Kipkirui v Republic (Criminal Appeal E102 of 2022)
[2023] KEHC 23984 (KLR) (17 October 2023) (Judgment)

Neutral citation: [2023] KEHC 23984 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CRIMINAL APPEAL E102 OF 2022

SM MOHOCHI, J

OCTOBER 17, 2023

BETWEEN

ELIAS KIPKIRUI ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Appeal against the Conviction and Sentence in CMCC SO No. NO 229 of 2020- Eldoret, Republic v Elias Kipkirui, delivered by Hon D. Mikoyan CM. delivered on 05.09.2022)

JUDGMENT

Introduction

1. Mr Elias Kipkirui appeals on mitigation of sentence of 30 years' imprisonment for the offence of defilement contrary to `sections 8(1) as read together with 8(2) of the *Sexual Offences Act* 2006 based on the following grounds;

    i. That, he is a first offender and thus beg for leniency.

    ii. That, he is the sole breadwinner of my family.

    iii. That he is remorseful, repentant and regretful for the offence he committed since he has learnt good lessons and morals by his incarceration.

    iv. That, he promise this honorable court that he will never repeat this offence and plead to be a law-abiding citizen

    v. That may this honorable court be pleased to consider the sentencing policy of 2016 published by the Kenya judiciary and invoke the provisions of section 332 (2) of the *Criminal Procedure Code* and commute his sentence from the time he was arrested and arraigned in court for plea taking.

vi. That, more grounds to be adduced at hearing there-of and determination of this appeal.

2. The Appellant was on the 10th September 2020 charged with the offence of defilement contrary to `sections 8(1) as read together with 8(2) of the *Sexual Offences Act* 2006, the particular of the offence were that on the 3rd September 2020 in Keiyo South Sub County within Elgeyo Markwet County, he unlawfully and intentionally caused his genital organ (penis) penetrate the genital organ (vagina) of "MJ", name withheld, a girl aged four (4) years old.

3. The Appellant was convicted and sentenced to serve 30 year's Imprisonment. He has appealed on mitigation and review of sentence only.

4. It is noteworthy that the Appellant was unrepresented by an advocate, was never granted bail or bond and his entire trial lasted from 10th September 2020 to the 5th September 2022.

Appellant Submissions

5. The Appellant submits that, this Court considers him a 1st offender who has no criminal history and has lived the better part of his life without being in conflict with any law and this can be confirmed from the trial proceedings of the record of appeal at page 36 the last line at the bottom.

6. The Appellant submits that, this Court considers this mitigating factor and invoke the provisions and guidelines as by the *Sentencing Policy* (2016) published by the Kenyan Judiciary and exercise its powers as provided by the *Constitution* Article 50 (2) (q) which states as follows: -

   - -- - " If Convicted to appeal to or apply for review by a higher Court as prescribed by Law.

7. The Appellant submits that, this Court is not handcuffed in law to hear and determine review of sentences and therefore he is approaching this Court to consider his mitigation and allow and review his sentence to a reasonable term of sentence which will allow him to secure his better future life.

8. The Appellant submits that he is a family man married and blessed with four children who are still at their tender age. His wife passed away in 2018 and he is left as the only parent to take care of their children and provide for their daily needs, this can be confirmed from the record of appeal at page 14, the last line at the bottom and also page 15 line 1.

9. The Appellant submits that; it was the evidence of PW2 Stanley Kosgei who was his employer at the time of the alleged offence. He informed the trial Court that his wife passed on and had a child. Since it is clear from the record that he used to depend on casual jobs to earn a living and provide for his children's daily needs it has really caused him a lot of stress and also pain, every day since he is worried about their position right now because his parents are elderly and jobless and therefore they cannot be willing to gather for their needs and also their school fees as well.

10. The Appellant submits that, it is for the interest of justice that, a crime should be punished which is true but also this Court may be pleased to consider his mitigation and also the future of these innocent children so that his punishment could not impact on their future lives. He urges the Court to be guided by wisdom and review his sentence to a lighter lesser term that will allow him to serve and go back to the society and assist my family to have a better future.

11. He is remorseful, repentant and regretful for the offence he committed since he has learnt good lessons and morals by his incarceration and promise to be a law-abiding citizen if given a second chance in life.

12. On the time spent in pre-trial custody the Appellant submits that, he was arraigned in Court of law 10th September, 2020 and the trial was concluded on 5th September 2022 this is an exact period of two years

which the Appellant had spent in remand custody pending the trial. That it is evident from the record of the trial Court and also the record of appeal that at the sentence the trial Court did not consider the period the Appellant had already served in pre-trial custody as provided for under section 333 (2) of the *Criminal Procedure Code* which states: -

> " Every sentence shall be deemed to commence from and to include the whole of the day of which it was pronounced... prior to such sentence been held in custody, the sentence shall take account of the period spent in custody."

13. The Appellant submits that, while interpreting the said section in the case of *Vincent Sila Jona and 87 others* vide Petition No. 15/2020 (2021) eKLR at Machakos High Court Hon G. V. Odunga (J) stated that:

> " It is therefore clear that it is Mandatorythat the period which an accused person has been held in custody prior to being sentenced must be taken into account in computing the period of the sentence."

14. In the case of *Director of Public Prosecutions v Perry Mansukh Kansagara & 8 Others* [2020] eKLR R. Mwongo J held as follows;

> " I think, without making any finding on it at this point, that in terms of the pursuit of substantive justice the court can be approached by any available procedure when, as a matter of law what is sought is the appropriation or enforcement of a constitutionally available jurisdiction or a constitutional right. In that light, a party seeking enforcement under a constitutional provision could be forgiven for approaching the court by any available procedure. Whilst ordinary rights can be defeated for failure to follow procedure, historically, procedural requirements often do defer to constitutionally granted rights."

15. It is therefore the Appellant's, humble submissions and prayer to this Court to consider and exercise its power and invoke this provision of law since the trial court failed to address itself on the same and he should be accorded the same in his sentence.

16. The Appellant submits that, he was arrested on 3rd September 2022, and arraigned in Court on 10th September 2022, and for seven (7) days he was detained in police custody without being arraigned in Court and from the perusal of the record, it is evident that there were no Court orders sought by the investigation officer to continue detaining him for more and further investigations. The Appellant submits that, no reason was given as to why he was detained for such a long period by the law enforcers who are expected to protect the rule of law as provided by the *Constitution*.

17. The Appellant submits that, he is a layman who does not understand his rights as provided by the *Constitution* and the state should not be allowed to take advantage of such illiterate people if for the interest of justice, the ODPP as a state organ established under the *Constitution* should have not admitted this charges and allow the trial to proceed since it was his duty to do so and protect the right of accused person as provided by the *Constitution* article 21(1). Its Appellant prayer before this Court to exercise its powers under article 165(3),(b) and do justice to the appellant herein.

Respondents case

18. The Appeal is opposed and the Respondent submits that the prescribed penalty under Section 8(2) of the *Sexual Offences Act*, is life imprisonment and that the 30-year sentence imposed was lawful and proper and took into consideration the Appellant's mitigation.

19. The State relies on the case of *Bernard Kimani Gacheru v, Republic* (20021 eKLR where the Court observed that:

> " 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 i, 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,"

20. Further Reliance is placed in the case of *Shadrack Kipkoech Kogo v R.* Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated that:

> " sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered".

21. The State urges the Court not to disturb the sentence and to dismiss the Appeal and Uphold the Sentence.

Analysis and Determination

22. The duty of an Appellate Court is to re-evaluate, re-analyze and re-consider the whole evidence in a fresh and exhaustive way before arriving at its own independent decision. (See *Collins Akoyo Okemba & 2 Others v Republic* [2014] eKLR).

23. Before I delve into the evaluation of the evidence, I shall first deal with the Appellant's submission that, he was arrested on 3rd September 2022, and arraigned in Court on 10th September 2022, and for seven (7) days he was illegally detained in police custody without being arraigned in Court and from the perusal of the record, it is evident that there were no Court orders sought by the investigation officer to continue detaining him for more and further investigations which raise the issue of violation of Appellant's right under Article 50 of the *Constitution*.

24. Article 165(6) and (7) bestows supervisory jurisdiction in this Court which is enjoined to, promote the purposes, values and principles of the *Constitution*, and to interpret it in such a way that the interpretation: advances the rule of law, develops the law and contributes to good governance failing which, then the person who caused the arrest and detention has a duty to explain the delay and persuade the Court that in any event the person has been brought before Court as soon as reasonably practicable. The burden of proving that such a person has been brought to Court as soon as is reasonably practicable rests on the person who alleges that the provisions of the *Constitution* aforesaid have not been violated.

25. Article 49(1), (f)(g) and (h)- provides for the Rights of an arrested person to include the rights to;

    (f) to be brought before a court as soon as reasonably possible, but not later than—

        (i) twenty-four hours after being arrested; or

(ii) if the twenty-four hours ends outside ordinary court hours, or on a day that is not an ordinary court day, the end of the next court day;

(g) at the first court appearance, to be charged or informed of the reason for the detention continuing, or to be released; and *Constitution* of Kenya, 2010

(h) to be released on bond or bail, on reasonable conditions, pending a charge or trial, unless there are compelling reasons not to be released.

26. Article 50 of the *Constitution* underscores the right to a fair hearing and provides that:

(2) Every accused person has the right to a fair trial, which includes the right—

(k) to adduce and challenge evidence

27. The Following Provisions of the *Constitution* are worthy to recall, Articles 3(2), binds every person with the obligation to respect, uphold and defend the *Constitution*, Article 10, enshrines the national values and principles of governance that bind all state organs, state officers, public officers and all persons whenever any of them— (a) applies or interprets this *Constitution*; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions, Article 232(1) provides the values and principles of public service to include— (a) high standards of professional ethics.

28. The Appellant's charge sheet, in the trial Court, was approved and certified on the 10th September 2020, by officer M.K Rop in the Office of the Director of Public Prosecution clearly ignoring the fact that the Appellant had been illegally detained for seven (7) days.

29. Upon Arraignment for plea taking, the trial court failed to inquire on the apparent detention exceeding 24 hours in police custody, the Prosecution Counsel, a public officer, failed to elaborate or explain the reason for the prolonged detention to the court before plea was taken.

30. The Constitutional tenets are binding to all, and as such, the requirement of arrest and arraignment of criminal suspects before court within 24 hours, and where prolonged detention is necessary, the seeking of and receipt of, necessary court orders, to enable conclusion of investigations is non-negotiable and cannot be casually treated.

31. The fair trial guarantees flow, include and transcend from the rights of an arrested person and any contravention thereof would contaminate the entire trial leading to declaration of a mistrial.

32. This Court finds that the Appellant's six-day incarceration period at the Kaptagat police station from the 5th September 2020, to the 10th September 2020 constituted illegal detention and a gross contravention of the Appellants fundamental rights.

33. In the case of *Mohamed Feisal& 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party)* [2018] eKLR Justice Nyakundi R while citing *Keroche Industries Ltd v Kenya Revenue Authority and 5 others* 2007 2 KLR the court held as follows

> "One of the ingredients of the rule of law is certainty of law. Surely the most focused deprivations of individual interest in life, liberty or property must be accompanied by sufficient procedural safeguards that ensure certainty and regularity of law. This is a vision and a value recognized by our constitution and it's an important pillar of the rule of law. Enforcing the law and maintaining public order must always be compatible with respect for the human person. Under article 73(a) and (b) of the *Constitution* its provided that authority assigned to a state officer is a public trust to be exercised in a manner that is consistent with

the purposes and objects of the *Constitution*, demonstrates respect for the people, brings honour to the nation and dignity to the office, promotes public confidence in the integrity of the office and vests in the state office the responsibility to serve the people, rather than the power to rule them".

Further holding that, the yardstick that police officers are meant to achieve in exercising their powers under the *National Police Service Act* and the criminal procedure code. To arrest, detain or investigate must be carried out within constitutionally permissible parameters.

34. On the analysis of the evidence, the Court finds that, the entire prosecution comprised of the 4-year-old victim, the father who doubled as the Appellant's employer and the one who allegedly found the Appellant red-handed on the act, a police officer and a doctor.

35. The corroboration of evidence is not water tight but this Court having found the trial to have been a mistrial shall be cautious not to give any party undue advantage should a fresh trial be ordered.

36. This Court is persuaded that a proper inquiry relating to the Pre-trial police incarceration must be undertake prior to and as a precursor of a fresh criminal trial.

37. If the Trial Court finds the incarceration to have fatally contaminated the intended trial, then it may issue appropriate orders.

38. This Court is guided by the case of *Fatehali Manji v Republic* [1966] EA 343. The court of appeal held as follows:-

> " In general a retrial will be ordered only when the original trial was illegal or defective; it will not be ordered where the conviction is set aside because of insufficiency of evidence or for the purpose of enabling the prosecution to fill up gaps in its evidence at the first trial, where a conviction is vitiated by a mistake of the trial Court for which the prosecution is not to blame, it does not necessarily follow that a retrial should be ordered, each case must depend on its own facts and circumstances and an order for retrial should only be made where the interest of justice require it."

39. In the case of *Mwangi v/s Republic* [1983] KLR 522 the Court of Appeal held as follows:

> " an order for a retrial is the proper order to make when an Accused has not had a satisfactory trial and a retrial should not be ordered unless the appellate Court is of the opinion that on a proper consideration of the admissible or potentially admissible evidence, a conviction might result."

40. The Trial Court shall consider and make a ruling, before the trial begins, on whether the 6 days that the Appellant was held without charge, do or do not render the trial itself an illegal trial. This is to be done before plea-taking, for the purpose of complying with this order.

41. This Court considers the serious charges against the Appellant, the tender age of the victim, the potential of the admissible evidence to secure a conviction and the interests of justice would demand a retrial notwithstanding the three (3) years since the alleged crime and the period the Appellant has remained in Prison custody.

42. I do therefore direct that a retrial be conducted before a different magistrate at the Chief Magistrate's Court Eldoret. For this purpose, I order that the Appellant shall be produced before the Chief Magistrate's Court at Eldoret on 23rd October 2023 or so soon thereafter, to plead afresh to the charge

of Defilement Contrary to Section 8 (1) as read with Section 8 (2) and the Alternative Charge of Indecent Act with a child contrary to Section 11(1) of the *Sexual Offences Act*

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU ON THIS 17TH DAY OF OCTOBER 2023

MOHOCHI S.M

JUDGE

In the Presence of;

Appellant in Person

Mr. Mugun for the Republic