**Hamisi v Republic (Criminal Appeal E020 of 2021)**
**[2022] KEHC 9922 (KLR) (22 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 9922 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT VOI**

**CRIMINAL APPEAL E020 OF 2021**

**JN ONYIEGO, J**

**APRIL 22, 2022**

**BETWEEN**

**GABRIEL MADEDA HAMISI ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Appeal from original conviction and sentence in criminal case No 28/2020 at RM's Wundanyi law courts judgment by E .M.Nyakundi dated and delivered on 25th March 2021)***

**JUDGMENT**

1. The appellant was arraigned before Wundayi RM's court on June 22, 2020 charged with the offence of defilement contrary to section 8(1) and (3) of the *Sexual Offences Act* No 3/2006. Particulars were that on the June 14, 2020 at around 18.30 hours at Wundayi Township Wundanyi location within Taita Taveta county intentionally caused his penis to penetrate the vagina of DMS a child of 12 years old.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11 (1) of the *Sexual Offences Act* No 3/2006. Particulars were that, on the June 14, 2020 at around 18.30 hours at Wundanyi Township Wundanyi location within Taita Taveta county intentionally touched the vagina of DMS with his penis against her will.

3. Having returned a plea of not guilty, the matter proceeded to full hearing with the prosecution calling a total of 5 witnesses. Upon being put on his defence, the applicant gave sworn testimony wherein he denied the charge by raising an alibi defence.

4. Vide its judgment delivered on February 10, 2021, the court found the appellant guilty of the main count and subsequently sentenced him to 15 years imprisonment on March 14, 2021. He was however discharged of the alternative count.

5. Aggrieved by the conviction and sentence, the appellant filed in person his petition of appeal on May 20, 2021. He cited four grounds of appeal as follows;

   i. That when the trial magistrate sentenced me to serve 15 years imprisonment he failed to consider and benefit me for being a first offender;

   ii. That the trial magistrate sentenced me to serve 15 years imprisonment without proper finding that this sentence is a mandatory minimum punishment which is unconstitutional.

   iii. That when the trial magistrate sentenced me to serve 15 years imprisoned he did not consider that I am the only member of my family

   iv. That I pray that this sentence be reduced.

6. When the matter came up for hearing, parties agreed to file submissions. Consequently, the appellant adopted his submissions filed on November 9, 2021 in which he categorically submitted that he was only challenging the excessive and harsh sentence imprisonment imposed on him and not conviction. It was the appellant's submissions that, upon conviction, the learned magistrate did not consider the fact that he was a first offender. In this regard, the court was referred to the holding in the case of *Josephine Arrisol v Republic* (1957) EA 44 where it was allegedly held that it was wrong to impose a maximum sentence on a first offender.

7. It was his contention that being a first offender he deserved forgiveness and a lenient sentence. The appellant further submitted that the court did not take into consideration the period he had spent in custody (remand) before conviction.

8. On their part, Mr Chirchir for the respondent filed brief submissions on January 17, 2022 stating that the minimum sentence for the offence the appellant was convicted of is 20 years hence 15 years imposed by the court was illegal. Counsel was however not opposed to the same given the spirit espoused in *Muruatetu* case where the Supreme Court held that courts had the discretion to impose sentence without being bound by the mandatory nature of the minimum sentence provided by the statute.

9. As regards the issue that the period of 11 months when held in remand custody was not taken into account, Mr Chirchir contended that the court can give him the benefit as per the law.

10. I have considered the grounds of appeal herein challenging only sentence on grounds that it was excessive and that the period spent in remand custody was not considered by the court. I can therefore discern only one ground for consideration and that is, whether the sentence imposed by the learned magistrate was excessive in the circumstances.

11. The appellant was charged and convicted of the offence of defilement contrary to section 8 (3) of the *Sexual Offences Act* which provides that;

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

12. According to the appellant, a period of 15 years is excessive being a first offender. A perusal of the court records reveals that the learned magistrate did express the view that he had the discretion to determine the sentence.

13. The issue of sentencing in offences comprising minimum mandatory sentence has been a thorny issue before all superior courts. However, the general principle in sentencing is that the trial court has wide

discretion to determine appropriate legal sentence and that an appellate court will only interfere with such sentence only if it is illegal, excessive and harsh or that the same was arrived at after taking into account wrong principles or consideration of irrelevant facts.

14. In the case of *Ogolla S/o of Owuor v Republic* (1954)EACA 270 the court held that;

> " The court does not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors".

15. Similar position was held in the case of *Shardrack Kipchoge Kogo v Republic* Eldoret criminal appeal 253/2003 where the court stated that;

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

16. It is clear from the main reading of section 8 (3) as read with 8(9) of the *Sexual Offences Act* that the minimum provided sentence is 20 years. Although the court did not mention the fact that the appellant was a first offender or remorseful, it never the less exercised discretion in the spirit of Muruatetu case and gave a lesser sentence than provided by the relevant statute. There is no illegality committed considering the seriousness of the offence committed.

17. As to computation of sentence less the period held in remand custody, the court was under obligation to apply section 333(2) of the *Criminal Procedure Code*. See *Ahmed Abolfath Mohamed and another v Republic* ( 2018) e KLR where the court held that;

> " the second is the failure by the court to take into account in any meaningful way, the period that the appellant had spent in custody as required by section 333(2) of the criminal procedure code."

18. Since the court had the discretion under the *Muruatetu* case before the new directions issued by the Supreme Court came into force, the learned magistrate ought to have considered the 11 months period spent in custody. Accordingly, it is my finding that the trial court arrived at the sentence imposed without taking into account section 333 (2) of the *Criminal Procedure Code* hence the sentence imposed is substituted by reducing the same by 11 months being the period served in remand custody.

19. Having held as above, the sentence of 15 years by the trial court is substituted with an imprisonment term of 14 years and 1 month. The Deputy Registrar to cause an amendment of the committal warrant to reflect the substituted sentence to run from the date of sentence by the trial court. Right of appeal 14 days.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL, 2022**

**J.N.ONYIEGO**

**JUDGE**