REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIVASHA

CORAM: HON. R. MWONGO, J.

CRIMINAL APPEAL NO. 16 OF 2019

ALFRED KIPKEMBOI KIGEN.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an Appeal against the Conviction and sentence of Hon. J. Karanja (SPM) in Naivasha CMCR No (S.O.) 71 of 2018 delivered on 14th May, 2019)

JUDGMENT

Appeal

1. The appellant in his original petition of appeal filed on 28th May, 2019 impugns the trial court's judgment on the following grounds:

1) That the learned trial magistrate erred in law and fact by convicting the appellant in a prosecution case where penetration was not conclusively proved.

2) That the learned trial magistrate erred in law and fact by convicting the appellant yet age was not conclusively proved.

3) That the learned trial magistrate erred in law and fact by convicting the appellant but failed to note that the prosecution case was not proved beyond reasonable doubt to the required standard.

4) That the appellant's defence was not considered accordingly, the evidence tendered was not conclusively considered alongside the appellant's defence.

Amended Appeal

2. When the appellant received and perused the proceedings of the lower court, he amended his grounds of appeal which he filed on 1st October, 2020. His amended grounds of appeal, challenge only the sentence imposed. Similarly, his written submissions concern only his opposition to the sentence meted, on the grounds that:

1) He is a first offender.

2) He is remorseful and repentant having learnt his lesson the hard way.

3) He is a father of three (3) children who have been suffering a lot since he was imprisoned and he is worried about their welfare especially during this COVID-19 epidemic.

4) He left behind an aged mother and younger siblings who were dependent on him.

5) His wife ill and passed on in 2009.

6) That the Supreme Court's decision in ***Francis Karioko Muruatetu & Another vs Republic [2017] eKLR*** *declared the mandatory nature of the death sentence as the case of* ***Dismas Wafula Kilwake vs Republic [2019] eKLR***.

7) He, while in prison, he have taken advantage of the numerous rehabilitation courses on offer.

8) He has learnt his lesson the hard way, he has reformed and promised to lead a crime free life upon his re-integration.

Factual Background

3. The brief facts are that the appellant was convicted and sentenced to 20 years imprisonment for the offence of defilement of a child aged 15 years. The particulars were that on diverse dates between 25th July, 2018 and 2nd September, 2019 the appellant lured the child to his house where he defiled her on several occasions.

4. The victim had been at home having come from the shops when the appellant, whom she knew as Kemboi, came by, took her hand and led her to his house where he defiled her. He would lock her up and on letting her out threatened that he would cut her up if she told anyone what had happened.

5. He did this on different occasions. On the day he was caught, one Rose Njoki had seen the appellant locking his house. She ran and urgently told PW2, the child's father, and they both raced back to the appellant's house. They told him to open the door, and PW2 was shocked to find his daughter on the appellant's bed. The child said she was brought there by the appellant. Meanwhile Rose Njoki, a member of Nyumba Kumi, went and called the police. The police took the child to the police post and finally to Naivasha Referral Hospital. At hospital, the child was found to have been defiled.

6. The trial court found that the victim was defiled and convicted the appellant under **Section 215** of the **Criminal Procedure Code**. The court also found that the age of the complainant was 15 years as evidenced by a medical certificate of age produced as Exhibit 3. As such, the trial court invoked Section 8 (3) of the **Sexual Offences Act** and imposed the statutory minimum penalty of twenty (20) years' imprisonment.

7. The State opposed the appeal both on the original merits of the petition, but on the sentence, the State is open to the court imposing an appropriate sentence. The State relied on the case of **Daniel Kamau v Republic [2019] eKLR** where the High Court substituted a life sentence with a sentence of 20 years imprisonment where the exact age of the victim was not ascertained.

8. In the present case, since the appellant abandoned his substantive appeal except against the sentence, that is the only matter which this court will consider.

9. The appellant's arguments against the sentence imposed are essentially as follows: that in his mitigation he was remorseful; he was a widower, having lost his wife to illness in 2009; he has three children; that the sentence meted was the maximum mandatory sentence and the court did employ its discretion; that the mandatory sentence goes against the principles in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and unconstitutional.

10. He correctly argues that the **Muruatetu** case declared the mandatory nature of death sentence unconstitutional; that this reasoning was applied by the Court of Appeal in the case of **Dismas Wafula Kilwake v Republic [2019] eKLR** where it was held that the reasoning of the Supreme Court in **Muruatetu** should apply to the provisions of the Sexual Offences Act which impose mandatory sentences. The Court concluded:

> ***"Being so persuaded, we hold that the provisions of Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing."***

11. The appellant cites several other authorities where the mandatory sentences imposed by courts under the Sexual Offences Act were challenged and reduced on appeal. I have taken all those authorities into account.

12. The real question in issue here is whether the trial court took into account the appellant's mitigation and duly exercised its discretion, before meting the sentence of imprisonment imposed.

13. The proceedings in the lower court show that the mitigation and sentencing proceeded as follows after the prosecution indicated that they had no previous records of the appellant:

> ***"Mitigation : I ask for forgiveness for the case because I was framed and did not do it. I do not have parents. I am married with 3 children, a boy and two girls. My wife fell sick in 2009 and died.***
>
> ***Court : Mitigation noted.***
>
> ***Sentence : The age of the complainant was assessed as 15 years as per the medical certificate of age (Exhibit 3). Thus, the <u>appropriate penalty</u> is as prescribed in Section 8 (3) of the Sexual Offences Act <u>which is a statutory</u> mandated minimum. The accused is accordingly sentenced to serve 20 years imprisonment.***

14. **Section 8 (3)** of the **Sexual Offences Act** provides 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.***

15. In this case, there is no doubt as to the age of the victim, and **Section 8 (3)** of the **Sexual Offences Act** was properly invoked. In the case of **John Otieno Obwar v Republic [2011] eKLR** Makhandia, J (as he then was) observed:

> ***"Defilement is a strict offence, whose sentence upon conviction is staggered depending on age of the victim. The younger the victim the stiffer the sentence. Accordingly it is important that the age of the victim be proved by credible evidence."***

16. The principle to be observed from that case is that the legislature intended that the punishment for the offence of defilement be staggered according to the age of the victim. Thus; **Section 8 (2)** to **8 (4)** of the **Sexual Offences Act** provide for a sentence of life imprisonment for defilement of a child aged less than eleven years i.e. from birth to 11 years. For a child aged twelve to fifteen years the punishment is a sentence of not less than twenty years. And for a child aged between 16 - 18 years the term is a sentence of not less than fifteen years.

17. In the present case the victim falls in the category of children aged 12 - 15 years and is at the higher or older end of that category. Equally it is clear that the trial magistrate heard the mitigation and noted it, though it was hardly detailed, and then imposed the appropriate penalty under **Section 8 (3)** of the **Sexual Offences Act**. In so doing the trial magistrate expressly stated that he based his decision on **Section 8** of the **Sexual Offences Act**, *"which is the statutory mandated minimum."* He did not indicate what, if any, effect the mitigation had in enabling him to arrive at the sentence he imposed. He based his decision entirely, it seems, on the fact that the penalty was a statutory minimum.

18. The appellant cited the recent case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** where the Court of Appeal, relying on the **Muruatetu** principles, set aside the sentence of 20 years and substituted a sentence of ten (10) years, for defilement of a child aged 14 years. There, the High Court had enhanced the sentence imposed by the trial court from 15 years to 20 years. That is not the position here.

19. In **Christopher Ochieng v Republic [2018] eKLR**, the Court of Appeal, faced with a case where a child of 8 years had been defiled and sentenced to life imprisonment and relying on the **Muruatetu** case, had this to say:

> ***"In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.***
>
> ***Bearing this in mind, the appellant was provided an opportunity to mitigate in the trial court where he stated that he is a sole bread winner, and was taking care of his two children, as well as his late brother's wife and three children, he craved for leniency. However, the converse is also true, the appellant has committed a heinous crime, and occasioned severe trauma and suffering to a girl young enough to be his daughter. His actions have demonstrated that around him, young and vulnerable children could be in jeopardy.***
>
> ***Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefor with a sentence of 30 years imprisonment from the date of sentence by the trial court."*** (Emphasis added)

20. Here, as earlier noted the role played by appellant's mitigation in the sentencing was not indicated by the trial magistrate. Taking into account that the sentence for defilement of a child of 16 years is 15 years imprisonment, the difference in the sentence in this case should not be unduly large. Upon taking the appellant's mitigation specifically into account, I would impose a sentence of fifteen (15) years in substitution for the sentence meted by the trial court. Such sentence shall run from 2nd September, 2018 the date of his first incarceration by the trial court.

Administrative directions

21. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

22. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

23. Orders accordingly.

Dated and Delivered in Naivasha by teleconference this 25th Day of January, 2021.

R. Mwongo

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Maingi for the DPP

2. Alfred Kipkemboi Kigen - Appellant in person - in Naivasha Maximum prison

3. Court Assistant - Quinter Ogutu