Korir v Republic (Criminal Appeal 100 of 2019)
[2021] KECA 305 (KLR) (17 December 2021) (Judgment)

Neutral citation: [2021] KECA 305 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CRIMINAL APPEAL 100 OF 2019

HM OKWENGU, F SICHALE & MSA MAKHANDIA, JJA

DECEMBER 17, 2021

BETWEEN

HENRY KIPTABEI KORIR ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

((Being an appeal from the judgment of the High Court of Kenya at Eldoret (Kemei,J) dated 14th November 2018) IN HC. CRA NO. 123 OF 2015)

JUDGMENT

1. Henry Kiptabei Korir (the appellant herein), has preferred this second appeal against the judgment of D.K Kemei, J dated 14th November 2018,in which he was charged in the Kapsabet Principal Magistrates Court with the main offence of defilement contrary to Section 8 (1) as read with Section 8 (3) of the *Sexual Offences Act* No.

2. The particulars of the offence against the appellant were that on the 18th day of February 2015 , at [Particulars Withheld] Village within Nandi County, he intentionally and unlawfully caused his penis to penetrate the vagina of GC (name withheld) a child aged 15 years.

3. The appellant further faced an alternative charge of committing an indecent act with a child contrary to Section 11 (1) of the *Sexual Offences Act*.

4. The particulars of the alternative charge were that at the same place and time, he intentionally and unlawfully caused his penis to come into contact with the vagina of GC a child aged 15 years.

5. The appellant denied the charges after which a trial ensued. In a judgment delivered on 14th September 2015, the appellant was convicted of the main count and sentenced to 20 years' imprisonment.

6. Being aggrieved with both the conviction and sentence, the appellant moved to the High Court on appeal and vide a judgment delivered on 14th November 2018, Kemei, J. found the appeal to be lacking in merit and dismissed the same in its entirety thereby upholding the conviction and sentence.

7. Undeterred, the appellant has now filed this 2nd appeal and probably last appeal that is before us vide memorandum of appeal filed in court on 23rd November 2018 . Subsequently, the appellant filed undated supplementary grounds raising what he called *"mitigating factors"* as follows:

    1. THAT the Honourable Court has got the discretion on sentencing following the decision on Francis Karioko Muruatetu & Another v Republic Petition number 15 and 16 of 2015.

    2. THAT the Honourable Court be pleased to find that I was convicted as a first offender.

    3. THAT the Honourable Court be pleased to find that I am a young man whose life is greatly affected by the imprisonment.

    4. THAT the Honourable Court acknowledge the fact that while in prison I have taken full advantage of the rehabilitative programmes offered in the correctional facility as is evident in the attached documents.

    5. THAT the Honourable Court be pleased while deciding on the sentence to be guided by the provisions of Article 50 (2) (p) (q) as well as considering the time I have already spent in prison".

8. Briefly, the background to this appeal is as follows; PW1, GC is a female minor aged 15 years. It was her evidence that On 18th February 2015 at around 11.00 am, she was going to a place called Siwo when she met the appellant cutting a tree. That, the appellant then told her that he would take her to his grandmothers' home and marry her whereupon she agreed. It was her evidence that they then went to the appellant's home and that the appellant "did bad manners to her" twice, that the first took about twenty minutes while the second one took about an hour then they slept till the following morning. It was her further evidence that the following morning, the appellant took her to his grandmother's house in a place called [Particulars Withheld] and left her there as he went back to Siwo.

9. PW2 was IKK. It was his evidence that on 22nd February 2015, at around 4.00 pm he was at the home of his sister (PW3), when she told him that her daughter (PW1) had disappeared and that she did not know where she had disappeared to. Acting on a tip off, the following day he proceeded to Siwo but did not find the appellant nor PW1 whereupon he proceeded to [Particulars Withheld], the home of the relatives of the appellant and sought the assistance of neighbours of the appellant. She found the appellant and PW1 at the home of the appellant's relatives whereupon they were both arrested and taken to Kibabet police post.

10. According to PW3 RC, on 18th February 2015, her daughter (PW1)requested to be allowed to go visit her father where he lived which request she acceded to. On the following day, she got to know that her daughter (PW1), was not with her father. On 20th February 2015, she reported the matter to PW1's uncle one DS who promised to assist in the search together with IKK (PW2).

11. PW4 was PC Moses Wambogo then based at Kibabet police patrol base. His evidence was that on 23rd February 2015, he was at the police station when PW2 came and reported that his niece (PW3) had disappeared from home and he was suspecting that the girl had disappeared with the appellant. On

23rd February 2015, at around 8:00PM, PW2 came and reported having found the appellant with PW1 whereupon he placed the appellant in the cells.

12. PW5 was Timothy Rotich a resident of Cherondo. It was his evidence that on 23 rd February 2015 , he led PW2 to the home where they found the appellant and PW1. The appellant was arrested and taken to Kibabet Police Post.

13. PW6 was Amos Kipruto Korir a clinical officer based at Nandi Hills Sub- County Hospital. It was his evidence that on 24th February 2015, he received a patient by the name of GC who was escorted by police officers from Nandi hills police station alleging that she was defiled by somebody known to her. On physical examination of the genitalia, labia majora and labia minora were normal, the hymen was broken and there was no discharge noted on the vaginal canal. The vaginal swab and urinalysis did not reveal any abnormality and both the HIV test and syphilis were negative.

14. The appellant in his defence gave an unsworn statement of defence and elected not to call any witness. He denied having committed the offence and stated that he did not know the complainant.

15. When the matter came up for plenary hearing before us on 13thMay 2021, the appellant urged the Court to consider his mitigation and the fact that he had been rehabilitated.

16. In opposing the appeal, Miss Gacau, learned counsel for the State submitted that the sentence imposed against appellant was very lenient as it was the minimum sentence. Consequently, she urged the Court to dismiss the appeal.

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

18. The appeal before us is a second appeal. Our mandate as regards a second appeal is clear. By dint of Section 361 (1) (a) of the *Criminal Procedure Code* we are mandated to consider only matters of law. In *Kados vs. Republic* Nyeri Cr. Appeal No. 149 of 2006 (UR) this Court rendered itself thus on this issue:

> "...This being a second appeal we are reminded of our primary role as a second appellate court, namely to steer clear of all issues of facts and only concern ourselves with issues of law ..."

19. In *David Njoroge Macharia vs. Republic* [2011] eKLR it was stated that under Section 361 of the Criminal Procedure Code:

> "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 vs. Republic [1984] KLR 213)."

20. We consider the facts in this appeal to be rather straight forward. Firstly, the appellant is not contesting his conviction. Indeed, the evidence that was tendered in the lower court was no doubt overwhelming, reliable and credible to sustain a charge and conviction for the offence of defilement. PW1 testified *inter alia* that the appellant persuaded her that he would take her to his grandmother's house and marry her whereupon she agreed and that they had sexual intercourse on two occasions on the night of 18th February 2015.

21. With regard to sentence, the appellant submitted *inter alia* that this Court has the discretion on sentencing while placing reliance on the decision of *Francis Karioko Muruatetu & Another vs. Republic*

[2017] eKLR that he was a first offender; that he was a young man whose life is greatly affected by the imprisonment and that while in prison he had taken full advantage of the rehabilitative programmes offered in the correctional facility. The appellant further submitted that he was now 25 years old and that he was convicted at the age of 19 years and was remorseful thus deserving another chance.

22. The appellant has contended that he was a first offender and a young man whose life is greatly affected by the imprisonment and that while in prison he had taken full advantage of the rehabilitative programmes offered in the correctional facility. It is also not lost on this Court that the appellant has been in custody since February 2015, a period of slightly over 6 years to date. We also note that the appellant had serious intentions of marrying G.C, a girl aged 15 years. However, the law does not allow for the marriage of girls below the age of 18 years.

23. In our considered opinion and in view of the above, these factors coupled with the facts in this case mitigate for leniency. The appellant had the intention of marrying PW1. He took her to his grandparents' place and left her to stay there. In applying the *Muruatetu decision* (supra) that removed the bar to discretion posed by minimum sentences, and considering that the appellant has been in custody for slightly over 6 years, we consider the period that he has served to be sufficient sentence in the circumstances of this case.

24. Accordingly, we dismiss the appeal against conviction, but allow the appeal against sentence to the extent of reducing the sentence imposed on the appellant to the period already served. We order that the appellant be forthwith set free unless otherwise lawfully held.

25. The appellant's appeal succeeds to that limited extent only.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR