Olubaka v Republic (Criminal Appeal E015 of 2022)
[2024] KEHC 2895 (KLR) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 2895 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CRIMINAL APPEAL E015 OF 2022

JN KAMAU, J

MARCH 18, 2024

BETWEEN

RICHARD NYANJE OLUBAKA ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the Judgment of Hon M. M. Gituma (SRM) delivered at Vihiga in Senior Principal Magistrate's Court in SO Case No E044 of 2021 on 8th September 2022)

JUDGMENT

Introduction

1. The Appellant herein was charged with the offence of attempted defilement contrary to Section 9(1)(2) (sic) of the *Sexual Offences Act* No 3 of 2006. He had also been charged with an alternative offence of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*. He was tried and convicted on the main charge by the Learned Trial Magistrate, Hon M. M. Gituma, Senior Resident Magistrate who sentenced him to ten (10) years imprisonment and was discharged of the alternative charge.

2. Being dissatisfied with the said Judgement, on 19th October 2022, the Appellant lodged the Appeal herein. His Petition of Appeal was dated 18th October 2022. He set out four (4) grounds of appeal. Subsequently, on 15th January 2024, he filed Amended Grounds of Appeal dated 28th October 2023. He set out three (3) Amended Grounds of Appeal.

3. His Written Submissions were dated 28th October 2023 and filed on 15th January 2024 while those of the Respondent were dated and filed on 1st March 2024. The Judgment herein is based on the said Written Submissions which parties relied upon in their entirety.

Legal Analysis

4. 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.

5. This was aptly stated in the case of Selle & Another v 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.

6. In his initial grounds of appeal, the Appellant had challenged both his conviction and sentence. In the Amended Grounds of Appeal that he subsequently listed in his Written Submissions, he limited himself to the sentence.

7. A reading of his Written Submissions showed that the Appellant argued issues in respect to both his conviction and sentence. As he was unrepresented, this court took upon itself to determine his appeal in respect of both the conviction and sentence.

8. 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 The Prosecution Case

10. Grounds of Appeal Nos (1), (2) and (3) of the Petition of Appeal were dealt with under this head as they were all related. This court, however, dealt with the said issues under the following distinct headings.

A. Age

11. The Appellant did not submit on this issue. On its part, the Respondent submitted that there are various ways which could be used to prove a victim's age. In this regard, it cited the case of Mwalengo Chichoro Mwajembe v Republic, Criminal Appeal No 24 of 2015 (UR) (eKLR citation not given) where it was held that age can be proved by documentary evidence such as birth certificate, baptism card or by oral evidence of the child, parents or guardian, medical evidence, observation and common sense.

12. It pointed out that JAE (hereinafter referred to as "PW 4") who was the father to the Complainant, (hereinafter referred to as "PW 1") confirmed that she was ten (10) years old at the time of the incident. It added that PW 1 's Birth Certificate was produced as exhibit before the Trial Court thus age was proved beyond reasonable doubt.

13. A perusal of the Certificate of Birth showed that PW 1 was born on 21st February 2010. The alleged offence was said to have taken place on 24th May 2021. She was therefore aged about 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 did not submit clearly on this issue. On its part, the Respondent submitted that PW 1 testified that it was the Appellant who attempted to defile her and that she had been seeing him repairing shoes. It pointed out that he did not challenge the issue of his identification during cross-examination. It was its contention that he was well known to her.

16. PW 1 testified that her mother sent her to the shop and on her way, she saw the Appellant herein. She said that she used to see him repairing shoes. Her evidence was that he ambushed her and put a sock in her mouth and was therefore unable to scream. He tied her hands. He removed her skirt, t-shirt and panty and tried to insert his penis into her vagina.

17. By good lZO (Z) (hereinafter referred to as "PW 2") came and grabbed him. PW 2 screamed and people came. Her further evidence was that she and the Appellant were then taken to the Police Station. She was emphatic that the incident happened during daytime and she was able to see the Appellant well. During her cross-examination, she reiterated that the Appellant tied her with a rope.

18. PW 2 witnessed the incident. He testified that on the material day of 24th May 2021 he was in a farm near the Appellant's home when he heard someone trying to scream. He stated that when he approached the noise, it was in a bush and he saw the Appellant holding a girl. He said that the Appellant was naked and the girl did not have a panty and when he got near, the Appellant ran away. He said that he ran after the Appellant and managed to get hold of him and later escorted him to Ebuyangu Police post.

19. On being cross-examined, he testified that when the Appellant was caught he tried to apologise to PW 1's father as the crowd wanted to lynch him.

20. PW 2's evidence was corroborated by that of BO(hereinafter referred to as "PW 3"). He told the Trial Court that he headed home, he heard some noises and saw people beating the Appellant herein who admitted to the offence. PW 3 accompanied PW 2 in escorting the Appellant to the Ebuyangu Police Station.

21. PW 1 positively identified the Appellant at the dock. The two (2) were not strangers to each other. She said that she used to see the Appellant repairing shoes. In his unsworn evidence, the Appellant admitted that he was a shoemaker.

22. The incident occurred during the day when the conditions were favourable for a positive identification. PW 2 caught the Appellant red handed and chased him until he caught him. PW 3 confirmed that he was at the scene when the Appellant was being beaten.

23. In this regard, this court was satisfied that the Appellant herein was positively identified and it could not have been a case of mistaken identity. Identification was by recognition.

C. Attempted Penetration

24. The Appellant was not clear on his argument on this issue. He mainly pointed the fact that the Prosecution case had many contradictions which could not warrant his conviction and/or sentence. He placed reliance on the case of Agustino Njoroge v Republic, Appeal No 99/98 Nairobi (eKLR citation not given) where it was held that contradiction evidence was not reliable.

25. On its part, the Respondent submitted an attempt to commit an offence is defined in Section 388 of the Penal Code and that an attempt to commit the offence of defilement must go over and beyond

preparation. It contended that it must be shown that steps were taken to actualise the offence but for some reason the offence did not take place.

26. It was its case that there was no other better proof that the Appellant was at the verge of committing the offence had PW 2 not appeared and from the fact that he covered her mouth with a sock, led her to a bush, removed her skirt and pant and tried to insert her penis.

27. It further argued that the inconsistency and contradiction raised by the Appellant did not go to the core of the case. In this regard, it relied on the case of SOO v Republic [2018] eKLR where it was held that the court had to decide whether inconsistencies and contradictions were minor or whether they went to the root of the matter.

28. Notably Section 388 of the Penal Code provides as follows:-

    1. When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfillment, and manifests his intention by some overt act, but does not fulfill his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

    2. It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

    3. It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence." (emphasis court)

29. The Appellant's defence evidence was a mere denial and did not outweigh the inference of guilt on his part. His arguments that there were glaring inconsistencies and contradictions thus fell by the wayside.

30. PW 1's, PW 2's and PW 3's evidence on what transpired on that material date was cogent and consistent. It was devoid of any contradictions or inconsistencies as he had asserted. It was evident that had not PW 2 not appeared at the scene, the Appellant would have acutalised the offence.

31. Michael Ochieng Otieno (hereinafter referred to as "PW 5") was the Clinical officer that examined both PW 1 and the Appellant. He testified that he made observations of a normal pubic on PW 1's private parts and opined that there was attempted defilement penetration. His examination on the Appellant showed that he had urinalysis infection, HIV positive and Hepatitis B positive. He produced outpatient form for PW 1, lab results for PW 1, P3 form for PW 1, PRC form, Outpatient, lab result and P3 form for the Appellant as exhibits in court.

32. 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*. Indeed, all the ingredients of the offence of attempted defilement were proven. The Trial Court could not therefore have been faulted for having come to the aforesaid conclusion.

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

II. Sentencing

34. Amended Grounds of Appeal Nos (1), (2) and (3) were dealt with herein as they were all related.

35. The Appellant submitted that sentencing was a judicial discretion by courts and that the ten (10) years imprisonment sentence that was meted upon him was unconstitutional.

36. He placed reliance on the case of Francis Karioko Muruatetu and Wilson Thirumbi Mwangi v Republic (eKLR citation not given) where it was held that any Judge or Magistrate dealing with criminal matters is allowed to exercise judicial discretion by considering any mitigating factors when sentencing any person charged with and found guilty of that offence.

37. It was his case that the mandatory nature of his sentence as per Section 9(1) as read with Section 9(2) of the *Sexual Offences Act* No 3 of 2006 denied the Trial Court judicial discretion which rendered an unfair trial on his part.

38. On its part, the Respondent submitted that sentencing was at the discretion of the trial court and that although the Appellant had argued on the basis of the decision of the Supreme Court in Muruatetu case, the apex court did not seem to deprive the courts judicial discretion while sentencing. It argued that the sentence meted on him was not unconstitutional and that the Trial Court considered his mitigation.

39. As pointed hereinabove, the Appellant herein was charged under Section 9(1) as read with Section 9(2) of the *Sexual Offences Act*. Section 9(2) of the *Sexual Offences Act* provides that:-

> "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."

40. Having convicted the Appellant herein, the Trial Magistrate did not therefore err when he sentenced him to ten (10) years imprisonment as that is what was provided by the law.

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

42. 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.

43. 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 v 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.

44. 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.

45. 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.

46. 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.

47. 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 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.

48. 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.

49. Whereas the High Court was bound by the decisions of the Court of Appeal as far as sentencing in defilement cases was concerned and it could exercise its discretion to sentence the Appellant herein to lower than the ten (10) years imprisonment that has been prescribed in Section 9(1) of the *Sexual Offences Act*, this court took the view that it could also exercise its discretion not to interfere with the decision of the lower court if there were aggravating circumstances.

50. As could be discerned from his mitigation in the lower court, the Appellant herein told the Trial Court that he was HIV positive. This was an aggravating factor that persuaded this court not to interfere with the sentence that the Trial Court meted upon him because he could have infected a child of eleven (11) years with the disease and relegated her to a life that she had not chosen for herself for the remaining part of her life.

51. This court therefore declined to interfere with the decision of the Trial Court as the sentence of ten (10) years imprisonment that was meted upon him as the same was fair in the circumstances of the case 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.

52. Going further, although the Appellant did not canvass the issue of Section 333(2) of the Criminal Procedure Code, this court found it prudent to address the same at this stage to avoid multiplicity of suits on his and to save the court's time.

53. The said Section 333(2) of the Criminal Procedure Code 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" (emphasis court).

54. The requirement under 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.

55. Further, Clauses 7.10 and 7.11 of the Judiciary Sentencing Policy Guidelines provide 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."

56. It was evident that the Learned Trial Magistrate failed to consider the provisions of Section 333(2) of the Criminal Procedure Code.

57. A perusal of the proceedings of the lower court showed that the Appellant was arrested on 24th May 2021. He was released on bond while the trial was ongoing on 11th June 2021. Thus, he had spent about nineteen (19) days in remand before he was released on bond. He was subsequently convicted on 8th September 2022 and sentenced on 3rd October 2022. This was a further period of twenty four (24) days. He was therefore entitled to forty three (43) days being taken into account in the computation of his sentence.

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

Disposition

59. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Petition of Appeal that was lodged on 19th October 2022 and amended on 15th January 2024 was not merited and the same be and is hereby dismissed. The Appellant's conviction and sentence be and is hereby upheld as it was safe.

60. For the avoidance of doubt, it is hereby ordered and directed that the period the Appellant spent in custody being the days between 24th May 2021 and 11th June 2021 and from 8th September 2022 and 2nd October 2022 be taken into account when computing his sentence in accordance with Section 333(2) of the Criminal Procedure Code Cap 75 (Laws of Kenya).

61. It is so ordered.

DATED and DELIVERED at VIHIGA this 18th day of March 2024

J. KAMAU

JUDGE