



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 16 OF 2018

(Being an Appeal from the original conviction and sentence in Criminal Case S/O No.6 of 2015 in the Chief magistrate's Court at Embu)

NJOGU MIRUGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant was convicted by Embu Chief Magistrate Embu 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. The particulars of the offence were that on 9/11/2014 in Embu County intentionally and unlawfully caused his genital organ penis to penetrate the vagina of EWN, a child aged 15. He was subsequently sentenced to serve twenty (20) years imprisonment and being aggrieved by the said conviction and sentence he lodged this appeal. The grounds of appeal were contained in his petition dated 28/11/2018.

2. At the hearing of the appeal, the parties erected to argue the appeal by way of written submissions. However, the appellant filed amended grounds of appeal contemporaneous with his submissions and wherein he challenged the sentence only.

B. Submission by the parties

3. The appellant submitted that the sentence was harsh and excessive taking into account that he was a first offender and further taking into account that mandatory sentences are unconstitutional as was held by the Supreme Court in **Muruatetu's case** as they denied the courts discretion in sentencing as it was applied by the Court of Appeal in **Christopher Ochieng v Republic** and **Jared Koita Injiri -v- R CR. APP. NO. 93/2014** and thus urged this court to consider his age and his good conduct and impose a soft substitute sentence. It was his submissions that he was sentenced to serve the minimum mandatory sentence and thus the sentencing court did not exercise discretion in sentencing and as such the court did not take into account his mitigation.

4. The respondent through Ms. Mati invited this court to take into account the seriousness of the offence that the appellant was charged with, the circumstances of the offence and the fact that the appellant was serving a legal sentence after having been heard by a competent trial court and which court had the advantage of assessing the demeanor of the witness. Relying on the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR**, the Respondent submitted that Sexual Offences Act sets the minimum sentence for the offence the appellant was charged with and failure of the law to give magistrates discretion was tantamount to a gross injustice. However, she invited the court to consider an aggravating factor that the victim was a minor and was impregnated by the appellant and as a result of which she dropped out of school at Standard 7 and went to live in a children's home in deciding whether or not to review the sentence downwards.

C. Issues for determination

5. As I have noted, the appellant abandoned the grounds challenging conviction and decided to pursue only those challenging sentence. As such, the main issue for determination is whether the sentence meted on the appellant ought to be interfered with by this appellate court.

D. Applicable law and determination of the issues

6. The principles upon which an appellate court will act in exercising discretion to review, alter or set aside a sentence imposed by the trial court were restated by the Court of Appeal in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** and include: - *where the sentence is*

manifestly excessive in the circumstances of the case; or where the trial court overlooked some material factor; or where the trial court took into account some wrong material, or acted on a wrong principle.

7. The appellant based his appeal basically on the fact that the trial court meted the minimum mandatory sentence and which sentences were declared unconstitutional by the Supreme Court in the Supreme Court petition of Francis Muruatetu. It important to note that the appellant was convicted of the offence of defilement contrary to section 8(1) and 8(3) of the Sexual Offences Act. The sentence provided for by the Sexual Offences Act for a person who commits an offence of defilement with a child between the age of twelve and fifteen years is imprisonment for a term not less than twenty years.

8. However, pursuant to Francis Karioko Muruatetu & Another –vs Republic [2017] eKLR and its application *mutatis mutandis* to offences under section 8 of the Sexual Offences Act No. 6 of 2003 by the Court of Appeal in Jared Koita Injiri –v- R (supra), Christopher Ochieng v Republic [2018] eKLR and Evans Wanjala Wanyonyi v Republic [2019] eKLR, and Dismas Wafula Kilwake vs Republic [2018] eKLR (amongst others) a new jurisprudence had developed in relation to minimum mandatory sentences to the effect that the same is unconstitutional as they minimum mandatory sentences deny the court discretion in sentencing.

9. It is pursuant to the jurisdiction bestowed by this court pursuant to the development in law as indicated in the above authorities that my view is that the sentence subject to this appeal ought to be interfered with as it was a mandatory minimum sentence which was meted out without considering the mitigation by the appellant and taking into account the circumstances of the case.

10. In this regard, this court must to bear in mind that the discretion of the court ought to **exercise in appropriate cases and whereas the circumstances of the case so demand. The court must be alive to the fact that the minimum sentence under Section 8 of the Sexual Offences Act is** indicative of the seriousness with which the Legislature and the society take the offence of defilement. (See Dismas Wafula Kilwake vs Republic [2018] eKLR).

11. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the offence and the manner in which the offence was committed and that there is no straightjacket formula for sentencing an accused on proof of crime. The court ought to alive to the fact that what sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity and motive for the crime, nature of the of the offence and all other attendant circumstances. (See Charles Ndirangu Kibue v Republic [2016] eKLR). The Judiciary Sentencing Policy Guidelines to take into account the aggravating and mitigating circumstances and their effects on the sentence in determining the most suitable sentence.

12. Considering the above principles and applying the above principles in resentencing to the facts of the case, I note that the appellant herein was a first offender. In mitigation, before the trial court informed the court that he was 75 years old and submits herein submitted that he would never indulge himself in crimes of any kind as through experience and the suffering he had undergone in prison, he was aware of the consequences of the crime and prayed the court to grant him a second chance in life through a lenient sentence as he was getting old and frail. This is an indication of remorsefulness by the appellant. The age and remorsefulness of the offender and the offender being the first offender are some of the mitigating factors and whose effect is to lessen the term of the custodial sentence.

13. I further note that as a result of the act by the appellant, the complaint before the trial court became pregnant and subsequently gave birth to a child which DNA tests confirmed to have been sired by him. This definitely had serious physical and psychological effects on the victim of the offence. This is an aggravating factor which may lead to enhancing the terms of imprisonment by the court.

14. The Sentencing guidelines provides that where both aggravating and mitigating circumstances exist, the court should weigh the aggravating and mitigating circumstances and where mitigating circumstances outweigh the aggravating ones, then the court should proceed as if there is a single mitigating circumstance. Where aggravating circumstances outweigh the mitigating circumstances, then the court should proceed as if there is a single aggravating circumstance.

15. As such, taking into account that the trial court did not exercise its discretion in sentencing the appellant and the fact that the appellant is entitled to review of sentence in line with the emerging jurisprudence of the Muruatetu's case and considering the principles set out in this judgment, it is my considered opinion that the facts in this appeal presents a case whereby this court ought to review the sentence meted out on the appellant herein. However, this court should not lose sight of the fact that the appellant deserves a deterrent sentence.

16. It is my finding that this appeal has merit and I hereby allow it by reviewing/setting aside the twenty (20) years imprisonment and substituting it with fifteen (15) years imprisonment.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 28TH DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the Respondent

Appellant through Video Link