Okeno v Republic (Criminal Appeal 26 of 2021)
[2024] KEHC 2894 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2894 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL 26 OF 2021

JN KAMAU, J

MARCH 19, 2024

BETWEEN

DENNIS OKENO ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon J. K. Ng'arng'ar (SPM) delivered at Hamisi in Senior Principal Magistrate's Court in Criminal Case No 713 of 2012 on 28th April 2016)

JUDGMENT

Introduction

1. The Appellant herein was charged jointly with another with the offence of gang defilement contrary to Section 10 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 by the Learned Trial Magistrate, Hon J. K. Ng'arng'ar(SPM), on the charge of gang defilement and was sentenced to life imprisonment. He was discharged on the alternative charge.

3. Being dissatisfied with the said Judgement, on 24th May 2019, he lodged the Appeal herein. His Petition of Appeal was dated 15th November 2018. He set out five (5) grounds of appeal. On 10th January 2024, he filed an undated Amended Supplementary (sic) Grounds of Appeal in which he set out four (4) amended supplementary grounds of appeal.

4. His undated Written Submissions were filed on 10th January 2024 while those of the Respondent were dated 26th February 2024 and filed on 28th February 2024. 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. As the Appellant was unrepresented on Appeal, this court took it upon itself to consider both his Petition of Appeal and his Amended Supplementary (sic) Grounds of Appeal as it was not clear whether he had abandoned his Petition of Appeal.

8. Having looked at the Appellant's Grounds of Appeal, Amended Supplementary (sic) Grounds of Appeal, his Written Submissions and those of the Respondent, it appeared to this court that the issues that had been placed before it for determination were as follows:-

    a. Whether or not the Prosecution proved its case beyond reasonable doubt; and

    b. Whether or not in the circumstances of this case, the sentence that was meted upon the Appellant herein by the Trial Court was lawful and/or warranted.

9. The court dealt with the said issues under the following distinct and separate heads.

I. Proof of Prosecution's Case

10. Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal and Amended Supplementary (sic) Grounds of Appeal Nos (1) and (2) were dealt with under this head as they were all related.

11. This court dealt with the same under the following distinct and separate heads.

A. Age

12. The Appellant did not submit on this issue. On its part, the Respondent submitted that No 90182 PC Diana Watembo (hereinafter referred to as "PW 7") testified that the Complainant, (hereinafter referred to as "PW 1") was eleven (11) years of age and produced her birth certificate.

13. A perusal of the Certificate of Birth showed that PW 1 was born on 6th March 2001. The alleged offence was said to have taken place on 11th November 2012. She was therefore aged eleven (11) years old at the material time of the incident.

14. As the Appellant did not controvert and/or rebut PW 1's age, this court found and held that her age had been proven and that for all purposes and intent, she was a child.

B. Identification

15. The Appellant submitted that there were contradictions in the Prosecution's evidence concerning the reporting of the offence, his arrest and time of the offence. He did not submit clearly on this issue. On the other hand, the Respondent re-hashed PW 1's testimony.

16. Notably, PW 1 testified that on the material date, she was on her way home at about 7.00 pm when she met two (2) people whom she knew. She stated that the Appellant used to work at their home and the

other worked at their neighbour. They both pulled her to the nearby bushes and defiled her in turns. She stated that it was the Appellant herein who began while his co-accused held her legs. She said that when she got home she told her mother, Dorah Khosia Ngesiya (hereinafter referred to as "PW 2") what the Appellant herein and his Co-Accused had done to her.

17. On being re-examined, she told the Trial Court that she was able to identify Appellant and his Co-Accused as the perpetrators of the offence as it was not so dark at the material time and that the lighting from a motor cycle that passed assisted her to clearly identify them.

18. PW 2 corroborated her evidence. She stated that she knew the Appellant and his Co-Accused. She said that the Appellant used to look after her cattle.

19. In his unsworn evidence, the Appellant admitted to having worked at PW 2's home. He asserted that PW 2 framed him. He added that she did not pay him and he had refused to work for him. It was his evidence that at the material time, he was at his home, sleeping.

20. Notably, PW 1 and the Appellant knew each other because he worked at their home. Although it was at 7.00 pm, she was able to identify him and his Co-Accused as it was not so dark. The headlights of a motor cycle that passed by also assisted her to see them. She positively identified the Appellant in the dock during trial. Identification was by recognition.

21. Without belabouring the point, this court came to the firm conclusion that the Prosecution proved the ingredient of identification.

C. Penetration

22. The Appellant submitted that there was wrong marking of the prosecution exhibits in that the P3 form and the Post Rape Care form were marked "mfi". It was his contention that the Prosecution's witnesses' testimony was not well corroborated by the medical findings. He pointed out that treatment notes from Kaimosi Hospital were not produced. He added that PW 2 indicated that after Kaimosi they went to Mbale for further treatment. He questioned why treatment notes from Vihiga Hospital were not produced as proof of that evidence.

23. He argued that several witnesses whose evidence would have led to his acquittal were not called to testify. He listed them as follows; Chilf (sic) of Matesta who escorted PW 1 to go home, the person with the motor cycle whose lights allegedly were used to identify him, PC Ali Kisisi who was said to be with No 68703 PC Geoffrey Morara (hereinafter referred to as "PW 6") and PW 1's father.

24. In this regard, he placed reliance on the case of Bukenya & Others vs Uganda (1972) EA where it was held that the director (sic) had the discretion to decide who the material witnesses were and whom to call.

25. On its part, the Respondent submitted that Sammy Chelule (hereinafter referred to as "PW 5") confirmed that PW 1 was indeed defiled as there was penetration on the vagina.

26. It was PW 2's testimony that on the material night at around 7.15pm, PW 1 arrived home crying with her black pants in her hands. She stated that her dress had blood stains and she had mud all over her especially on her head.

27. PW 5 testified that PW 1 was bleeding from her vagina and was in shock. She had scratch marks on the neck which was swollen and tender on touch. Her left thigh was tender and had swollen bruises. She had difficulty in walking. Her hymen had been torn, reddish and painful on touch. The labia was also swollen and painful on touch. She had a tearing on the vagina towards the anus and the vagina had some traces of blood.

28. He stated that there were active sperms and red blood cells noted from the vaginal swab. He opined that there was penetration of the vagina. He produced P3 form, Post Care Rape (PRC) form and Treatment records as exhibits in support of the Prosecution's case.

29. The Appellant's argument that the Prosecution witnesses' evidence was not well corroborated by the medical findings therefore fell by the wayside. It was evident that the documents that were marked as "MFI" were subsequently tendered in evidence and marked as Exhbitis.

30. Having analysed both the Prosecution and the Appellant's cases, this court came to the firm conclusion that the Prosecution proved its case to the required standard, which in criminal cases, is proof beyond reasonable doubt as envisaged in Section 108 and Section 109 of the *Evidence Act* Cap 80 (Laws of Kenya).

31. Indeed, all the ingredients of the offence of defilement being identification or recognition of the offender, penetration and the age of the victim that were set out in the case of George Opondo Olunga vs Republic [2016] eKLR were proven. The aspect of gang defilement was also proven as it was clear from the record that the Appellant committed the offence together with another who escaped after the close of the defence case.

32. The Appellant was obligated to have called a witness to corroborate his alibi defence that he was sleeping in his house at the time of the incident, the burden of proof having shifted to him. His arguments that there were glaring inconsistencies, that the Prosecution failed to call crucial witnesses and that the Trial Court gravely erred on points of law by convicting him on a case that had not been proven beyond reasonable doubt as prescribed by the law thus fell by the wayside.

33. Notably, the Prosecution was not required to call a particular number of witnesses to prove its case but was only required to call only those witness who added value to its case. Indeed, Section 143 of the *Evidence Act* stipulates as follows:-

> "No particular number of witnesses shall, in the absence of any provision of law to the contrary, be required for the proof of any fact."

34. It was the considered view of this court that PW 1's evidence was well corroborated by factual and scientific evidence of other Prosecution witnesses. The Trial Court could not therefore have been faulted for having found that the Appellant did in fact penetrate PW 1 and that the Prosecution had proved its case beyond reasonable doubt.

35. In the premises foregoing, Grounds of Appeal Nos (1), (2), (3) and (4) of the Petition of Appeal and Amended Supplementary (sic) Grounds of Appeal Nos (1) and (2) were not merited and the same be and are hereby dismissed.

II. Sentencing

36. Ground of Appeal No (5) of the Petition of Appeal and Amended Supplementary Ground of Appeal Nos (3), (4) and (5) were dealt with under this head.

37. The Respondent did not submit on the issue of sentencing. On his part, the Appellant submitted that the sentence that was imposed on him was degrading and inhuman. He prayed that the same be set aside and that an appropriate sentence be meted out.

38. He placed reliance on the case of Julius Kitsao Manyeso vs Republic Criminal Appeal No 12 of 2021(eKLR citation not given) where the court therein stated that life imprisonment was unconstitutional and proceeded to re-sentence the appellant therein.

39. He further relied on the case of Benard Barasa vs Republic Criminal Appeal No 313 of 2018(eKLR citation not given) where the court reduced a sentence of life imprisonment to ten (10) years imprisonment.

40. He pleaded with the court to rely on the doctrine of stare decisis and Article 165 of *the Constitution* of Kenya, 2010 in considering his appeal on sentence.

41. He also urged this court to consider Section 333(2) of the Criminal Procedure Code when determining his sentence as he had been in custody since the year 2012. He pointed out that he was arrested while he was unmarried, his parents died while he was in prison and that he was asthmatic.

42. Notably, 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."

43. The Trial Court therefore did not err in fact or law when it sentenced the Appellant to life imprisonment.

44. 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.

45. 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.

46. 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.

47. 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.

48. 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.

49. 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.

50. 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.

51. The principle of sentencing was fairness, justice, proportionality and commitment to public safety. The main objectives of sentencing were retribution, incapacitation, deterrence, rehabilitation and reparation. The Sentencing Policy Guidelines in Kenya had added community protection and denunciation as sentencing objectives. The objectives were not mutually exclusive and could overlap.

52. Bearing in mind that the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned, this court took the view that it could exercise its discretion to review the Appellant's sentence herein to a sentence that was lower than the life imprisonment that had been prescribed in Section 10 of the *Sexual Offences Act*.

53. There was now a global shift in not meting out life imprisonment on convicted persons as the same was deemed to be dehumanising, degrading and violates the right to dignity.

54. In dealing with a matter where the appellant had been sentenced to life imprisonment under Section 8(2) of the *Sexual Offences Act*, in the case of Manyeso vs Republic (Criminal Appeal 12 of 2021) [2023] KECA 827 (KLR) (7 July 2023) (Judgment), the Court of Appeal rendered itself as follows:-

> " ...an indeterminate life sentence is in our view also inhumane treatment and violates the right to dignity under article 28, and we are in this respect persuaded by the reasoning of the European Court of Human Rights in Vinter and others v The United Kingdom (Application Nos 66069/09, 130/10 and 3896/10) [2016] III ECHR 317 (9 July 2013) that an indeterminate life sentence without any prospect of release or a possibility of review is degrading and inhuman punishment, and that it is now a principle in international law that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.... we are of the view that having found the sentence of life imprisonment to be unconstitutional, we have the discretion to interfere with the said sentence... We, therefore in the circumstances, uphold the appellant's conviction of defilement, but partially allow his appeal on sentence. We accordingly set aside the sentence of life imprisonment imposed on the appellant and substitute therefor a sentence of 40 years in prison to run from the date of his conviction."

55. Indeed, due to the hierarchical nature of our courts, this court was bound by the decisions of the Court of Appeal and Supreme Court of Kenya. In addition, as provided in Article 50 (p) of *the Constitution* of Kenya, 2010, an accused person is entitled to the least severe punishment prescribed by the law. It states as follows:-

> " Every accused person has the right to a fair trial, which includes the right to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing."

56. Further, Article 50(q) of *the Constitution* of Kenya stipulates that:-

> " Every accused person has a right if convicted, to appeal to, or apply for review by, a higher court as prescribed by law."

57. According to Article 27(1) of *the Constitution* of Kenya:-

> " Every person is equal before the law and has the right to equal protection and equal benefit of the law."

58. The Court of Appeal decision was delivered way after the Appellant herein was convicted. He had a right to appeal to benefit from least severe punishment that was being meted out for the offence of defilement under Section 10 of the Sexual Offence Act that attracts the sentence of life imprisonment. He was entitled to equal benefit and protection of the law. Failure to accord him this benefit could amount to discrimination against him which is prohibited by Article 27(4) of *the Constitution* of Kenya that states that:-

> " The State shall not discriminate directly or indirectly against any person on any ground (emphasis court), including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth."

59. Bearing in mind the cases of Dismas Wafula Kilwake vs Republic [2018] eKLR (Supra), GK vs Republic (Supra), Maingi & 5 others v Director of Public Prosecutions & Another (Supra), Manyeso vs Republic (Supra) and almost other cases cited hereinabove, this court took the view that it could exercise its discretion to sentence the Appellant herein to a lower sentence than the life imprisonment that has been prescribed in Section 10 of the *Sexual Offences Act*.

60. Taking all the circumstances of this case into consideration, this court came to the conclusion that a sentence of twenty five (25) years would be adequate herein to punish him 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.

61. Taking into account that this court had concluded that it could mete out a determinate sentence upon the Appellant herein, it therefore found and held that it could consider the period he had spent in custody while his trial was ongoing.

62. This court had due regard to Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya) which provides as follows:-

> " 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" (emphasis court).

63. This duty is also contained in 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 take into account the period in which the offender was held in custody during the trial."

64. 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.

65. A perusal of the proceedings of the lower court showed that the Appellant was arrested on 15th November 2012. He took plea on 10th April 2013 and was granted bond of Kshs 100,000/= with one surety of similar amount. His bond was approved on 22nd May 2013. He absconded court and a warrant of arrest was issued. He was arrested on 13th January 2016 whereupon the Trial Court ordered that his Surety be discharged and that he be remanded in custody until matter was finalised.

66. The period he spent in custody between 15th November 2012 and 22nd May 2013 when he was arrested and took plea respectively and the period between 13th January 2016 and 28th April 2016 when he was arrested for the second time and sentenced respectively ought to be taken into account while computing his sentence.

Disposition

67. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal dated 15th November 2018 and his undated Amended Supplementary (sic) Grounds of Appeal lodged on 24th May 2019, were partly merited and the same be and is hereby allowed but only on the aspect of sentence. This court left his conviction undisturbed as the same was safe and lawful.

68. It is hereby directed that the sentence of life imprisonment be and is hereby vacated and/or set aside as the same was unconstitutional and replaced with a sentence of twenty five (25) years imprisonment to run from the date of sentence of the lower court which was on 28th April 2016.

69. It is hereby directed that the period the Petitioner spent in custody between 15th November 2012 and 22nd May 2013 and the period between 13th January 2016 and 28th April 2016 while his trial was ongoing be and is hereby taken into account while computing his sentence as provided in Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

70. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 19TH DAY OF MARCH 2024

J. KAMAU

JUDGE