Mohamed v Republic (Criminal Appeal 4 of 2018)
[2022] KECA 1266 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1266 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CRIMINAL APPEAL 4 OF 2018

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

NOVEMBER 18, 2022

BETWEEN

HAMAD MOHAMED ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Mombasa delivered by A. Ongeri, J. on 3rd August 2016inHigh Court Criminal Appeal No 159 of 2015 (Originally Kwale PM Criminal Case No. 752 of 2012))

JUDGMENT

1. This is a second appeal arising from the judgment delivered by A. Ongeri, J. on 3rd August 2016 in High Court Criminal Appeal No 159 of 2015. The Appellant, was charged on 18th June 2012 before the Principal Magistrates' court at Kwale with one count of the offence of defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offences Act* (SOA). He faced an alternative count of committing an indecent act with a child contrary to section 11 (1) of the *SOA*. The particulars of the main charge of defilement was that on June 16, 2012 at around 0930 hours in Kwale County of Coast Region he unlawfully and intentionally caused his penis to penetrate into the anus of SSH a boy aged 5 years.

2. The appellant pleaded not guilty to both counts. The prosecution called 6 witnesses and the appellant testified in defence. PW1, MM, was the maternal grandmother of the victim.

   Her testimony was that she was living with the victim because her daughter, PW2, the mother of the victim was married elsewhere. She testified that on 16th June 2012 she was at home when the victim returned home crying. She noted that the victim was also bleeding from his anus. The victim reported to her that the appellant defiled him. PW1 called PW2 to see what had happened to the victim. The two of them took the victim to Makupa Police Station and later to Coast General Hospital. PW1testified

that the victim was born on April 8, 2008 and his birth certificate that was tendered as an exhibit. PW3 MA, was a cousin to the victim and a neighbor to the appellant. Her evidence was that on the material morning she saw the appellant holding the victim by the hand and escorting him from his house, that when they neared the victim's home, the appellant released the victim and told him to go home. PW3 testified that the victim was crying and when she called him to find out what had happened but he continued walking home.

3. PW4 PC Felix Kibet Kosgei was based at Shimo Police station at the time. He said that he was informed of a complaint of defilement. He testified that he conducted investigations, visited the scene and recovered the victim's shorts. PW5 was the child victim. He testified that on the material day the appellant called him to his home where he penetrated his anus. PW5 was examined on June 16, 2013 by PW6 Dr. Philip Kibet Chebii who filled a P3 form and examined of PW5. He testified that his examination revealed that the victim had anal abrasion, bleeding in the anus and watery faeces which was proof of defilement.

4. The appellant in his defence denied committing the offence and maintained that the case was fabricated because of a long- standing dispute between his father and PW5's father.

5. The learned trial Magistrate was satisfied PW5 was a truthful witness. He found that PW5's evidence was corroborated by that of PW1 and PW3 and further that the medical evidence corroborated the evidence of PW5 that he had been penetrated through his anus. The court was satisfied that that PW5 was born on 8th April 2008 as evidenced by the immunization card. The court disbelieved the appellant's defence, found him guilty of the main count and convicted him. After considering mitigation, he was sentenced to 30 years imprisonment.

6. The appellant was dissatisfied with the decision of the learned trial magistrate and appealed to the High Court at Mombasa. The grounds of appeal were that the prosecution did not prove its case; that he was denied a fair hearing; that Section 36 of the *Sexual Offences Act* as well as section 19 of the *Oaths and Statutory Declarations Act* was not complied with and his defence was not considered. The Learned Judge of the High Court, A. Ongeri, J. vide judgment rendered on 3rd August 2016 noted that the appellant abandoned his grounds of appeal and gave mitigation on sentence instead. She found no reason to fault the learned Magistrate judgment as there was overwhelming evidence in support of the prosecution case. It was found that the appellant was accorded a lenient sentence for an offence that attracts a life sentence. The appeal was dismissed for want of merit; and the appellant's conviction and sentence were affirmed.

7. The appellant was dissatisfied with the decision and filed his appeal to this court. The appellant filed supplementary grounds of appeal and also written submissions dated July 1, 2022. He raises four grounds all touching on sentence, that the first appellate court erred by failing to find that sentence of 30 years was manifestly harsh and excessive; for failing to consider that he was a first offender; failing to consider the Judiciary Sentencing Policy Guidelines and section 4 (1) & (2) of the *Probation of Offenders Act*; and failed to consider the period he had spent in remand. He relied on this court's decision in *Eliud Waweru Wambui vs. Rep.* 2019 eKLR for the proposition that the *SOA* needs a serious re-examination in a sober pragmatic manner for criminalizing sexual acts with children above 16 years. He also relied on section 4 (1) & (2) of the *Probation of Offenders Act* for proposition that a non-custodial sentence should be consider for certain persons on account of certain circumstances.

8. Mr. Jami Yamina, Senior Principle Prosecution Counsel filed written submissions dated May 20, 2022. While relying on section 361 of the *Criminal Procedure Code*, learned prosecution counsel urged that this being a second appeal, the court could only consider points of law only. Mr. Jami submitted that the grounds raised by the appellant in his appeal were on sentence which were points of fact. He

urged that the only instance that a second appeal court could interfere with sentence is when reducing severe sentence, which was not the case here. Learned prosecution counsel urged that the appeal is incompetent. The court was reminded that the appellant abandoned his grounds of appeal and that this court could not tamper with the conviction. To counsel, what remained was a declaration of a mistrial so that the appeal be reheard however there were no grounds for rehearing the appeal. It was concluded that the 30-year sentence was irregular in view of the provisions of section 8(2) of the *Sexual Offences Act*. The court was urged to dismiss the appeal.

9. We have considered this appeal, the grounds of appeal raised by the appellant, together with the submissions by both the appellant and the State. This is a second appeal, the appellant having been heard by the High Court sitting as a first appellate court. This being a second appeal, under section 361(1) of the *Criminal Procedure Code*, our jurisdiction is limited to matters of law. As stated by the court in *Karani v Republic* [2010] 1 KLR 73:

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

10. As we set out earlier in this judgment, the appellant raised four grounds all of which touched on sentence. Section 361(1)(a) of the *Criminal Procedure Code* provides that "severity of sentence is a matter of fact". The only instance when a second appellate court can consider an appeal on sentence is where the sentence is illegal, or one that cannot be justified given a consideration of the personal circumstances of the offender, for instance the age or such other special circumstances. In this case the appellant was an adult. In his mitigation the appellant stated that he was sorry, that his family was suffering at home, and that his parents depended on him. There was nothing in mitigation or the case to suggest that there were any special or unique circumstances that could have warranted an interference with the sentence. The law and the case that the appellant cited do not aid the appellant's case. He defiled a child of five years. The *SOA* prescribes life imprisonment for the offence, but his sentence was reduced to 30 years.

11. Having considered the appeal we find it has no merit, as it raises issue with the sentence, which we find we have no reason to interfere with it. The result is that this appeal is dismissed. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF NOVEMBER 2022.

S. GATEMBU KAIRU (FCI Arb)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR