Livombolo v Republic (Criminal Appeal E041 of 2022)
[2024] KEHC 3255 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CRIMINAL APPEAL E041 OF 2022

SC CHIRCHIR, J

MARCH 20, 2024

BETWEEN

ALEXANDER LIVOMBOLO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon. J.N Maragia(SRM) delivered on 26th may 2022 at the chief Magistrate's court at Kakamega)

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to section 4 of the *sexual offences Act* (The Act). He was found guilty by the lower court and and sentenced to 10 years in prison. He was aggrieved by the judgment and filed this Appeal.

2. He later filed amended grounds, which exclusively dwelt on the issue of the sentence only . The grounds were:

    a. That the imposed sentence is excessively harsh and unjust considering that the appellant was a first offender and he was an old man who needed a lesser sentence.

    b. That the imposed sentence is excessive and does not go well with the provisions of the policy sentencing directives 2015 under paragraph 4:1

    c. That the appellant is remorseful and regrets his actions. He is repentant.

    d. That the appellant before his conviction and sentence was a father of five school going children and a husband to one wife who was unemployed

e. That the appellant worked tirelessly to support his family and self and potential if given another chance.

f. That the court considers his mitigation grounds and award a lesser sentence or substitute the remaining sentence with a non-custodial sentence or the court be pleased to order that the appellant serves in the community service order.

g. That the court considers the provisions of section 333 (2) of the criminal procedure code to be factored in his sentence.

3. The appellant prayed for the following orders;

a. That the sentence of 10 years imposed by the trial court be set aside and the appellant be set at liberty.

b. That the court be pleased and find that the circumstance of the case did not call for a long sentence thus reduce the 10 years to any lesser sentence the court finds favourable in the circumstances

c. That the court finds it favourable to award a community service order or order for the appellant to serve a probation service sentence

4. In his written submission the appellant acknowledged that sentencing was a judicial discretion but avers that with the sentence imposed was excessive that in the circumstances; that the sentence was too grievous considering that no person was hurt.

5. On the issue of what constitutes an appropriate sentence, he relied on the case of Thomas Mwambu wenyi Vs. Republic (2017) eKLR that cited the decision of Alister Anthony Pereira vs, State of Maharashtra to buttress his submissions

6. He further submits that the sentencing of 10 years did not met the objective that were listed under paragraph 4:1 of the sentencing policy guidelines.

7. The appellant mitigation was that he was remorseful for his actions which he fully condemned and promises not to repeat his mistakes.

8. He states that he was the sole provider of his five school- going children and that his wife is ailing and jobless. He avers that the time he has served has fully rehabilitated him .

9. He also asks the court to take into account the time he spent in custody prior to conviction.

10. The respondent did not file any submissions.

Determination

11. The only issue for determination is in this Appeal is whether the sentence was excessive, and if the time spent in custody should be taken into Account.

12. The appellant in this case was sentenced to serve ten years imprisonment . He was charged under Section 9 (1) as read with Section 9 (2) of the *Sexual Offences Act*.

13. Section 9 (1) provides for the offence of attempted defilement whilst 9 (2) spells out the penalty for the offence as follows:

> 9(1) a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(2)A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years"

14. Sentencing is at the discretion of the trial court. In the case of Wanjema v Republic (1971) EA 493, 494, the court had this to say on matter discretion:

'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'

15. In this case, the appellant's claim is that the 10 years imprisonment meted on him was too harsh and excessive .The Appellant's argument is that the mandatory minimum sentence takes away the discretion of the Court and this should not be the case because the Court's hands are not supposed to be tied.

16. A perusal of the court record shows that the accused had been given an opportunity to mitigate for leniency and a non-custodial sentence. The appellant grounds was that he was the sole bread winner and that his wife and family depended on him.

But It was the evidence of the said wife (PW2,) who told the court that they were no longer cohabiting with the Appellant.

17. The sentence meted out was the minimum and mandatory. The trial court had no discretion. This court does not have discretion too. This ground is dismissed.

18. The appellant further claimed that the trial court did not put into consideration the time he had spent in remand while the trial was ongoing.

19. Section 333 (2) of the Criminal Procedure Code states that the court is mandated to consider the period the accused spent in remand custody to constitute part of the sentence. For avoidance of doubt, the provision reads:

" 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."

20. This duty is further given emphasis by clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines 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 consider the period in which the offender was held in custody during the trial."

21. Looking at the trial court record, it attests to the fact that the Appellant was in custody throughout the trial. He was arraigned on 20/9/2021 and was convicted on 27/04/2022. This means that he was

in custody for a period of almost six (6) months ,a period the learned trial magistrate ought to have taken into consideration.

22. In the end this Appeal partially succeeds. The sentence of 10 years is upheld but will run from 20th September 2021 being the date when the Appellant was first arraigned in court.

DATED , SIGNED AND DELIVERED AT KAKAMEGA THIS 20TH DAY OF MARCH 2024.

S. CHIRCHIR

JUDGE

In the presence of :

Godwin – Court Assistant.