



REPUBLIC OF KENYA



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**Shivembe v Republic (Criminal Appeal 21 of 2021)
[2024] KEHC 2057 (KLR) (26 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2057 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CRIMINAL APPEAL 21 OF 2021
JN KAMAU, J
FEBRUARY 26, 2024**

BETWEEN

NICKSON SHIVEMBE APPELLANT

AND

REPUBLIC RESPONDENT

(Being an Appeal from the Judgment of Hon M. L. Nabibya (SRM) delivered at Vihiga in Principal Magistrate's Court in Sexual Offence Case No. 131 of 2018 on 4th April 2018)

JUDGMENT

Introduction

1. The Appellant herein together with his Co- Accused, Erasters Matone, were jointly charged with the offence of gang rape contrary to Section 10 of the [Sexual Offences Act](#) No 3 of 2006. They were also charged with an alternative charge of the offence of committing an indecent act with an adult contrary to Section 11(A) of the [Sexual Offences Act](#).
2. Both of them were convicted on their own plea of guilty and the Learned Trial Magistrate, Hon M. L. Nabibya (SRM) sentenced them to fifteen (15) years imprisonment each.
3. Being dissatisfied with the said Judgement, on 11th March 2019, the Appellant herein lodged the Appeal herein. His Petition of Appeal was dated 31st May 2018. He set out five (5) grounds of appeal.
4. His undated Written Submissions were filed on 15th November 2023 while those of the Respondent were dated 15th November 2023 and filed on 16th November 2023. 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. Notably, the Appellant did not submit on any of his grounds of appeal. Rather, he mainly focused on the review of his sentence. Be that as it may, this court also analysed his Grounds of Appeal for completeness of record as he had not withdrawn the Appeal herein.
8. This court therefore dealt with this matter under the following distinct and separate heads.

I. Regularity or Otherwise of The Plea Taking

9. Ground of Appeals Nos (1) and (5) of the Petition of Appeal were dealt with under this head as they were all related.
10. The Appellant had asserted that the Trial Court erred in law and fact for convicting him on a plea of guilt without warning him of the consequences. He also averred that the Charges were read to him in a language that he could not understand and that he was not furnished with the evidence that the Prosecution intended to rely on to prove its case.
11. In the case of *Olel v Republic* [1989] KLR 444, the court therein rendered itself 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.”
12. The plea taking process was laid out in the case of *Adan v 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.”



13. The plea in this case was taken in a language that the Appellant herein understood, Kiswahili. When the Charge was read to him on 31st January 2018, he denied the same. However, when the matter came for hearing on 21st March 2018, he asked that Charges be read to him afresh.
14. Before he pleaded to the Charge, the Trial Court warned him of the consequences of pleading guilty in such kind of cases. When he was asked whether he admitted or denied the facts that had been read earlier to his Co-Accused, he replied that they were was true.
15. The proceedings of 21st March 2018 showed that the Trial Court warned him of the consequences of pleading in such offences. However, he proceeded to plead guilty and confirmed that the facts of the case that were read to him were correct. His assertion that that he was not warned of the consequences of pleading guilty to the Charge was therefore not true.
16. Further, his contention that he was convicted on facts that were read to him in a language that he did not understand did not also hold water. It was evident that he followed the proceedings and responded to questions that were posed to him by the Trial Court. When he pleaded to the Charge on 21st March 2018, it was recorded that he said “Ni ukweli”. Indeed, there was no clearer confirmation that he understood the language of the Trial Court than from the way his plea was recorded. It was therefore clear to this court that the proceedings were conducted in a language that he understood, Kiswahili.
17. In opposition to the Appeal herein, the Respondent argued that the appeal herein was not merited as the sentence that was meted upon the Appellant herein was lawful. It submitted that he was convicted on his own plea of guilt and under Section 348 of the Criminal Procedure Code, no appeal was allowed except on the legality of the sentence.
18. As the Respondent ably pointed out, an accused person who had pleaded guilty to an offence could only appeal against the legality and extent of the sentence as stated in Section 348 of the Criminal Procedure Code Cap 75 (Laws of Kenya). The said Section 348 of the Criminal Procedure Code stipulates 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.”
19. It was evident from the proceedings of the lower court that the Appellant’s plea of guilty was unequivocal and that the process of plea taking was untainted. An appeal could therefore not lie against his conviction. As the Trial Court ably stated, it became functus officio when he pleaded guilty to the offence and then convicted him.
20. In the premises foregoing, Grounds of Appeal Nos (1) and (5) were not merited and the same be and are hereby dismissed.

II. Proof Of The Prosecution’s Case

21. Ground of Appeal No (2) was dealt with under this head.
22. The Appellant had asserted that the Trial Court erroneously relied on the facts that were read by the Prosecution facts before it convicted him without considering the provisions of Article 50(2)(j) of *the Constitution* of Kenya, 2010.



23. A perusal of the proceedings of 31st January 2018 showed that the Trial Court directed that he be furnished with copies of the witness statements. This was in line with Article 50(2)(j) of the Constitution of Kenya, 2010 that provides that:-
- “Every accused person has the right to a fair trial, which includes the right to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence.”
24. When the matter came up in court on 1st February 2018, 15th February 2018, 1st March 2018, 15th March 2018 and 21st March 2018, he did not inform the Trial Court that he had not been furnished with the documentary evidence that the Prosecution intended to rely upon to prove its case.
25. His assertion that the facts of the case were read out to him without considering the provisions of Article 50(2)(j) of the Constitution of Kenya did not therefore have any legal basis.
26. 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 Charge was first read to him on 31st January 2018, a conclusion that was also arrived at in the case of Henry Kerage Nyachoti v Republic [2020] eKLR and in any event, before he pleaded to the charge on 21st March 2018.
27. In the premises foregoing, Ground of Appeal No (2) of his Petition of Appeal was therefore not merited and the same be and is hereby dismissed.

III. Sentence

28. Grounds of Appeal Nos (3) and (4) of the Petition of Appeal were dealt with under this head as they were related.
29. The Appellant did not expound on the issue of sentence in his Written Submissions. He merely pointed out that he was the bread winner of his family and that he was a first offender. It was his contention that he had been rehabilitated during his incarceration and was ready to be integrated back to his family and society.
30. 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 v Republic [2002] eKLR.
31. The Appellant herein was charged under Section 10 of the Sexual Offences Act provides that:-
- “Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less fifteen years but which may be enhanced to imprisonment for life.”
32. The sentence of fifteen (15) years that the Trial Court meted on him was therefore legal, lawful and had the basis of the law as it had the discretion of enhancing it to life imprisonment.



33. This court noted that the Trial Court ordered that Probation Reports be filed before it could sentence the Appellant herein and his Co-Accused. The Trial Court considered some reports at the time of sentencing. There was no express indication that the said reports were Probation Reports. Suffice it to state that the Probation Reports that were filed in the Trial Court were in respect of both the Appellant and his Co-Accused. They were both authored by Catherine Wanyama. The Probation Report in respect of the Appellant herein was dated 4th April 2018 while that of his Co-Accused as dated 3rd 2018 respectively. The proceedings of the lower court showed that both the Appellant and his Co-Accused were given an opportunity to mitigate.
34. In his mitigation, the Appellant herein told the Trial Court that he was twenty five (25) years of age. He apologised and promised not repeat the offence again. He added that he had a small child who was under his custody and he did not know how he was fairing. It was therefore not correct that the Trial Court did not consider his mitigation or take into account the Probation Report. It had the discretion of meting out to him any sentence up to life imprisonment.
35. The above notwithstanding, this court took cognisance of the fact that there was emerging jurisprudence that the mandatory minimum sentences in sexual offences cases was unconstitutional and courts have a discretion to depart from the minimum mandatory sentences so as administer justice in this case.
36. Prior to the directions of the Supreme Court in Francis Karioko Muruatetu and Another v 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.
37. 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.
38. With the directions of the Supreme Court which clarified that the case of Francis Karioko Muruatetu and Another v Republic (Supra) was only applicable to re-sentencing in murder cases only, courts stopped re-sentencing applicants in sexual offences.
39. However, on 3rd December 2021 while the Supreme Court directions of 6th July 2021 were still in place, in the case of GK v 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.
40. 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.
41. In the case of Joshua Gichuki Mwangi v Republic [2022] eKLR, the Court of Appeal reiterated the reasoning in the case of Dismas Wafula Kilwake v 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.



42. 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.
43. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal in sexual offences, this court took the view that it could exercise its discretion to mete out to the Appellant herein a sentence that was lower than the fifteen (15) years imprisonment that has been prescribed in Section 10 of the *Sexual Offences Act*.
44. 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 the Complainant and the society to find retribution in that sentence.
45. Going further, although the Petitioner did not seek that the period he had spent in custody while his trial was ongoing be taken into account at the time his sentence was being computed, the Respondent did not object to the said period being considered herein.
46. Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) 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.”
47. The duty to take into account this period 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.”
48. 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 v Republic* [2018] eKLR.
49. A perusal of the proceedings of the lower court showed that the Appellant was arrested on 31st January 2018 and was sentenced on 4th April 2018. The period of two (2) months and three (3) days during which the Appellant herein remained in remand while his trial was ongoing ought to be taken into account when computing his sentence.
50. In the premises foregoing, Grounds of Appeal Nos (3) and (4) though not merited, this court reduced the sentence that was meted upon the Appellant herein and took into account the period he spent in custody while his trial was ongoing.



Disposition

51. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was dated 31st May 2018 and filed on 11th March 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.
52. It is hereby directed that the time the Appellant spent in custody between 31st January 2018 and 3rd April 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).
53. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 26TH DAY OF FEBRUARY 2024

J. KAMAU

JUDGE

