



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 171 OF 2019

LABAN KEVEDERE AMAHENDO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against the sentence in Criminal Case Number 241 of 2016 delivered on 13/2/2019 by Hon. H. Barasa (PM) at Eldoret Law Courts)

JUDGMENT

1. The Appellant was charged with the offence of defilement of an imbecile contrary to **section 146** of the **Penal Code** and in the alternative he was charged with the offence of committing an indecent act with a child contrary to **section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 10th day of October 2016 in Lugari subcounty within Kakamega County, he unlawfully and intentionally caused his genital organ, namely penis, to penetrate the genital organ of CA (name withheld), who to his knowledge was an imbecile girl aged 15 years.
2. In his judgement the learned trial magistrate considered the evidence from both the prosecution and the defence and concluded that the ingredients of the offence in the alternative charge had been proved beyond reasonable doubt. The Appellant was found guilty and convicted on the alternative charge. He was sentenced to ten years' imprisonment.
3. The Appellant who was disgruntled, originally filed an appeal on the 3rd of October 2019 opposing both the conviction and sentence. He subsequently filed supplementary grounds of appeal in which he opposed only the sentence. In his grounds of appeal which were advanced in mitigation, the appellant urges that he is a first offender, that the sentence imposed was too harsh and that he is aged.
4. The Appellant avers that he is remorseful, reformed and rehabilitated and is ready for reintegration back into society. He pleads that the remaining part of his sentence be reduced to a non-custodial sentence. He cites the case of **Francis Karoki Muruatetu & 5 Others [2017] eKLR** and submits that the constitutionality of mandatory minimum sentences is highly doubtful, as they do not allow the court to consider peculiar circumstances of the case to arrive at the appropriate sentence.
5. Learned state counsel M/s Okok has opposed the appeal on behalf of the state. Counsel submits that the state supports the sentence in view of the fact that, the appellant took advantage of the child while he was aware that she was mentally challenged. She urged the court not to interfere with the sentence.
6. I have considered the principles set out with regard to appeals against sentencing. In **S vs. Malgas 2001 (1) SACR 469 (SCA)** the court held that:

“A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court...However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as “shocking”, “startling” or “disturbingly inappropriate”

7. **Section 11(1)** of the **Sexual Offences Act** provides as follows;

(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.

8. In the case of **Shadrack Kipkoech Kogo vs. R. Eldoret Criminal Appeal No. 253 of 2003** the Court of Appeal stated thus:

“Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered with (see also Sayeka – vs- R. (1989 KLR 306)”

9. In the instant case the Appellant has not shown that the trial court took into account an irrelevant factor, or that a wrong principle was applied, or that the sentence itself is so excessive as to warrant interference by the court.

10. In **Simon Kipkurui Kimori v Republic [2019] eKLR**, the court, while acknowledging the findings of the Supreme Court in the **Muruatetu case (supra)** held:

This does not mean that the court ought not to mete out what appears as prima facie mandatory minimum sentence. What it means is simply that the circumstances of the offence must be considered and having done so nothing bars the court from imposing such sentence.

11. Having considered the circumstances under which the offence was committed, I note that the complainant was not only a minor at the time of the offence, but nature had also saddled her with a debilitating challenge. She was mentally challenged. She was therefore, a child in need of protection and care from all right thinking persons. The appellant’s defence and mitigation notwithstanding, I find no reason to interfere with the sentence imposed against the appellant by the trial court.

The appeal is therefore found to be without merit and is accordingly dismissed. It is so ordered.

PREPARED, DATED AND SIGNED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2020.

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L. A. ACHODE

HIGH COURT JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 30TH DAY OF OCTOBER, 2020.

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OLGA SEWE

HIGH COURT JUDGE