REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 8 OF 2020

PIUS WEKESA WANJALA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Appeal against the original sentence in Criminal Case No. 86 of 2018 at the*

Chief Magistrates Court Bungoma by Hon. J. Kingori – CM

on 20/1/2010)

J U D G M E N T

1. Upon arraignment, **Pius Wekesa Wanjala,** the Appellant, was charged, tried and convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(4)** of the Sexual Offences Act. It was stated that he intentionally and unlawfully caused his penis to penetrate the vagina of **DKB** a child aged 17 years.

2. In the alternative, he faced a charge of committing an Indecent Act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. Particulars being that on the 1st day of September 2018 at [Particulars Withheld] Village, Sirare Location Bungoma Central Sub-County within Bungoma County, intentionally and unlawfully caused his penis to come into contact with the vagina of **DKB** a child aged 17 years.

3. Evidence adduced by the prosecution was that **DKB,** the complainant, a minor born on the 26th June 2001 had penetrative sex with the appellant on several occasions, on the 27th September 2018, her mother chased her away from home because of her conduct and she went to stay with the appellant. On the 3rd day of October, 2018 while at the house of the appellant her mother and aunt arrived with police officers who arrested both of them. She was subjected to medical examination and it turned out that she was pregnant. Investigations carried out established that the complainant was a minor, therefore, the appellant was charged. Subsequently she gave birth to a child.

4. Upon being placed on is defence the appellant denied having defiled the complainant and gave a tale of having been arrested by two (2) individuals as he carried on his 'Bodaboda' duties.

5. The trial court considered evidence adduced and found that at the time, the complainant was 17 years old, there was proof of penetration and the appellant was identified as the culprit. It convicted and sentenced the appellant to serve ten (10) years imprisonment.

6. Aggrieved, at the outset the appellant appealed against the judgment on grounds that the sentence imposed was harsh and excessive; and, there was miscarriage of justice as he was frustrated as the trial magistrate failed to protect him.

7. During hearing of the appeal, however he opted to mitigate on sentence. He submitted that he is satisfied with the sentence imposed of ten (10) years but urged the court to exercise leniency by reviewing the sentence. That at the time of the alleged offence he did not know anything to do with the law and although he has reformed and is remorseful, he is perishing because the sentence was harsh and excessive.

8. The Respondent's argument is that the prosecution's evidence was consistent and not controverted. It called upon the court to dismiss the appeal and uphold the sentence.

9. This being a first appeal, the court is mandated to reconsider and re-evaluate what transpired at trial bearing in mind that it had no opportunity of seeing or hearing those who testified, to reach it's independent conclusions.

10. **Section 8(4**) of the constitution Provides thus;

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

11. In passing the sentence the trial court stated as follows;

> ***"Accused has been treated as a 1st offender. His mitigation is noted but the accused of importance is not remorseful. The offence charged is serious attracting a sentence of 15 years in the minimum but now that the court has jurisdiction to impose a sentence lesser than the minimum, I will impose a lesser sentence that still addresses the seriousness of the offence and the need to protect children. I sentence the accused to serve 10 years imprisonment."***

12. Principles upon which an appellate court can interfere with the sentence meted out by the lower court were stated in the case of ***Bernard Kimani Gacheru Vs. Republic (200) eKLR*** as follows:

> ***"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 the 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 if, 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 (emphasis court's)."***

13. The complainant and appellant engaged in consensual sex. But, the age of the complainant was proved by a birth certificate that was adduced which indicated that she was born on 26th June 2001. At the time of the act she was seventeen (17) years old; therefore a child (See **Section 2** of the children Act). It was not suggested by the appellant that he believed she was not a minor following some deception on the part of the complainant and circumstances that prevailed which he ascertained.

14. The law provides for a minimum mandatory sentence of fifteen (15) years, but the trial court for reasons given as afore captured sentenced him to serve ten (10) years imprisonment. As correctly pointed out by the trial court, it was seized of the discretion following the decision of ***Francis Karioko & Another Vs. Republic (2017) eKLR*** where the Supreme Court found death sentence to be unconstitutional. Subsequently, the Court of Appeal reasoned that the rationale could be applicable to mandatory minimum sentence in the Sexual Offences Act ***(****See* ***Jared Koita Injiri Vs. Republic (2019) eKLR; Dismas Wafula Kilwake Vs. Republic (2018) eKLR)***

15. This position has, however, been corrected by a clarification given in the case of ***Francis Muruatetu & Another Vs. Republic, Katiba Institute & 5 others (Amicus Curiae) (2021) eKLR;*** that the discretion only applies in murder cases but not sexual offences.

16. From the foregoing, the trial court acted on proper principles and the sentence imposed was too lenient. In the result,

> I have no reason to interfere with the sentence meted out.

17. Accordingly, the appeal against sentence which is devoid of merit is dismissed.

18. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 29TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Appellant

Mr. Ayekha – ODPP

Court Assistant – Immaculate