REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAROK

CRIMINAL APPEAL NO. E017 OF 2021

(CORAM: F.M. GIKONYO J.)

(From the sentence of Hon. G.N. Wakahiu (C.M) in Narok SOA No.40 of 2019 on 22nd July 2021)

REPUBLIC .....APPELLANT

-VERSUS-

NICHOLAS WAMBOGO.....RESPONDENT

JUDGMENT

Enhancement of sentence

1. The respondent was charged with the offence of defilement contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. It was alleged that on diverse dates of April 2019 at [Particulars Withheld] village in Narok North Sub County within Narok County, unlawfully and intentionally caused his penis to penetrate the vagina of SS a child aged 14 years old.

2. In the alternative charge, the respondent was charged with the offence of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. It was alleged that on diverse dates of April 2019 at [Particulars Withheld] village in Narok North Sub County within Narok County, unlawfully and intentionally touched the vagina of SS a child aged 14 years old.

3. The respondent entered a plea of not guilty.

4. The prosecution called 4 witnesses.

5. The respondent chose not to testify during trial. He is entitled to remain silent.

6. On 28th June 2021 the trial court found the respondent guilty and convicted him accordingly.

7. On 22nd July 2021 the respondent was sentenced to serve three years' imprisonment.

8. Being dissatisfied with the said sentence the appellant (the State) has preferred an appeal as set out in petition of appeal;

> **i. That the learned magistrate erred in law when he imposed an illegal sentence thereby occasioning miscarriage of justice.**

9. Ultimately, the appellant prayed that this appeal be allowed; and the sentencing orders of the learned chief magistrate be set aside and substituted with an appropriate sentence.

10. The respondent filed a notice of cross appeal dated 9th February 2022. The respondent contends that the decision ought not to be varied or reversed for reasons;

> **ii. That the sentencing is at the discretion of the trial court who has the advantage of seeing and hearing the witnesses testify.** The respondent cited the case of **Kwa Zulu Natal High Court- South Africa in S V Muchunu and Another (AR24/11) [2012] ZAKZPHC6.**

iii. That the high court does not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors. The respondent cited the case of **Wilson Waitegei V Republic [2021] eKLR**

iv. That the court did not act on wrong principles since like any other litigant he benefitted from the decision of the supreme court in Francis Karioko Muruatetu V Republic Petition Number 16 Of 2015 and Dismas Wafula Kilwake V R., Peter Saikapor Nayioma V Republic [2019] eKLR and Musa Saddy Hussein V Dpp [2020] eKLR.

11. Ultimately, the respondent stated that the law is progressive and not retrogressive. Judgment was delivered on 28th June 2021. The respondent was sentenced on 22nd July 2021. He prayed that the appeal be dismissed and the sentencing orders of the learned magistrate be upheld in the interest of justice fairness and equity.

12. Duncan Ondimu, OGW, senior principal prosecution counsel submitted that this being a first appeal, the duty of this court is laid under in Section 379 of the Criminal Procedure Code. The jurisdiction is limited to matters of law. He cited the case of ***David Njuguna Wairimu V Republic [2010] eKLR.***

13. The appellant submitted that the court should evaluate evidence in relation to sentence vis-a-vis the law. The object of punishment is the prevention of crime and every punishment is intended to prevent the accused from repeating the crime and other members of the public from committing similar crimes. He relied on Section 8 and 8(3) SOA, 216 and 329 CPC, ***KAMARO Wanyingi V Republic [2008] eKLR and Republic V Thomas Gilbert Cholmondeley [2009] eKLR***

14. The appellant submitted that the state has to prove beyond reasonable doubt the existence of aggravating factors and the accused is to prove the mitigating factors. The factors the court has to consider were cited in the cases of ***S V Makwanyane [1995] (3) SA 391 Para 46 and The State Vs Mpho Mpelegang Cthlb-000008-07 and The State V Muller, Ivan, Andries Case No. 2 Sh98/ 2005 High Court of South Africa.***

15. The appellant submitted that the offence that was facing the respondent is a serious one and the court misapplied the provisions of the Act.

16. The appellant submitted that the victim went through a traumatizing experience and such experience will stick to her memory for several years.

17. The appellant submitted that the aggravating circumstances outweigh his mitigating factors. The respondent claimed his both parents had passed on. The probation report showed him as a person who was not remorseful. He claimed not to be responsible for the pregnancy of the victim while evidence showed otherwise.

18. The appellant submitted that the question of other mandatory sentences was never placed before the supreme court meaning there was no direct challenge of the same before the supreme court. Therefore, the trial court was wrong in applying the ***Muruatetu***'s case in the present circumstances. He relied on the case of ***Francis Karioko Muruatetu & Another V Republic & 5 Others [2016] Eklr***, The National Assembly Hansard of April 26 20006, Hon. Lady Justice Njoki S. Ndungu, CBS, EBS, "***a critique of the judicial approach on sexual offences and the age of consent, figures and challenges***," presented at judges' colloquium, 2019, ***G N v Republic [2019] eKLR, R V Ipeelee [2012] R.C.S.***

19. In conclusion the appellant submitted that the sentence passed by the trial court was not proper in the present circumstances and ***Muruatetu*** 's case is not applicable in the present circumstances. The prosecution urged this court to pass appropriate sentence as provided by Section 8(3) SOA.

ANALYSIS AND DETERMINATION

Court's duty

20. First appellate court is under duty to re-evaluate the evidence presented at trial and draw its own independent conclusions. Except, it must bear in mind that it neither saw nor heard the witnesses give their testimonies. Thus, matters of demeanor are best observed by the trial court. See ***Okeno vs. Republic [1972] E.A 32***.

21. The appeal as well as the cross-appeal are on sentence. The appellant prays for setting aside of the sentence and increasing it to 20 years. They have stated their reasons which I shall examine later. The respondent prays that the sentence does remain as is. He too has given his reasons which I will also evaluate accordingly.

22. In an appeal against sentence, the court has power to sustain, or increase, or reduce the sentence, or alter the nature of the sentence (section 354(3)(b) of the Criminal Procedure Code)

23. The test, however, is that the High court will not alter a sentence unless the trial court has acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle. See **Shadrack Kipkoech Kogo - Vs - R., Eldoret Criminal Appeal No.253 of 2003, the Court of Appeal, and Wilson Waitegei V Republic [2021] eKLR)**

Applying the test

24. The appellant claims that the sentence herein was illegal for it did not adhere to section 8(3) of the Sexual Offences Act which prescribes

a minimum sentence of twenty years. According to the appellant, the correct sentence is 20 years.

25. Minimum sentences are currently under intense legal debate on constitutional front. Some posit that minimum sentences deprive the court of discretion to impose appropriate sentence, thus, inconsistent with the Constitution. Other pundits argue that minimum sentences are merely indicative of the seriousness of the offence and should be imposed. Quite some work needs to be done here; judicial as well as legislative in order to bring provisions of existing law such as SOA to conform to the Constitution. See some hints from contemporary jurisprudence and practice.

Prescriptive minimum sentences

26. I have had the advantage of scanning through how some jurisdictions- Australia, England, some USA states, South Africa- have dealt with the question of mandatory minimum sentences for violent and sexual offences. Although it emerges from these jurisdictions that no universal rules can be stated to deal with minimum sentences, they are agreed that it is possible to create appropriate legislative scheme in the nature of prescriptive minimum sentences which does not create mandatory sentences, but preserving the discretion of judicial officers to sentence above and below the 'standard'" by taking into account a non-exhaustive "check list of aggravating and mitigating factors" which are already largely taken into account by sentencing courts. Others provide for prescriptive minimum sentences but allowing the court to depart and impose appropriate sentence upon reasons to be recorded by the court. The idea here is arguably that, the legislative scheme does not impose a fetter upon discretion of the sentencing court, but creates emphasis on material factors which may justify imposition of the minimum sentence. For instance, in sexual offences, age of the victim child-the younger the child the more severe the sentence- physical injury resulting from the penetration, other permanent effects e.g. pregnancy, psychological and emotional injury, post traumatic manifestations, general effects on the person, integrity, life of the person, etc.

27. See **R v Way ((2004) 60 NSWLR 168** at 183, that: -

> **"…the legislative policy … was not to create a straight jacket for judges … [and] the amendments were not introduced as a form of mandatory sentencing, but rather were intended to provide further guidance and structure to judicial discretion".**

Guideline judgments

28. Other jurisdictions adopt Guideline judgments to provide the prescriptive elements of the minimum sentences prescribed in law. Whereas this is a powerful tool of judicial self-regulation and the maintenance of discretion for individualized justice in sentencing, guideline judgments may be limited. First, they are ordinarily issued by the precedent setting court. Second, although they may be issued *suo moto*, they are ordinarily issued within the context of a particular case which may have its own special or peculiar circumstances-this may restrict the nature as well as the scope of application of the Guidelines to other offences. And, third, they may not be comprehensive enough especially where they were not the basis of the decision.

29. Nevertheless, whatever the legislative approach or scheme or otherwise, care should be taken not to fetter the discretion of the court in sentencing.

Back to the main…

30. The relevant penalty clause is Section 8(3) of the Sexual Offences Act which provides as follows: -

> **(3) 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.**

31. When I employ the judicial tool provided in section 7 of *the Transitional Provisions* of the *Sixth Schedule* of *the Constitution*, I must construe this section with such modifications, alterations, adaptations and exceptions as appropriate in order to bring into conformity with the Constitution. Thus, I take the minimum sentence to be indicative of the seriousness of the offence given the age of the victim. The trial magistrate was also alive to this constitutional approach on existing law. I shall so proceed.

32. I have perused the record of the trial court. It reveals that the respondent was convicted of the offence of defiling a child aged 14 years and was sentenced to serve 3 years' imprisonment. As submitted by the appellant the punishment prescribed for the offence of defilement where the victim is aged between 12 and 15 years old is a term of not less than 20 years' imprisonment. The respondent also correctly submitted in support of the cross appeal that despite the minimum sentence prescribed, the court still retained discretion in sentencing. However, discretion in sentencing, like any other discretion, must be exercised upon defined principles; not whimsically or capriciously.

33. The question is therefore whether the trial court acted upon wrong principles or overlooked some material factors or took into account irrelevant factors or short of this, the sentence is illegal or is so inordinately excessive or patently lenient as to be an error of principle (See **Shadrack Kipkoech Kogo - Vs - R., and Wilson Waitegei V Republic [2021] eKLR)**

34. The evidence on and the record in this case discloses facts upon which the following are deducible: -

> **i. THAT the victim was aged 14 years at the time of the offence;**
>
> **ii. THAT from the testimony of the minor, she had several sexual encounters with the respondent at his house.**
>
> **iii. THAT the respondent looked out for the minor and encouraged her to visit his house where they would engage in a sexual**

intercourse.

iv. The minor became pregnant which as a result would affect her ambitions and further studies and career.

35. The trial magistrate did not take into account these elements or factors in passing sentence. Notably, physical as well as psychological effects of the offence on the minor are long lasting- something a court should never lose sight of.

36. I do note a strange thing; the trail court stated in its sentence ruling that a probation officers report had been availed [sic] to him. I have looked for the said report in vain. When such report is asked for in a matter such as this, the court should follow through and see to it that the report is provided. Most perplexing is that, I see not any details or information or recommendations or finding of the probation report in the ruling.

37. On reliance on Muruatetu case, the respondent argued that, his sentence was before the new guidelines, and so he was entitled to the benefit of the law as was at the time. I have no quarrel with that submission. The issue is that trial court did not consider relevant factors when passing sentence, thereby, arriving at patently lenient sentence which was an error in principle. Accordingly, contrary to the submission by the respondent in support of his cross appeal, the exercise of discretion in that manner should never remain undisturbed.

Conclusion and orders

38. In light thereof, I allow the appeal and dismiss the cross-appeal on the following terms: -

i. The sentence of three years' imprisonment imposed by the trial court is hereby set aside. In lieu thereof, I sentence the respondent to 15 years' imprisonment.

ii. In compliance with section 333(2) of the CPC, the sentence shall commence from the date of arraignment in court, that is, 6/5/2019.

39. It is so ordered.

40. Right of appeal explained.

DATED, SIGNED AND DELIVERED AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 27TH DAY OF APRIL, 2022

F.M. GIKONYO

JUDGE

In the presence of:

1. Mr. Karanja for Appellant

2. The respondent

3. Mr. Kasaso -Court Assistant