REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 4 OF 2018

EDWARD GITONGA MBITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *Edward Gitonga Mbiti* was charged and convicted of the offence of defilement contrary to *Section 8 (1)* of the *Sexual Offences Act (*the Act*)* as read with *Section 8 (3)* of the said Act.

The particulars of the offence alleged that on 12th January 2015 within Embu County, the appellant defiled *MKJ*, a child aged 13 years.

2. Upon his conviction, the appellant was sentenced to serve 20 years imprisonment. He was aggrieved by his conviction and sentence which he challenged in his petition of appeal filed on 29th January 2018. He subsequently filed amended grounds of appeal on 12th August 2020 in which he abandoned his appeal against conviction and pursued his appeal against sentence.

3. In his amended grounds of appeal, the appellant faulted the trial court's decision on sentence on grounds that the trial court failed to consider that he was a first offender and was under *Article 27 (1) (2)* of the *Constitution* entitled to the benefit of the least severe sentence prescribed by the law; that the trial court erred in imposing the minimum mandatory sentence prescribed by the law which was declared unconstitutional by the Supreme Court in ***Francis Karioko Muruatetu & Another V Republic & 5 Others, [2017] eKLR***.

4. At the hearing, both the appellant and the respondent chose to rely entirely on their respective written submissions.

In his submissions, the appellant urged the court to find that the sentence imposed on him by the trial court was harsh considering that he was a first offender; that the trial court failed to exercise its discretion by considering his plea in mitigation as it considered itself bound by the mandatory minimum sentence provided under S*ection 8 (1) (3)* of the *Sexual Offences Act* which it proceeded to impose.

5. Further, the appellant urged this court to consider that he was young and ignorant when he committed the offence and that following the hardship he has experienced in prison, he is now reformed and ready to rebuild his life. Relying on the Supreme Court's decision in ***Francis Karioko Muruatetu & 5 Others V Republic [2017] eKLR*** and ***Evans Wanjala Wanyonyi V Republic [2019] eKLR***, the appellant implored me to set aside the sentence meted by the trial court and substitute it with a lenient sentence.

6. In her submissions on behalf of the respondent, learned prosecuting counsel *Ms. Mati* did not contest the appellant's appeal pointing out that she appreciated the development of jurisprudence in respect of minimum mandatory sentences prescribed by the law. She thus conceded to the appeal but urged the court to consider the seriousness of the offence of defilement, the aggravating factors as reflected by the circumstances under which the offence was committed including the age of the victim.

7. I have considered the amended grounds of appeal and the parties' written submissions. I agree with *Ms Mati's* submissions that the Supreme Court's decision in the ***Muruatetu case [supra]*** was concerned with the mandatory death sentence prescribed by the law as punishment for the offence of murder. However, the decision was subsequently applied by the Court of Appeal to the minimum mandatory sentences prescribed for sexual offences under the *Sexual Offences Act.*

8. In ***Dismas Wafula Kilwake V Republic [2018] eKLR*** which is one of the decisions in which the Court of Appeal applied the ***Muruatetu case*** to sentences prescribed under the *Sexual Offences Act*, the court expressed itself as follows:

> ***"…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. Those provisions are indicative of the seriousness with which the Legislature and the society take the***

offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing."

9. In this case, when sentencing the appellant, the trial court stated as follows:

"Considers mitigation and that the convict is a first offender. Under section 8 (3) of the minimum sentence is 20 years in custody. Considering the age of the subject, I hereby sentence the convict to serve 20 years in jail."

10. Given the learned trial magistrate's notes on sentencing, I agree with the appellant's submissions that though appreciating that he was a first offender, the learned trial magistrate proceeded to impose the mandatory minimum sentence prescribed by the law without considering whether or not it was the appropriate sentence in his case given his plea in mitigation and the facts of the case.

11. In the ***Muruatetu case [supra]***, the Supreme Court, *inter alia*, declared that minimum mandatory sentences were unconstitutional to the extent that they deprived the trial court its discretion to impose appropriate sentences taking into account the particular facts and circumstances of each case and the mitigating factors offered by the convict. As noted earlier, the decision was subsequently applied by the Court of Appeal to the minimum mandatory sentences prescribed under the *Sexual Offences Act.* This was done in several authorities including the ***Wafula case [supra]*** which I have cited above and ***Christopher Ochieng V R, [2018] eKLR***; ***Evans Wanjala Wanyonyi V R, [2019] eKLR*** among others.

12. In this case, it is clear from the trial court's record that though the appellant was given an opportunity to mitigate, the learned trial magistrate did not exercise his discretion in deciding the appropriate sentence that befitted his case taking into account all relevant factors including the circumstances of the case. The learned trial magistrate took cognizance of the minimum mandatory sentence prescribed for the offence and imposed it on the appellant without much consideration. As held by the Supreme Court in the ***Muruatetu case***, failure to exercise discretion in sentencing contravened a convict's right to a fair trial which is one of the absolute rights enshrined under *Article 25* of the *Constitution*.

13. Having found as I have above, I am persuaded to find that in failing to exercise his discretion in sentencing the appellant, the learned trial magistrate erred in principle by failing to consider the mitigating factors the appellant had presented before him including the fact that he was a first offender.

14. This is not to say that I am not alive to the gravity of the offence of defilement and the traumatizing effect it has on its victims who are mainly young children. What I am saying is that the learned trial magistrate ought to have considered the seriousness of the offence; the circumstances surrounding its commission and any other aggravating factors and weigh them against the mitigating factors offered by the appellant before deciding on the appropriate sentence to impose on the appellant. In my opinion, a term of twenty years imprisonment for a young first offender was harsh and manifestly excessive.

15. In view of the foregoing, I find merit in this appeal and it is hereby allowed. The sentence imposed by the trial court is consequently set aside and is substituted with a sentence of ten years imprisonment to take effect from the date of sentence of the trial court.

16. In his submissions, the appellant requested this court to take into account the time he had spent in custody prior to his sentence. The court record shows that the appellant was arrested on 19th January 2015 and he was released on bond on 16th September 2015. It is evident from the trial court's record that in passing sentence, the learned the trial magistrate did not order that the time the appellant had spent in custody be taken into account when computing his sentence.

17. In compliance with the proviso to *Section 333 (2)* of the *Criminal Procedure Code*, I hereby order that the period of about eight months the appellant had spent in custody prior to the date of his sentence shall form part of his substituted sentence.

It is so ordered.

DATED, SIGNED and DELIVERED at **EMBU this 30th day of October 2020.**

C. W. GITHUA

JUDGE

In the presence of:

The appellant

Ms. Mati for the respondent

Mr. Wambugu Court Assistant