Kassim v Republic (Criminal Appeal 3 of 2023)
[2024] KEHC 16951 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 16951 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KWALE

CRIMINAL APPEAL 3 OF 2023

F WANGARI, J

MARCH 15, 2024

BETWEEN

BARAKA MRAJA KASSIM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal arises from the Judgement of the Trial Court, Hon. S. Ogot, Senior Resident Magistrate in Msambweni SRMCSO No. E067 of 2021 dated 17th February 2023.)

JUDGMENT

1. This Appeal arises from the Judgement of the Trial Court, Hon. S. Ogot, Senior Resident Magistrate in Msambweni SRMCSO No. E067 of 2021 dated 17th February 2023.
2. The Appellant was charged with defilement contrary to Section 8(1) & (3) of the *Sexual Offences Act* No. 3 of 2006. There was also an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the *Sexual Offences Act*, 2006.
3. The particulars were that on 29th August 2021 to 2nd September 2021 at [Particulars Withheld] in Msambweni Location of Kwale County intentionally and unlawfully caused your penis to penetrate the vagina of SMJM, a child aged 17 years.
4. The Accused person was arraigned and he denied the charges. A plea of not guilty was consequently recorded.
5. The Trial Court considered the case and rendered the Judgement on 17th February 2023. The Court found the Appellant guilty and convicted him of the offence. The Appellant was also sentenced to 15 years imprisonment.
6. The Appellant, aggrieved, lodged this Appeal.

7. The Appellant preferred 4 grounds of appeal. On the face of it, the grounds of appeal are against sentence only. It is lamented that the sentence was unfair, harsh, excessive and failed to consider the period spend in custody. Largely, the Appellant challenges the imprisonment term of 15 years.

Evidence

8. At trial, PW1, the minor testified that she was 17 years old.

9. It was her testimony that together with her two friends they had visited a patient at the Msambweni Hospital where they arrived and the Appellant assisted them to access the wards since the allowed time had passed and the hospital gates consequently locked.

10. Further, that they later went to the beach where the Appellant also happened to have been present. The Appellant asked the complainant to go home with him and they went.

11. It was her case that the Appellant had sex with her that night and continued to for the four nights she spent at him home.

12. PW2 was the Complainant's mother. She testified that they had gone with the complainant to a wedding ceremony from which the complainant went missing. That they later on found out through the complainant's friend called M that the complainant had gone home with the Appellant. Later they found her at the Appellant where she had spent 5 days.

13. PW3, the Children Officer also testified that she recued the Complainant at the house of the Appellant with the assistance of the police officers.

14. PW4 testified that he was the Police Officer. He testified that the results of the investigations pointed to the Appellant. That they traced the complainant at the house of the Appellant and had reason to believe that he was an offender and so they arrested him.

15. PW5 was the Medical Officer. She produced the P3 Form and PRC. It was her case that there were fungal infections and epithelial cells which could be associated with defilement.

16. The Appellant also testified. It was his case that the complainant's mother was in the business of using the complainant to earn a living by soliciting for money after sending her to men.

17. He testified that he was in the house with his wife and children at the time he was arrested. That the has five children and a 6-months pregnant wife who all saw him arrested.

18. Directions were given for parties to file submissions. I have not seen any submissions filed by either parties.

Analysis

19. The issue is whether the Trial Court erred in convicting and sentencing the Appellant as she did.

20. As earlier observed, this Appellant did not clearly plead any Ground of Appeal as against conviction. The Petition of Appeal details how the conviction to imprisonment of 15 years was harsh and unfair. All the four paragraphs thereof are about the sentence imposed by the Trial Court.

21. Even though the Appellant prayed to this court to quash the conviction and set aside the sentence, this was clearly not supported by the Grounds in Petition of Appeal. Nonetheless, I will endeavor to deal with both conviction and sentence to proffer a conclusive decision in this Appeal.

22. The duty of the first appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows:-

> "On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court different."

23. In the case of Mbogo and Another vs. Shah [1968] EA 93 where the Court stated:

> "...that this Court will not interfere with the exercise of judicial discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which is should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

24. I note that the complainant testified that she was a minor aged 17 at the time of the alleged defilement. The Complainant identified the Appellant by recognition. The prosecution also proved both vaginal and anal penetration to the required standard.

25. It was held by the Court of Appeal in Moses Nato Raphael vs. Republic [2015] eKLR as follows;

> "What then amounts to "reasonable doubt"? This issue was addressed by Lord Denning in Miller v. Ministry of Pensions, [1947] 2 ALL ER 372 where he stated:-
>
> 'That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice."

26. On my reevaluation, I am in congruence with the finding of the Trial Court that the intentional and unlawful penetration was proved and the Appellant was the person who caused the said penetration, hence the offence. The evidence of PW5, the medical officer confirmed the unlawful act.

27. I consequently have no reason to interfere with the finding of the Trial Court on conviction.

28. On sentence, the Trial Court imprisoned the Appellant to 15 years. The sentences were to run concurrently taking into consideration the time spent in the remand.

29. In any case the sentence should be proportional. The Court of Appeal in the case of Thomas Mwambu Wenyi – vs- Republic (2017) eKLR stated as follows: -

> "A sentence imposed on an accused person must be commensurate with the blame worthiness of the offender and hat the court should look at the facts and circumstances of the case in its entirety before settling for any given sentence".

30. I have perused the pre-sentence report. I am also alive to the Sentencing Guidelines. The Supreme Court has propounded them in Francis Karioko Muruatetu & Another v Republic (2017) eKLR. The following are guidelines with regard to mitigating factors before sentencing.

    (a) age of the offender;

    (b) being a first offender;

    (c) whether the offender pleaded guilty;

    (d) character and record of the offender;

    (e) commission of the offence in response to gender-based violence;

    (f) remorsefulness of the offender;

    (g) the possibility of reform and social re-adaptation of the offender;

    (h) any other factor that the Court considers relevant

31. I am well guided that the Trial Court was not wrong in imposing a custodial sentence. The offence appears to have been welcome by the community simply because the complainant had then attained the majority age. This was unacceptable.

32. However, the sentence of 15 years was in my view excessive. I am guided by the facts and circumstances of this case where the minor admittedly had previous similar cases in which she was the complainant vis a vis the remorsefulness of the Appellant and his status as first offender. I reduce the sentence from 15 years to 10 years.

33. In the circumstances, I make the following Orders:

    i. The Appeal on conviction is dismissed.

    ii. The sentence of 15 years is set aside and replaced with 10 years' imprisonment.

    iii. The sentence shall consider the time spent in remand.

    iv. Right of Appeal 14 days.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 15TH DAY OF MARCH, 2024.

.....

F. WANGARI

JUDGE

In the presence of: -

M/S Mwaura S.C for State

Appellant p.i.p

Barile, Court Assistant