REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 9 OF 2018

(Being an Appeal from the original conviction and sentence in Criminal Case S/O No.13 of 2016

at the Senior Principal Magistrate's Court at Siakago)

PIUS NJERU NYAGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

J U D G M E N T

A. Introduction

1. The appellant herein was convicted of two counts of defilement contrary to Section 8(1) as read together with section 8(3) of the Sexual Offences Act No. 3 of 2006 and the particulars of the two counts being that on 10/10/2016 at [particulars withheld] village in Mbeere North Sub-county within Embu County intentionally and unlawfully caused his penis to penetrate the vagina of JM, a child aged 14 years in the first count and PM, a child aged 13 years in the second count. He was sentenced to serve twenty (20) years imprisonment in each of the two counts and all the sentences were ordered to run concurrently. He was aggrieved by the said judgment and lodged this appeal.

2. The grounds of appeal were contained in her petition of appeal filed in court on 27/02/2018 which challenged both the conviction and sentence. During the hearing of the appeal, the appellant abandoned the grounds challenging conviction in respect of all the counts and proceeded to argue those challenging the sentences. This was after leave was granted for him to amend his petition of appeal.

B. Submission by the parties

3. This appeal was argued by way of written submissions. The Appellant in his submissions prayed that the court do consider a lenient sentence in consideration of the Supreme Court's judgment in **Petition 15 of 2015** which held mandatory minimum sentences as unconstitutional. Reliance was made to the case of **Yawanyale -vs- Republic (2018) eKLR** and **Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR.**

4. The respondent through Ms. Mati was not opposed to the revision of the sentence on the grounds that the appellant failed to demonstrate that the court acted on a wrong principle, ignored material factors, took into account irrelevant considerations or the sentence was manifestly excessive relying on the Court of Appeal's decision in **Bernard Kimani Gacheru**. Further that the victims of the offence were minors and PW2 was a child with special needs as such these presented aggravating factors warranting harsh sentences in consonance with the retribution principle of sentencing guidelines and as such the sentence imposed was fair and justifiable in the circumstances and the trial court acted judiciously.

C. Issues for determination

5. As I have already said, the appellant abandoned the grounds challenging conviction is only pursing those challenging sentence. He prayed for a lenient sentence on the basis that the mandatory minimum sentence that was imposed was unconstitutional. 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: -**

a. Where the sentence is manifestly excessive in the circumstances of the case; or

b. Where the trial court overlooked some material factor; or

c. Where the trial court took into account some wrong material, or acted on a wrong principle.

7. The main contention by the appellant was to the effect that he was deprived of the benefits of Article 27 (1)(2) of the Constitution and the right to benefit from the least severe sentence and further that the mandatory 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 two (2) counts of defilement contrary to section 8(1) and 8(3) of the Sexual Offences Act. The sentence provided for is imprisonment for a term not less than twenty (20) years for a person who commits an offence of defilement with a child between the age of twelve and fifteen years. The trial court in meting out the sentence noted that *"I have considered the accused person's mitigation and the circumstance of his case…".*

8. This case was decided only two (2) months after the decision in **Muruatetu case.** Due to the development of the law since that time, I am of the considered opinion that the principles in the **Muruatetu case** are applicable to sexual offences.

9. Based on the new jurisprudence developed in relation to minimum mandatory sentences in Francis Karioko Muruatetu & Another –vs- Republic (supra) and which has been applied in sentences provided for in the Sexual Offences Act. In the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** the Court of Appeal extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory minimum sentences provided under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that does not take away the discretion of the Court in sentencing.

10. Pursuant to this jurisprudence, mandatory minimum sentence is unconstitutional and an appellate court is bound to interfere with it. This discretion ought, however, to have been **exercised in appropriate cases and if the circumstances of the case so demand. The court ought not be constrained by Section 8 to impose the provided sentences if the circumstances do not demand it. The same should be done bearing in mind that t**hose provisions are 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. The court ought to bear in mind that 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 crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the of the offence and all other attendant circumstances. (See **Charles Ndirangu Kibue v Republic [2016] eKLR).**

12. Further the court ought to bear in mind the obligation imposed on it by 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. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

13. The Judiciary Sentencing Guidelines provide that the effect of mitigating factors is to lessen the term of the custodial sentence whereas that of aggravating circumstances has the effect of enhancing the term of the custodial sentence. 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.

14. This is a case where the trial magistrate failed to exercise her discretion in sentencing the appellant given that he was a first offender and was remorseful. I am of the considered opinion that the cardinal principles of sentencing in the **Muruatetu petition** and in the Judiciary Sentencing Guidelines were not complied with during sentence. The trial magistrate overlooked some material factor in sentencing thus giving this court a reason to interfere with the sentence imposed.

15. It is further noted I note that the appellant herein was arrested on 11/10/2016 and released on cash bail 18/04/2017. As such, he spent six (6) months in custody. This time was not taken into account by the trail court when meting the sentence upon the appellant herein and which contravened the provisions of section 333(2) of the Criminal Procedure Code whose *proviso* mandates the trial court to take into account the period spent in custody where the person has, prior to such sentence, been held in custody. This principle was highlighted in the case of **Bethwel Wilson Kibor vs. Republic [2009] eKLR and** the Judiciary Sentencing Policy Guidelines. I am of the considered view that the period spent in custody was a factor that required to be taken into account by the trial court during sentencing. This was a serious omission on part of the magistrate which ought to be corrected by this court suo moto herein. The period of six (6) months will be taken into account in the final orders herein.

16. For the foregoing reasons, I find that the appeal in regard to sentencing is successful. It is hereby allowed in the following terms: -

That the sentences of twenty (20) years imposed on the appellant on each of the two counts are hereby set aside and substituted with fourteen and a half (14½) years imprisonment on each count to run concurrently.

17. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 27TH DAY OF JULY 2020.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mati for the Respondent

Appellant through Video Link