Njoroge v Republic (Criminal Appeal 55 of 2023)
[2024] KEHC 7919 (KLR) (28 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7919 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CRIMINAL APPEAL 55 OF 2023

RC RUTTO, J

JUNE 28, 2024

BETWEEN

GERALD MBURU NJOROGE ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal from the judgment of the Chief Magistrate Court at Gatundu (C.N. Mugo, SRM) dated 6th November 2019 in Sexual Offence No 1 of 2019)

JUDGMENT

1. The appellant filed this appeal seeking to challenge the sentence. The appellant was charged with the offence of attempted defilement of a child contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*. The particulars of the offence are that on the 1st day of January 2019 at Githima village in Gatundu, North Sub- county within Kiambu County, the appellant intentionally and unlawfully attempted to commit an act which would cause penetration of his genital organ namely penis into the genital organ namely vagina of Pauline Wangare Kagia a child aged 10 ½ years.

2. Upon trial, the appellant pleaded not guilty and the matter proceeding for trial which resulted in a judgment dated 6th November 2019. In that judgment, the trial court found that the prosecution had proved its case beyond reasonable doubt and proceeded to convict the appellant in accordance with section 215 of the *Criminal Procedure Code* for the offence of attempted defilement of a child contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act*. Consequently, the trial court proceeded to sentence the appellant to 10 years imprisonment.

3. Aggrieved by the decision of the trial court, the appellant lodged a petition of appeal dated 6th February 2020 appealing against the conviction and sentence. The petition of appeal is premised on the grounds that;

a. The trial court erred in both law and fact on arriving at unsafe and unsecure conviction and sentence where the entire prosecution case was not properly investigated.

b. The trial court erred in both law and fact whereby the prosecution failed to discharge it's burden of proof on whether the appellant was involved in such heinous offence in contradiction of section 107 of the *Evidence Act*.

c. The trial court erred in both law and fact to uphold the conviction where the prosecution case was marred with irregularities, illegalities and contradictions.

d. The trial court erred in both law and fact on where the appellants defence was not awarded adequate opportunity or equality as contemplated under section 169(2) of the *Criminal Procedure Code*.

e. The trial court erred in both law and fact on where there was no point/points of determination and the reasons for reaching such a decision in accordance with section 169(1) of the *Criminal Procedure Code*.

4. The appellant thereafter proceeded to file his submissions in which he stated that he wished to appeal against the sentence only. This position agrees with the submissions of the appellant to the court on 5th June 2024 during the hearing. The appellant submitted that he was seeking to have his sentenced reduced and would be relying on his written submissions.

5. I note a turn of events by the appellant whereby he now seeks to appeal only the sentence and not both the conviction and sentence. This is supported by the submission filed, where the appellant has limited his submissions to only the sentencing. At no point has he submitted on the conviction.

6. The appellant submits that the trial court did not take into account the time spent in custody. He seeks that this court makes an order for review and consider the time spent in custody in accordance with section 333(2) of the *Criminal Procedure Code*.

7. The appellant urges the court to exercise its unlimited jurisdiction, considering that he is remorseful, has reconciled with the victim's family, he is a family man with a wife and three children and grant him a non-custodial sentence. He seeks this court to set aside the entire sentence of the trial court, to consider the time spent in custody and review it to an appropriate lesser sentence.

8. The respondent opposed this appeal and urged the court to dismiss the appeal and uphold the conviction. In opposing the appeal, the respondent filed its submissions dated 23rd May 2024. The respondent's submission was geared towards urging this court to uphold the conviction. The respondent did not submit on the issue of sentencing.

9. In totality the respondent urged this court to find that the prosecution had proved its case beyond any reasonable doubt by proving all the ingredients of the offence of attempted defilement.

10. The appellant herein having abandoned his appeal on conviction now seeks review of sentence from 10 years to a lesser sentence. He also seeks this court to invoke section 333(2) of the *Criminal Procedure Code* and consider the period he served in remand custody pending the hearing and disposal of the trial. He states that he spent a period of 10 months and some days in custody and that period ought to have been taken into consideration.

Determination

11. In this appeal, the appellant is only aggrieved with the sentence. The principles guiding an appellate court in deciding whether to interfere with the sentencing of a trial court were well articulated by the Court of Appeal in the case of Bernard Kimani *Gacheru v Republic*, Cr. App. No 188 of 2000 wherein it stated the law as follows:

> " It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist."

12. I also draw inference from the case of *Joseph Mureithi Kanyita v Republic* [2017] eKLR where the Court of Appeal stated:

> " In this appeal the sentence by the trial court was not illegal or unlawful. There is no palpable misdirection by that court apparent on the record. We do not perceive any material factor that the trial court overlooked or any immaterial factor that it took into account. It has not been demonstrated that the trial court acted on a wrong principle or that the sentence it imposed was manifestly excessive or manifestly low. In these circumstances, we are satisfied that the first appellate court erred in enhancing the sentence imposed on the appellant.

13. I note that the appellant was convicted for a period of 10 years which is the minimum prescribed period as per the provisions of section 9(2) of the *Sexual Offences Act*. I find that the appellant has not demonstrated any ground to the effect that the trial court misdirected itself or overlooked any material factor that it ought to have taken into account when the sentence was meted. The appellant has not demonstrated that the sentence was illegal, unlawful or unreasonable or that the trial court acted on a wrong principle. In the circumstance I find that the sentence was appropriate and should not be disturbed.

14. On the question of whether the trial court should have taken into consideration the time spent in custody, section 333(2) of the *Criminal Procedure Code* provides:-

> " Subject to the provisions of Section 38 of the *Penal Code*, 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 sub section (1) has prior, to such sentence shall take account of the period spent in custody."

15. This provision requires sentence to take into account the period spent in custody. The Court of Appeal, in finding that the first appellate court misdirected itself held in the case of *Ahamad Abolfathi Mohammed & another v Republic* [2018]eKLR that:-

> " The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by section 333(2) of the *Criminal Procedure Code*. By dint of section 333(2) of the *Criminal Procedure Code*, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the *Criminal Procedure Code* was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."

16. Similarly, in the case of *Bethwel Wilson Kibor v Republic* [2009]eKLR the same court expressed itself as follows:-

> " By proviso to section 333(2) of the *Criminal Procedure Code* where a person sentenced has been held in custody prior to such sentence, the sentence shall take into account of the period spent in custody. Ombija J, who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September 2009 he had been in custody for 10 years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing, we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."

17. Further, guidance has been provided by the *Judiciary Sentencing Policy Guidelines* to wit:

> " 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."

18. Consequently, it is clear from the above analysis that the law requires courts to take into account the period a convict spent in custody while sentencing. In this instance, the appellant was arrested on 1st

January 2019 and remained in custody until when he was convicted on 6th November 2019. By virtue of Section 333(2) of the *Criminal Procedure Code*, this duration ought to have been considered during sentencing.

19. Accordingly, I find that the prayer sought under Section 333(2) has merit and it is hereby allowed.

20. I uphold the sentence of 10 years and hold that the appellant will serve ten years imprisonment with effect from the date of arrest that is 1st January 2019.

21. It is so ordered.

RHODA RUTTO

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE, 2024

For appellant: Not Present

For respondent: Ms Lubanga

Court assistant: Peter Wabwire