Aywa v Republic (Criminal Appeal E023 of 2021)
[2024] KEHC 615 (KLR) (29 January 2024) (Judgment)

Neutral citation: [2024] KEHC 615 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E023 OF 2021

JN KAMAU, J

JANUARY 29, 2024

BETWEEN

EVANS AYWA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon W. K. Cheruiyot (RM) delivered at Vihiga in Principal Magistrate's Court in Sexual Offence Case No. 57 of 2018 on 19th November 2018)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the *Sexual Offences Act* No 3 of 2006. He was also charged with an alternative charge of the offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*.

2. He was convicted on his own plea of guilty by Hon W. K. Cheruiyot (RM) and was sentenced to fifteen (15) years imprisonment.

3. Being dissatisfied with the said Judgement, on 17th January 2019, he lodged the Appeal herein. His Petition of Appeal was dated 21st December 2018. He set out three (3) grounds of appeal.

4. His undated Written Submissions were filed on 15th November 2023 while those of the Respondent were dated 5th December 2022 and filed on 8th December 2022. The Judgment herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

5. It is settled law that the duty of a first appellate court is to evaluate afresh the evidence adduced before the trial court in order to arrive at its own independent conclusion but bearing in mind that it neither saw nor heard the witnesses testify.

6. This was aptly stated in the case of *Selle & Another vs Associated Motor Boat Co Ltd & Others* [1968] EA 123 where the court therein held that the appellate court was not bound by the findings of fact of the trial court but that in re-considering and re-evaluating the evidence so as to draw its own conclusions, it always had to bear in mind that it neither saw nor heard the witnesses testify and thus make due allowance in that respect.

7. Having said so, right from the onset, the Respondent opposed the appeal. It argued that the Appellant was convicted on his own plea of guilt and under Section 348 of the *Criminal Procedure Code*, no appeal was allowed where an accused pleaded guilty except if the sentence was illegal. In this case, it argued that the appeal was not merited as the sentence was legal.

8. On his part, the Appellant did not submit on his grounds of appeal but mainly focused on Section 333(2) of the *Criminal Procedure Code* in urging the court to take into account the time he spent in custody before his conviction in computation of his sentence.

9. Section 348 of the *Criminal Procedure Code* does prohibit appeals against a plea of guilty. It stipulates:

> "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."

10. In the case of *Olel vs Republic* (1989) KLR 444, the court therein interpreted the above provision as follows:-

> "Where a plea is unequivocal, an appeal against conviction does not lie. Section 348 of the *Criminal Procedure Code* (Cap 75) does not merely limit the right of appeal in such cases but bars it completely."

11. The plea taking process was laid out in the case of *Adan vs Republic*(1973) EA 445 at 446 thus:

> "When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must, off course, be recorded."

12. The plea in this case was taken in a language that the Appellant herein understood, Kiswahili. When the charge was read to him and he was asked whether he admitted or denied the truth of the charge he replied "Ni kweli" The prosecution then read the facts of the case to him and he replied, "Facts are correct".

13. In his Petition of Appeal, he stated that the Prosecution failed to prove penetration, age of the victim and the fact that nothing medically linked him to the offence. However, the record was clear that he pleaded guilty to the charges and maintained his plea even after the facts of the case were read to him. In the event he would have wanted to challenge any aspect of the Prosecution's case, he had an opportunity to do so at the time the plea was being taken, a conclusion that was also arrived at in the case of *Henry Kerage Nyachoti vs Republic* [2020] eKLR.

14. The record showed that his plea of guilty was unequivocal. An appeal could therefore not lie against his conviction. He could only appeal against the extent and legality of the sentence that was meted against him.

15. Notably, an appellate court will not disturb the trial court's discretion on sentence unless it is manifestly excessive or the trial court overlooked some material factor or took into account some wrong material or acted on a wrong principle. Even if the appellate court was of the view that the sentence was heavy and that it might itself have passed a lighter sentence, that was not in itself a sufficient ground for it to interfere with the discretion of the trial court, a position that was set out in the case of *Bernard Kimani Gacheru vs Republic* [2002] eKLR.

16. The Birth Certificate of the Complainant (hereinafter referred to as "PW 1") indicated that she was born on 20th February 2002. That meant that at the material time on between 6th November 2018 and 11th November 2018 she was sixteen (16) years of age.

17. The Appellant herein was charged under Section 8(1) as read with Section 8(4) of the *Sexual Offences Act*. Section 8(4) of the *Sexual Offences Act* provides that:-

> " A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."

18. The sentence of fifteen (15) years that the Learned Trial Magistrate had meted on the Appellant herein was therefore legal, lawful and had the basis of the law.

19. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in defilement cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences.

20. Prior to the directions of the Supreme Court in *Francis Karioko Muruatetu and Another vs Republic* [2017] eKLR on 6th July 2021 that emphasised that the said case was only applicable to murder cases, courts re-sentenced applicants for different offences, including sexual offences.

21. In the case of defilement matters, the High Court and subordinate courts were bound by the Court of Appeal decision in the case of *Dismas Wafula Kilwake vs Republic* [2018] eKLR where it held that Section 8 of the *Sexual Offences Act* must be interpreted so as not to take away the discretion of the court in sentencing offences.

22. With the directions of the Supreme Court which clarified that the case of *Francis Karioko Muruatetu and Another vs Republic* (*Supra*) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.

23. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of *GK vs Republic* (Criminal Appeal 134 of 2016) [2021] KECA 232 (KLR), the Court of Appeal reiterated that the law was no longer rigid with regard to minimum mandatory sentences and would take into account the peculiar circumstances of each case.

24. On 15th May 2022 which was also after the directions of the Supreme Court, in the case of *Maingi & 5 others v Director of Public Prosecutions & another* (Petition E017 of 2021) [2022] KEHC 13118 (KLR), Odunga J (as he then was) held that to the extent that the *Sexual Offences Act* prescribed minimum mandatory sentences with no discretion to the trial court to determine the appropriate sentence to impose, such sentences fell afoul of Article 28 of the *Constitution* of Kenya, 2010. He, however, clarified that it was not unconstitutional to mete out the mandatory sentence if the circumstances of the case warranted such a sentence.

25. In the case of *Joshua Gichuki Mwangi vs Republic* [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of *Dismas Wafula Kilwake vs Republic* (*Supra*) and held that it was impermissible for the legislature to take away the discretion of courts and to compel them to mete out sentences that were disproportionate to what would otherwise be an appropriate sentence.

26. The principle of sentencing is fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing are retribution, incapacitation, deterrence, rehabilitation and reparation. The *Sentencing Policy Guidelines* in Kenya have added community protection and denunciation as sentencing objectives. The objectives are not mutually exclusive and can overlap.

27. Bearing in mind that the High Court is bound by the decisions of the Court of Appeal as far as sentencing in defilement cases is concerned, this court took the view that it could exercise its discretion to sentence the Appellant herein to lower than the fifteen (15) years imprisonment that has been prescribed in Section 8(3) of the *Sexual Offences Act*.

28. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of ten (10) years would be adequate herein to punish the Appellant for the offence that he committed and deter him from committing similar offences and for PW 1 and the society to find retribution in that sentence.

29. Going further, Section 333(2) of the *Criminal Procedure Code* which provides that:-

> " Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."

30. This duty is also contained in the *Judiciary Sentencing Policy Guidelines* (under clauses 7.10 and 7.11) where it is provided that: -

> " The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may

result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial."

31. The duty to take into account the period an accused person had remained in custody before sentencing pursuant to Section 333(2) of the *Criminal Procedure Code* was restated by the Court of Appeal in the case of *Ahamad Abolfathi Mohammed & Another vs Republic* [2018] eKLR.

32. A perusal of the proceedings of the lower court showed that the Appellant was arrested on 16th November 2018 and was sentenced on 19th November 2018, which was a period of three (3) days. This period ought to be taken into account when computing his sentence.

Disposition

33. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 21st December 2018 and filed on 17th January 2019 was partly merited and the same be and is hereby allowed on the aspect of sentence only. The Appellant's conviction be and is hereby upheld as it was safe. However, the sentence of fifteen (15) years be and is hereby vacated and/or set aside and replaced with a sentence of ten (10) years imprisonment.

34. It is hereby directed that the time the Appellant spent in custody between 16th November 2018 and 18th November 2018 be taken into account while computing his sentence as provided in Section 333(2) of the *Criminal Procedure Code* Cap 75 (Laws of Kenya).

35. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF JANUARY 2024

J. KAMAU

JUDGE