



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT EMBU**

**CRIMINAL APPEAL NO. E009 OF 2021**

**JUSTIN NYAGA MUNYI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an Appeal against sentence by Hon. Mutai S.K. in Embu***

***Criminal Case (Sexual Offence) No. 27 of 2017 delivered on 09.07.2018).***

**JUDGMENT**

1. The appellant herein filed an undated petition of appeal and wherein he challenges the sentence by the trial court in Chief Magistrate's Court at Embu in Sexual Offence Case No. 27 of 2017. The trial court convicted the appellant of the offence of defilement contrary to section 8(1) as read together with Section 8(3) of the Sexual Offences Act No. 3 of 2006 and sentenced him to serve Twenty (20) years imprisonment. He faults the trial court for having failed to take into account his dignity in meting out the sentence.
2. It was the sentence that necessitated the instant appeal which was instituted vide the petition of appeal wherein the appellant raised Seven (7) grounds of appeal. However, from the reading of the submissions filed in support of the said grounds and which submissions he entirely relied on, the appellant challenges the sentence as being harsh and excessive.
3. At the hearing of the appeal, the parties elected to rely on their written submissions to argue the appeal.
4. In the said submissions, the appellant submitted that the sentence was harsh and excessive taking into account the circumstances under which the offence was committed. He reiterated the fact that he does not deny that the complainant spent in his house on the night of 06.12.2017 but the same should not be used to punish him in that, PW5 did state before the court that upon examination of the complainant, it was determined that she had no physical injuries and the outer genitalia too was normal. That as much as the hymen was broken, it should not overshadow the fact that he provided the complainant with a place to spend the night after having been beaten by her mother. It was his case that the sentence imposed by the trial court overshadowed his act of good samaritanism and thus should not be left unrecognized.
5. Reliance was made on the case of **Pius Njeru Nyaga v Republic HCRA No. 9 of 2018** where the High court after consideration of the grounds preferred on the appeal, granted a more lenient sentence unto the appellant. He thus prayed that this Honourable court do consider the time he has spent in custody and further reduce the length of the sentence based on his grounds of the appeal.
6. The appeal was opposed by Ms. Mati, the Learned Prosecution Counsel wherein she submitted that they are opposed to the review of the sentence owing to the development in jurisprudence by the Supreme Court relating to the mandatory sentences in sexual offences. Further that, the appellant benefitted from the doctrine of the least severe sentence and that the sentence was not excessive. It was submitted that the trial court exercised its discretion properly and this court ought not to interfere with the said discretion. Reliance was made on the case of **Bernard Kimani Gacheru v Republic [2002] eKLR**.
7. I have considered the appeal before me and the written submissions by both parties. As already indicated, the appeal is mainly on sentence wherein the appellant contends that the same is harsh and excessive.
8. The duty of this court while exercising its appellate jurisdiction was set out by the Court of Appeal in **Okeno v Republic [1972] E.A. 32** and re-stated in **Kiilu and another v R (2005) 1 KLR 174** where it was held that the evidence as a whole is to be exposed to a fresh and exhaustive examination and thereby weigh conflicting evidence and thereafter draw its own conclusions. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses. Further the court should be alive to the principle that a finding of fact made by the trial court shall not be interfered with unless it is based on no evidence or on a misapprehension of the evidence or that the trial court acted on the wrong principles (See **Gunga Baya & another v Republic [2015] eKLR**).

9. Having considered and analyzed the evidence before the trial court, the issue for determination is whether the appellant has made a case for this court to interfere with the sentence imposed by the trial court.

10. In the case before the trial court, the appellant was charged with the offence defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006, the particulars of the offence being that on 06.12.2017, at [particulars withheld] Market, Manyatta in Embu North Sub County within Embu County unlawfully and intentionally caused his penis to penetrate into the vagina of M.W.M a child aged 12 (Twelve) years.

11. The sentence under **Section 8(3) of the Sexual Offences Act** states that:

***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***

12. It is not in dispute that the complainant was 12 years old as the same could be determined from the evidence produced in the trial court (P3 Form and the Birth Certificate). The age has not been a subject of the instant appeal. As such, that being the case, the trial court had the discretion of sentencing him to 20 years imprisonment.

13. However, before sentencing, the appellant was offered an opportunity to mitigate and the trial court indeed noted as to having considered the said mitigation before sentencing the appellant to 20 years imprisonment. The trial court did consider the mitigation and other factors before meting out the said sentence and so, it cannot therefore be faulted since it had the opportunity to exercise its discretion. The trial court did mete a sentence that is very lawful and legitimate per the provisions of the law. (See **Christopher Ochieng v R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011, B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014**). **The appellant did not prove that the sentence was 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.**

14. In regards to taking into consideration the amount of time the appellant had taken in custody, the court record show that the appellant was out on bond and so, this argument fails and in any event, the trial court imposed the mandatory minimum sentence under the Sexual Offences Act.

15. In my view, the trial court rightfully considered all material facts before it and further appreciated the objectives of sentencing and arrived at a determination that is well founded in the law. As such, it is my considered view that in the circumstances of the case, the sentence cannot be said to be excessive and/or harsh. The appellant did not satisfy and/or prove as to any of the grounds as were pronounced in **Bernard Kimani Gacheru v Republic [2002] eKLR**.

16. In the above premises, I find that the appeal is in want of merit and I hereby dismiss it. The decision of the trial court on both the conviction and sentence is upheld.

17. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF JANUARY, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Appellant

.....for the Respondent