



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 16 OF 2019

MUSINDA MAHUPA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the sentence imposed on the appellant on 14th November, 2016 by Hon. S. Mulekyo, Chief Magistrate, in Kwale Chief Magistrate's Court Criminal Case No.105 of 2016).

JUDGMENT

1. The appellant was convicted on his own plea of guilty for the offence of defilement contrary to Section 8(1) as read with Section (2) (sic) of the Sexual Offences Act No. 3 of 2006 laws of Kenya. The particulars of the charge were that on the 12th November, 2016 at around 1400hours in [particulars withheld] village Mwaluphamba location in Kwale County within Coast region, intentionally and unlawfully caused his penis to penetrate the vagina of EL [name withheld] a child aged 9 years.

2. The appellant pleaded guilty to the charge and after the facts we read out to him, he admitted that the facts were correct. He was convicted accordingly. Although this is an appeal against sentence only, this court has looked at the manner in which the plea was taken and is satisfied that the charge was read out to the appellant in Kiswahili language. The facts of the case were also explained to him in the said language. At each stage, the appellant made comments which signified that he admitted having committed the offence.

3. He was dissatisfied with the sentence imposed on him and filed his petition and grounds of appeal on 28th January, 2019. On 25th November, 2019 he filed amended grounds of appeal on mitigation, with leave of the court. The appellant's grounds of appeal are-

(i) That the learned Trial Court erred in law and fact by imposing on him an excessive sentence;

(ii) That the learned Trial Court erred in law and fact by not considering his mitigation address; and

(iii) That the learned Trial Court erred in law and fact by failing to note that if he was to serve life sentence with a life expectancy of about 72 years, the sentence would go beyond his life expectancy.

4. In his written submissions, the appellant stated that under the provisions of Section 8(2) of the Sexual Offences Act, he was sentenced to the mandatory sentence of life imprisonment. He submitted that in the current constitutional dispensation, mandatory sentences ought to be looked at in light of Article 27 of the Constitution as read with clause 7 of the transitional and consequential provisions.

5. The appellant was of the view that the mandatory sentence under Section 8(2) of the Sexual Offences Act did not permit the court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by the circumstances of the case. He further submitted that as a result, the court was deprived of the direction to consider whether a lesser punishment would be more appropriate. He held the view that mandatory sentences do not meet constitutional dictates. He cited the case of **Francis Karioko Muruatetu and Another v Republic** [2017] eKLR, **Samuel Achieng Alego v Republic** [2018] eKLR, **Baraka Safari v Republic** [2018] eKLR, to support his position.

6. The appellant relied on the decision in **S v Malgas** 2001 (2) SA 1222 SCA 1235 at paragraph 25 which states that courts are a good deal freer to depart from the prescribed sentences that were passed in previously decided cases and the circumstances of any particular case should determine if they justify a departure from the said sentences.

7. The appellant contended that in imposing the sentence of life imprisonment on him, the Trial Magistrate failed to take into consideration relevant factors such as the fact that he was 72 years old at the time of conviction. He submitted that that if he was to serve life

imprisonment, it would mean that he would spend his whole life in jail; and that would be above the life expectancy of 70 years stated in the Bible.

8. The appellant made reference to the World Health Organization data for the year 2018 to show that the life expectancy for Kenyan males is 64.4 years, with a total life expectancy average of 66.7 years. He relied on the case of **Ali Abdalla Mwanza v Republic** [2018] eKLR, where the Court of Appeal reduced a sentence of 40 years imprisonment to 20 years after the said court considered the life expectancy of the appellant therein.

9. The appellant also relied on the case of **David Masila Githumu v Republic** [2018] eKLR, where the High Court substituted a conviction for the offence of defilement with one for indecent act and substituted the sentence of life with 10 years imprisonment.

10. The appellant herein submitted that the sentence meted out against him by the Trial Magistrate was manifestly harsh and excessive. He urged this court to substitute the life sentence imposed on him with a lenient sentence.

11. The Director of Public Prosecutions through Mr. Muthomi, Prosecution Counsel, on 28th January, 2020 filed written submissions. He stated that by way of the Supreme Court decision in **Francis Karioko Muruatetu & Another v Republic** (supra) the said Court gave other courts powers to impose appropriate sentences even where minimum sentences are prescribed.

12. He stated that in **S v Mchunu and Another** (AR 24/11) [2012] ZAKZPHC6, the Kwa Zulu Natal High Court stated that punishment which is excessive serves neither the interest of justice nor those of the society.

13. Mr. Muthomi also cited the case of **S v Mofokeng** 1999 (1) SACR 502(w) at 506(d) and **S v Jansen** 1999 (2) SACR 368 (c) at 373 (g) - (h), on mandatory minimum sentences. He also relied on the case of **S v Toms** 1990 (2) SA 802 (a) at 806 (h) – 807(b), where the court held that imposition of mandatory sentences by the legislature has always been considered an undesirable intrusion upon the sentencing function of the court and that a provision which reduces the court to a mere rubber stamp, is wholly repugnant.

14. The Prosecution Counsel further submitted that the appellant's age was not disclosed before the Trial Magistrate. He pointed out that the said Magistrate sentenced the appellant to life imprisonment because in her view, her hands were tied by the mandatory sentence for the offence of defilement under the provisions of Section 8(2) of the Sexual Offences Act.

15. This court was urged to substitute the sentence of life imprisonment with a determinate sentence of 25 years, as the victim of the defilement was 9 years old.

16. In response to the submissions by Mr. Muthomi, the appellant pointed out that if this court was to substitute the sentence of life imprisonment with a sentence of 25 years imprisonment, it would mean that he would reach the age of 100 years while in prison, since he is already 75 years old. The rest of his submissions in response to those filed by the respondent are similar to what he had written in his initial submissions.

ANALYSIS AND DETERMINATION

The issue of determination is if the sentence imposed on the appellant was harsh or excessive.

17. The appellant admitted to having defiled a 9 year old girl. He was therefore convicted on his own plea of guilty. The Trial Magistrate cautioned the appellant that the offence he was charged with carried a penalty of life imprisonment. In response thereto he said as follows:-

“It is true I did it. I cried. I cannot refuse. I was wrong. I was supposed to pay Kshs. 20,000/= to her parents and I had agreed, then I was brought to court. I agree I did it.”

18. Upon the facts being read out to him, the appellant said –

“The facts are correct. I do not dispute the same.”

19. When the court asked him to mitigate the appellant stated –

“I have nothing to say. I said it was true. I leave it to the court.”

20. As was observed by Mr. Muthomi, nowhere in the proceedings is it indicated that the appellant informed the Trial Magistrate that he was either 72 years old then. It is therefore not correct for the appellant to claim that the Trial Magistrate failed to note that if he was to serve life sentence when the life expectancy for Kenyan males is 64.4 years, the sentence would go beyond his life expectancy.

21. When the appellant was called upon to mitigate, he should have informed the Trial Magistrate of his age. This court cannot state with certainty if the appellant is 75 years old now. I however had occasion to see him in open court during several mentions and through an online platform when this appeal came up for highlighting of submissions. I noted that he is an elderly man who could well be in his late 60s or early 70s.

22. I have borne in mind the submissions made by the appellant and the Prosecution Counsel. I further note that the latter being mindful of the age of the appellant requested for substitution of the life imprisonment imposed on the appellant with a determinate sentence of 25 years

imprisonment.

23. In the case of **Jared Koita Injiri v Republic** [2019] eKLR, the Court of Appeal substituted the sentence of life imprisonment imposed on the appellant therein with 30 years imprisonment.

24. In the present case, 3 factors work in the appellant's favour and are persuasive to this court. The 1st one is that the appellant expressed remorse whenever he was given an opportunity to address the lower court. The 2nd factor is that he pleaded guilty to the charge of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act and saved the lower court many man hours which it would have used to hear witnesses and write a Judgment in the case. The 3rd factor is that the appellant is an elderly man. However, regardless of the said fact, he should have known better than to defile a girl who was young enough to be his granddaughter. The appellant must be rehabilitated so that when he will be released from prison he will keep his hands off young girls.

25. I hereby set aside the sentence of life imprisonment imposed on the appellant and substitute it with 15 years imprisonment. The appeal succeeds only to the above extent. The appellant has 14 days right of appeal.

DELIVERED, DATED and SIGNED at MOMBASA on this 25th day of September, 2020. Judgment delivered through Microsoft Teams online platform due to the outbreak of covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Mr. Muthomi, Prosecution Counsel - for the DPP

Mr. Oliver Musundi - Court Assistant