeal before us, learned Counsel, Mr. Kundu appeared for the appellant while Ms. Ombega, learned Prosecution Counsel, appeared for the State. The appellant relied on written submissions dated April 28, 2022 in which he observes that his appeal was summarily dismissed under section 352(2) of the *Criminal Procedure Code*; and that in dismissing his appeal summarily, the learned Judge erred by failing to acknowledge that the record of appeal raised important issues that could only be determined after the appeal had been admitted and heard. In oral submissions on behalf of the appellant, Mr. Kundu submitted that the charge sheet indicated that the complainant, one GNM, was aged 5 years while the P3 form indicates that the complainant was approximately 7 years. That the age assessment report was not relied on, and that on the first page of the P3 form, the doctor indicated the age of the complainant was 3 years while section C of the said report indicated that the complainant's age was 7 years.

5. It was further submitted on behalf of the appellant that the birth notification produced in court to ascertain the age of the complainant was in respect of GNN (name withheld) whilst the complainant was one GNM (name withheld) who was not the complainant. Mr. Kundu submitted that in light of the contradictions in the age and name, the learned Judge ought to have admitted the appeal.

6. In her response in opposition to the appeal, Ms. Ombega submitted that the issues raised were not raised in the grounds of appeal and the first appellate court could not therefore consider what was not raised in the said grounds. Regarding the sentence imposed on the appellant, Ms. Ombega submitted that the appellant was charged with an offence which attracts a mandatory sentence.

7. We have considered the record of appeal and the submissions of the parties. We note that the appellant's appeal before the High Court was dismissed summarily under the provisions of section 352 (2) of the *Criminal Procedure Code* which provides that:

> "Where an appeal is brought on the ground that the conviction is against the weight of the evidence, or that the sentence is excessive, and it appears to a judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground for complaint."

8. We have some reservations about the summary rejection of the appellant's appeal in this matter. In considering the provisions of the section, this Court in *Aggrey vs. Republic* [1983] KLR 649 held that the exercise of the power to summarily reject an appeal under that provision is strictly limited to cases where the appeal is brought on grounds that the conviction is against the weight of the evidence or the sentence is excessive. See also *Abdi Wali Hassan Kher v Republic* [2016] eKLR.

9. The view we take of this matter is that the High Court erred in its summary rejection of the appellant's appeal. The appellant's grievance related to alleged violation of his rights to fair trial under Article 50(2) of the *Constitution*. He alleged that he was not informed of the nature and elements of the charge against him. He also complained about the sentence meted against him, which he complains was harsh. He was also not informed of the seriousness and penalty upon his plea of guilty. In the circumstances of this case, the appellant's appeal merited consideration before the first appellate court.

10. We think it appropriate to make an observation on the duty of a Judge exercising powers of summary rejection under section 352(2). Of this duty this Court in *Wilson Maina Murage vs Republic* [2000] eKLR stated:

> " Any Judge seized of the record under this section must give full consideration, not only to that record, but also, to the grounds put forward in support of the appeal. This task is greatest where, as here, the appellant is unrepresented and prepares his grounds of appeal in person. It is necessary to scrutinise the grounds put forward by the appellant in order to see, whether they disclose a discernable point of law worth putting forward for a full hearing upon admission of the appeal".

11. The statutory provisions require that the "judge must be satisfied that the appeal has been lodged without any sufficient ground" before making the order for summary rejection. Implicit in this requirement is that the High Court must state why it has reached the decision that summary rejection is deserved. While we do not for a moment suggest that the High Court should render a reasoned decision, the order certifying the rejection, however brief, should be able to communicate to the appellant the reason or reasons why the appeal must come to a sudden end. In the matter before us, the first appellate court did not give any reasons why it was satisfied that the appeal was for summary rejection.

12. The appellant has now come before us to challenge not just the summary rejection of his appeal but his conviction before the trial court. His appeal before us revolves around the name and age of the complainant. We have considered the record of the trial court. We note that the appellant was convicted of the offence of defilement of a child of 5 years upon his own plea of guilty.

13. The proceedings before the trial court indicate that on 14th January 2014, when the appellant was first presented in court for plea and the charge was read to him, he pleaded guilty. The record further indicates that the charge was interpreted from English to Kiswahili. On that day, the prosecutor informed the court that he did not have the facts of the case, and he requested that the reading of facts be deferred to the following day. The matter was deferred to the January 16, 2014 and thereafter to the January 17, 2014. The record indicates that the charge sheet was again read to the appellant, in Kiswahili, which he understands, and he again pleaded guilty. The facts were read to the accused, and he stated in Kiswahili:

> " Ï have heard the facts. It's true that I had intercourse with the minor."

14. The appellant was then sentenced to life imprisonment, the mandatory penalty under the *Sexual Offences Act* for defilement of a child aged 11 years or less.

15. Section 348 of the *Criminal Procedure Code* provides that no appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence. In the present case, the appellant pleaded guilty to the offence charged. He did so when he first appeared in court, and three days later when the charges were read again and the facts of the case read to him. The name and age of the complainant were contained in the facts read to the court, which the appellant admitted. Evidence of the age of the complainant was also placed before the court. The trial court imposed the penalty prescribed by law, noting that the offence he had 'liberally admitted' is a serious one attracting a mandatory life sentence.

16. Thus, while we find that the appeal before the High Court should not have been summarily dismissed, in the end, we find no merit in the appellant's appeal, and it is hereby dismissed.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR