Bii v Republic (Criminal Appeal E114 of 2020)
[2024] KEHC 5078 (KLR) (24 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5078 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CRIMINAL APPEAL E114 OF 2020

SM MOHOCHI, J

APRIL 24, 2024

BETWEEN

SIMON KIPLAGAT ARAP BII ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an Appeal from the judgement a sentence of Hon H. M Nyaga delivered on 19{{^th}} March, 2015 in Molo Chief Magistrate's Court Criminal Case No. 646 of 2015)

JUDGMENT

1. The Appellant 19th March, 2015 the accused was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8 (2) of the *Sexual Offence Act* No. 3 of 2006. The Particulars of the charge are that-

   > On the diverse dates between 15th March, 2015 and 1st day of March, 2015 at Londiani Sub County of Kericho County, intentionally and unlawfully caused his penis to penetrate the vagina of SCL a child aged 7 years old.

2. The Appellant also faced an alternative charge of committing Indecent Act with a child contrary to section 11(1) of the *Sexual Offence Act* No. 3 of 2006. The Particulars are that:

   > On the diverse dates between 15th March, 2015 and 1st day of March, 2015 at Londiani Sub County of Kericho County, intentionally touched the vagina of SC a child aged 7 years old with his penis.

3. The Appellant pleaded guilty to the main charge. He was convicted on the main charge and sentenced to serve life imprisonment.

4. The Appellant being dissatisfied with the entire Judgement filed this Appeal seeking that this Court allows his Appeal, quashes the lower Court's conviction, sentence be set aside and the Appellant be set at liberty.

5. The Appeal was argued based on the grounds in the Amended Grounds of Appeal dated 2nd August, 2023 reproduced in verbatim:-

    i. That the Learned Trial Magistrate erred in law by upholding a life sentence awarded by the trial Court but failed to note that this sentence was against the spirit of the *Constitution* of Kenya Articles 50 (p) (q) it does not serve the objectives of sentencing as listed on pages 15 paragraph 4:1 of the policy guidelines and other enabling provisions Section 216 and 389 of the *Criminal Procedure code*.

    ii. That the Learned Trial Magistrate erred in law by convicting the Appellant to life imprisonment but failed to note that the plea was not unequivocal and he misdirected himself on the principals and procedure of taking plea.

6. The Court on 17th July 2023 directed that the Appeal would be heard and disposed by way of written submissions.

Appellant's Submissions

7. The Appellant in his submissions dated 2nd August 2023 submitted that the sentence lawful and legal but the Courts can divert from the mandatory minimum sentences. Reliance was place in *Julius Kitsao Manyeso v Republic* Mombasa CRA No. 12 of 2021 and *Phillip Mueke Maingi and 5 others v Director of Public Prosecutions & the Attorney General*. It was the Appellants submission that he was a first offender and had given mitigation and the Court ought to have given the most lenient sentence.

8. On conviction, the Appellant submitted that his plea was not unequivocal and that the steps laid out in *Aden v Republic* (1973) EA 445 and in *Kariuki v Republic* (1984) eKLR 809 in plea recording were not followed.

9. He also submitted that the language was not clear. That it was not on record whether the Trial Magistrate asked the Appellant which language he understood. That the indication of Eng/Kis/Kalenjin does not mean that there was interpretation done. That the magistrate did not follow the law by not indicating what was said as clearly as possible. That what was said is missing from the record. Reliance was placed on *Bashir Abdi v Rep* (2010) eKLR and *Joseph Bosire Ogao v Republic* (2010) eKLR.

10. The Appellant submitted that no caution was given before or after the charges were read and therefore an omission. That the Court misdirected itself by giving a warning after plea taking. Reliance was place in *Njuki v Republic* (1990) KLR 334.

11. It was also submitted that it was not enough to record the prosecution exhibits to wit medical evidence without assessing them. That there was no indication of the findings of the medical doctor in the said documents. That was critical to read the findings to establish or support the charge of defilement. He relied on Samwel Njoroge Wanjiru v Republic Appeal No. 074 of 2022. That even with a plea of guilty, the burden of proof lay with the prosecution.

12. The Appellant further submitted that it was a misdirection of the Court not to note down that the Appellant was a first offender and in mitigation he pleaded for forgiveness That the Appellant was

unrepresented and it was the duty of the Magistrate to explain the importance of mitigation. That the magistrate ought to have noted that the Appellant was a first offender, an old man and that a lenient sentence was called for.

Respondent's Submissions

13. The Respondent opposed the Appeal and through written submissions filed on 4th March, 2024 submitted that on conviction, Section 348 of the Criminal Procedure Code bars appeals from subordinate Courts where an accused person was convicted upon plea of guilty except on the extent and legality of sentence and relied in the case of *Olel v Republic* (1989) KLR 444.

14. It was further submitted that the bar operates where a guilty plea was unequivocal. That the plea taking was in compliance with the provisions of Section 207 of the *Criminal Procedure Code*. That the charge was read in a language the Appellant understood and his response was recorded.

15. On sentencing the Prosecution left it to the discretion of Court in light of the decision in the Phillip Mueke Maingi's case on sentencing in defilement matters.

Analysis and Determination

16. It is the duty of this first Appellate Court for an exhaustive examination of the trial Court proceedings in criminal cases as was restated in the case of Charles Mwita v Republic, CA Criminal Appeal No. 248 of 2003 (Eldoret) (unreported) where the Court of Appeal, at page 5, recalled that;

> " In *Okeno v R* [1972] EA 32 at page 36 the predecessor of this Court stated: - "An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v R* [1957] EA. 336) and to the appellate Court's own decision on the evidence".

17. Being a 1st Appeal Court, I must, weigh conflicting evidence and draw conclusions, (*Shantilal M. Ruwalla v R* [1957] EA 570) it is not the function of a 1st Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Courts findings and conclusion; it must make its own findings and draw its own conclusions only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] EA 424."

18. The Court has considered the Appeal and the submissions on record. The Appellant was charged with the offence of Defilement as the Main Count and an Alternative Charge of Indecent Act with a child. The Appellant replied when the charge was read out to him in the Subordinate Court "it is true". He was warned of the consequences and he replied "it is true I did it". The facts were narrated and he admitted to the facts and replied "it is true I defiled the girl". He was thus convicted on his own plea of guilty with another warning on the main count. After mitigation Appellant was sentenced to serve life imprisonment.

19. The Plea was unequivocal and the Appellant cannot thus Appeal against the conviction as per bar contained in Section 348 of the *Criminal Procedure Code* and holding in the case of *Olel v Republic* (1989) KLR 44 that;

> " Where a plea in unequivocal, an appeal against conviction does not lie"

20. The Appeal against conviction accordingly fails.

21. With regard to the Appeal against sentence, nothing has been presented in Appeal to show case the sentence imposed as having being illegal, or that the sentence was harsh and excessive in the circumstances.

22. Following conviction of the Appellant after admitting to the facts by pleading guilty for the second time even after being forewarned for the second time by the trial Court, the Respondent applied that a deterrent sentence be imposed on the Appellant. When invited to mitigate the Appellant apologized in Kalenjin language.

23. The Court in imposing the sentence of life imprisonment it relied on the reason the Appellant was undeserving of leniency as he was the age of a grandfather to the victim who was seven (7) years old.

24. While this Court finds that the exercise of discretion was not judicious the ultimate and the harsh sentence was imposed was only on the basis of the estimated age of the Appellant, and age of the victim and that no reason had been offered by the Respondent as to why he was undeserving of leniency.

25. The Court is alive to the legal evolution on the unconstitutionality of the life imprisonment sentence owing to its indeterminate nature, and its negation of the reformatory strand of the criminal justice system.

26. To this extend I am thus constrained to find that the Appeal partially succeeds and that the sentence of life imprisonment imposed is hereby set-aside and is substituted with an imprisonment sentence of thirty (30) years imprisonment.

27. The sentence is to run from 18th March 2015.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU

ON THIS 24TH DAY OF APRIL, 2024.

_____

MOHOCHI S.M.

JUDGE