SKS v Republic (Criminal Revision E275 of 2021)
[2025] KEHC 415 (KLR) (24 January 2025) (Ruling)

Neutral citation: [2025] KEHC 415 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL REVISION E275 OF 2021

JRA WANANDA, J

JANUARY 24, 2025

BETWEEN

SKS ..... APPLICANT

AND

REPUBLIC ..... RESPONDENT

RULING

1. The Application herein seeks re-opening of a criminal case concluded before the Magistrate's Court in the year 2009 in which the Applicant was convicted on his own plea of guilty on two counts of defilement of his daughters. He was sentenced to serve 50 years on each count and which decision he unsuccessfully appealed all the way to the Court of Appeal.

2. The background to the matter is that the Applicant was charged in Eldoret Senior Resident Magistrates Court Criminal Case No 2933 of 2009 with two counts of 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 were that on 8/04/2009, at [Particulars Withheld] village, Kaptebe Location in Uasin Gishu District, he defiled his two daughters, MJ, aged 8 years and JJ aged 9 years, respectively. He was also charged with the respective alternative offence of indecently touching the private parts of the said two children. The Applicant, on 12/05/2009, pleaded guilty to the charges and was then convicted and sentenced to serve 50 years on each count, to run concurrently.

3. Aggrieved by the decision, the Appellant lodged an appeal, namely, Eldoret High Court Criminal Appeal No 78 of 2009 against both conviction and sentence. He claimed that the lower Court proceedings were conducted in a language that he did not understand. In the Judgment delivered on 4/08/2011 by F. Azangalala J, it was found that the proceedings were conducted in English and translated to Kiswahili which language the Applicant understood and that the plea of guilty was unequivocal. In respect to sentence, Azangalala J found that the sentence provided for under the law upon conviction for the offence of defilement of a girl aged below 11 years, was life imprisonment and

that the trial Magistrate had therefore erred by meting out the 50 years imprisonment. The High Court therefore dismissed the Appeal on conviction, and on sentence, enhanced the 50 years jail term to life imprisonment.

4. Undeterred, the Applicant lodged a second appeal against both conviction and sentence, namely, Eldoret Court of Appeal Criminal Appeal No 231 of 2011. This, too, was dismissed in its entirety in the Judgment delivered on 10/12/2015.

5. The Applicant has now returned to this Court with the present Application, namely, the Notice of Motion dated 22/09/2021 and filed on 3/10/2021. Before filing the instant Application, the Applicant had also filed a separate earlier Application, namely, Eldoret High Court Miscellaneous Criminal Petition No 21 of 2020, whereof he sought revision of the sentence. However, when asked which of the two contradictory Applications he wished to proceed with, he withdrew that other Application and retained the instant one.

6. Back to the instant Application, the prayers sought, quoted verbatim, are as follows:

   i. ..... [spent]

   ii. That the Honourable Court do revise the Judgment of Senior Resident Magistrates N. Shiundu dated 12th May 2009 in the Chief Magistrate Court at Eldoret in Criminal Case No 2933 of 2009.

   iii. That the Honourable Court do revise the Judgment of the High Court Criminal Appeal No 78 of 2009 by Justice F. Azangalala dated 4th August 2011.

   iv. That the Honourable Court do revise the Judgment in the Court of Appeal Criminal Appeal No 231 of 2011.

   v. ..... [spent]

7. In his Supporting Affidavit, the Applicant deponed that he is invoking this Court's unfettered jurisdiction to revise the decisions. He averred that his plea of guilty which culminated into the Judgment was made out of fear and in anticipation that the case would be concluded with a lesser punishment, that the decision of the Court was based on false accusations made against him and that the complainants have since absolved him of the allegations made against him.

8. Also filed in support of the Application are respective Affidavits stated to be sworn by the two complainants in the criminal case, namely, JJ and MJ (now adults). The import of the Affidavits is that the complaint was made by their parents, that they were never called to testify and neither did they write statements. They deponed further that they do not object to release of the Application and that the alleged offences were never committed.

9. In opposition to the Application, Emma Okok, Senior Prosecution Counsel, swore the Replying Affidavit filed on 16/04/2023. In response to the complainant's averment that they were never called to testify, she deponed that there was no need to conduct a trial as the Applicant was convicted on his own admission of guilt. She appreciated that having gone all the way to the Court of Appeal, the Applicant has exhausted his avenue of Appeal and deponed that the Affidavits sworn by the complainants do not meet the threshold of new and compelling evidence to warrant a new trial. She deponed that the Applicant had an opportunity to make an Application to adduce new evidence at the High Court and the Court of Appeal but failed to do so and that the instant Application is therefore an afterthought.

10. The Applicant then filed Submissions in which he basically reiterated the matters already deponed in his Affidavit and those of the complainants. He added that as at the date of the Application, he had

so far served 16 years in prison, that he is remorseful and has gone through rehabilitation programmes and that he has attained expertise in carpentry and joinery.

11. On his part, Mr. Okaka, Prosecution Counsel, appearing for the State, opted to submit orally. He, too, basically reiterated the matters already contained in the Replying Affidavit.

Determination

12. The issue that arises for determination is "whether this Court should set aside the conviction of the Appellant by the Magistrate's Court, subsequently upheld on Appeal, and instead, order for a retrial of the case on the ground that the complainants have since recanted their accusations of having been defiled by the Applicant".

13. I agree that it is possible, and indeed there have been many cases, both in Kenya and worldwide, in which innocent people have paid the price by being jailed on the basis of false accusations levelled against them. Levelling of such false accusations would be motivated by various factors, such as an element of "settling scores" or to "eliminate competitors" for scarce resources, particularly within the family. The most damning and painful example of such false accusation is where a mother cajoles and manipulates her under-age daughter to accuse her father of the most abominable offence of defiling them. Framed for such heinous offence, a father would stand little chance of escaping jail. This is because of the public outrage ordinarily attracted by accusations of defilement, particularly of one's own daughters, and the belief that children below a certain age are normally believable.

14. The question here is whether sufficient material has been placed before this Court to convince it that this might be one such case of false accusations. Methinks not and I give my reasons below.

15. First, it must be recalled that the Applicant was convicted of his own plea of guilty. He pleaded guilty to the two counts of the charge of defilement, and also subsequently confirmed as true the alleged facts when read out to him. In mitigation, he simply prayed for forgiveness. This conduct, in my view, is not in tandem with that of a person who was genuinely falsely accused of such beastly offence of defiling his, not one, but two, underage daughters. Considering the high level of stigma, ridicule and outrage that such a charge carries, and the severe penalty that is laid down carries, people accused of such an offence, ordinarily, even where undeniably guilty and even where there is overwhelming evidence against them, will fight to death to deny such an accusation. In this case, even on appeal, both the High Court and the Court of Appeal found that the Applicant's plea of guilty was unequivocal and properly taken. The plea of guilty therefore severely waters down the Applicant's allegation that he was framed.

16. Secondly, considering that the complainants were aged 8 and 9 years old in 2009 when the incident is alleged to have occurred, it means that currently, 15 years later, they are 23 and 24 years old. By around the age of 18 years or thereabouts, they could be said to have reached an age where they would be presumed to have become "independent" to a great extent, and to have extricated themselves from the "yoke" of their parents. However, the complainants do not disclose at what point in time they experienced the "spirit of the "Pentecost" and decided to come forward with the truth. They also do not disclose the reason why they did not come forward earlier. They also do not disclose what has now suddenly changed to "push" them to come forward. In light of these glaring instances of material non-disclosure, I take their sudden "change of heart" with a pinch of salt.

17. Thirdly, on appeal, the Applicant's 50 years jail term was enhanced to life sentence and he has now exhausted all his avenues his Appeal, albeit unsuccessfully. In my assessment, the complainants have done nothing to allay the fear and valid suspicion that their current move may as well be a plot brokered within the family to assist the Applicant to get out of jail after a family truce. I expected the complainants to have done more to demonstrate the genuineness and truthfulness of their

"confessions". On the contrary, they have not even disclosed whether their mother whom they allege to be the one who masterminded the whole plot against their father and convinced them to make the false accusations against him is still living with them and what her views on the Application are. Has she too owned up for her sins and if so, what has she done to make amends, if any? The complainants do not even explain the manner in which their mother allegedly convinced them to make such serious accusations against their father and what her motive was. Were they threatened or were they promised a reward? Have they even reported the mother to the police for action? They do not bother to shed light.

18. In an Application of this nature, considering the precedent that it might set if not handled carefully, I believe that in a case such as this one, where a complainant comes forward alleging to have made false accusations (upon manipulation by a third party), and makes such "confession" long after the "innocent" person has already been convicted and jailed, it would be advisable for such complainant to first make a report of such false accusation to the police. The police would then investigate the matter and submit at least a preliminary Report. It is such Preliminary Report that may then be presented to the Court. With that done, the Court would then be at least possessed of some material to enable it make determinations. The Court does not have the investigatory powers or may not even the capacity to unravel the truth and genuineness of alleged recanting of a complaint. It is the police which is the institution clothed with such powers and obligated by law to conduct investigations. This is important because the person belatedly purporting to "withdraw the false accusations" may as well be himself be playing a trick on the Court. There ought to also be some evidence that the person who allegedly masterminded the whole false accusations plot has at least recorded a statement with the police. His or her side of the story ought to be revealed to the Court.

19. In this case, I am afraid, the complainants have not done enough to convince me to give them the benefit of doubt. Mere swearing of 6-paragraph Affidavits by the complainants is not and cannot be sufficient.

20. On a different note, as aforesaid, both the High Court and the Court of Appeal have dealt with the Applicant's appeals on both conviction and sentence, and upheld the same. What the Applicant may therefore be said to be doing is inviting this Court to interfere with the decisions already affirmed by both this same Court, and also by the Court of Appeal, which is a higher Court, an action which is untenable in law. A High Court Judge cannot sit on appeal over a decision of the Court of Appeal. As the Applicant exercised his right of appeal to the Court of Appeal and upon which the Court of Appeal pronounced itself, in my view, this Court is now functus officio. This Court cannot once again entertain an Application for revision with respect to the same matter.

21. On this point, I cite the case of *Kenya Hotel Properties Limited v Attorney General & 5 others* (2020) eKLR, where the Court of Appeal expressed itself as hereunder:

> "Despite several declarations of finality made by various Judges of the High Court and benches of this Court, the matter appears to have an uncanny capacity for reincarnation. Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. The *Constitution* itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts. Moreover, under Article 164(3) of the *Constitution*, this Court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against

> a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere. We think the Supreme Court in the S.K Macharia case captured the essence of the need for courts to respect and stay within jurisdictional tethers and constraints..."

22. I am bound by the holding in the above case. The upshot of the foregoing is that apart from the other grounds on merits set out above, this Court may also be said to lack the jurisdiction to entertain the present Application.

23. In the premises, the Application is dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 24TH DAY OF JANUARY 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the Presence of:

Applicant present physically in open Court

Mr. Okaka for the State

C/A: Mr. Kuto