



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**CRIMINAL APPEAL NO. 23 OF 2018**

**PIUS MUGENDI NJIRU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

1. The appellant, *Pius Mugendi Njiru* was charged in the main count with the offence of gang rape contrary to *Section 10 (a)* of the *Sexual Offences Act* and with an alternative count of committing an indecent act with an adult contrary to *Section 11* of the *Sexual Offences Act*. He denied the offences charged in each count.
2. After a full trial, he was convicted of the offence of gang rape and was sentenced to serve fifteen years imprisonment. Being dissatisfied with his conviction and sentence, he proffered an appeal to this court through his petition of appeal filed on 18<sup>th</sup> June 2018. He subsequently filed amended grounds of appeal in which he abandoned his appeal against conviction and pursued his appeal against sentence only.
3. In his appeal against sentence, the appellant faulted the trial court's decision on grounds that: the learned trial magistrate failed to consider that he was a first offender and was thus qualified for a lenient sentence; that he failed to take into account his dignity and imposed a harsh sentence and that he failed to consider his plea in mitigation.
4. At the hearing, both the appellant and the respondent chose to rely entirely on their written submissions. In his submissions, the appellant relied on the Supreme Court's decision in *Francis Karioko Muruatetu & Another & 5 Others V Republic, [2017] eKLR* in support of his claim that the learned trial magistrate failed to follow the jurisprudence enunciated by the Supreme Court in that case and imposed the minimum mandatory sentence prescribed under *Section 10* of the *Sexual Offences Act*.
5. In addition, the appellant expressed the view that the learned trial magistrate failed to exercise his discretion by taking into account the mitigating factors he had advanced including the fact that he was a first offender; that being a first offender, he was entitled to the benefit of the law under *Articles 27 (1) (2) and 50* of the *Constitution*. He implored the court to follow the decision of the Court of Appeal in *Evans Wanjala Wanyonyi V Republic, [2019] eKLR* and set aside the sentence meted by the trial court and substitute it with a lenient sentence.
6. Further, the appellant offered reasons which in his view supported his appeal for resentencing. He claimed that at the time he was convicted and sentenced, he was young and that a long period of incarceration will make it difficult for him to restart his life. He claimed that following his experiences in prison, he was now reformed and should be given a chance to rebuild his life.
7. The respondent through learned prosecuting counsel, *Ms Mati* informed the court that the respondent was not opposed to the appeal in principle given the development in jurisprudence relating to mandatory sentences. She however urged the court to note that the appellant was not a first offender; that he was given an opportunity to offer his mitigation; the aggravating factors exemplified in the circumstances under which the offence was committed and the seriousness of the offence the appellant committed.
8. I have considered the amended grounds of appeal, the record of the trial court and the written submissions made by both the appellant and the respondent.

It is trite that as a general rule, the trial court has discretion in deciding the sentence to impose on a convicted person in each case after taking into account several factors including the nature and seriousness of the offence, the circumstances surrounding commission of the offence, whether the convict was a first offender, his plea in mitigation and the objectives of sentencing. ***See: The Sentencing Policy Guidelines 2016 published by the Kenya Judiciary.***

9. The principles that guide an appellate court in deciding whether or not to interfere with the sentence imposed by a trial court have been articulated in many authorities both by the High Court and the Court of Appeal. The thread running across all those authorities is that an appellate court should not interfere with the trial court's discretion in sentencing unless it is satisfied that the sentence imposed was illegal or it was harsh and manifestly excessive or that in sentencing, the trial court erred in law or failed to take into account relevant factors or

considered extraneous matters.

10. The Court of Appeal in **Benard Kimani Gacheru V Republic, [2002] eKLR** when enumerating the above principles held as follows:

***“On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”***

See also **Macharia V Republic, [2003] KLR 115.**

11. In this case, though the appellant has claimed that the learned trial magistrate erred by sentencing him to fifteen years imprisonment without considering his young age and that he was a first offender, the record of the trial court shows that he was not a first offender. He admitted that he had a previous conviction for which he was serving a sentence of five years. The record also shows that in his plea in mitigation, he did not disclose his age. He only requested the court to note that he had a wife and three children.

12. The record clearly shows that the learned trial magistrate considered the appellant’s plea in mitigation, the circumstances under which the offence was committed and the fact that he was not a first offender. All these were relevant considerations for a trial court to take into account when deciding on an appropriate sentence.

13. There is nothing in the court record to indicate or to suggest that the learned trial magistrate meted the impugned sentence only because it was the mandatory minimum sentence prescribed by the law not because he found that it was the appropriate sentence for the appellant considering the facts and the circumstances of the case. The learned trial magistrate must have exercised his discretion after considering the factors stated above to arrive at the sentence of fifteen years imprisonment out of a possible sentence of life imprisonment.

14. I am not therefore persuaded that the learned trial magistrate failed to follow the spirit of the Supreme Court’s decision in the **Francis Muruatetu case (Supra)** as applied by the Court of Appeal in sexual offences in several subsequent decisions. See: **Dismas Wafula Kilwake V Republic, [2018] eKLR; Christopher Ochieng V Republic, [2018] eKLR; Evans Wanjala Wanyonyi V Republic, [2019] eKLR** among others.

15. That said, the question that now arises is whether the trial magistrate properly exercised his discretion in sentencing the appellant. I have noted from the evidence on record the circumstances in which the the offence was committed. There is nothing in the court record to show that in imposing the sentence, the trial court considered irrelevant factors or applied any wrong legal principle. Needless to state, gang rape is a serious and monstrous crime which robs the victim of her dignity and may cause her lifelong psychological trauma. It calls for a severe and deterrent sentence.

16. Taking all relevant factors into account, I am not satisfied that the sentence imposed on the appellant in this case was harsh or manifestly excessive. I thus find no basis upon which to interfere with the trial court’s decision. Consequently, I do not find any merit in this appeal and it is hereby dismissed.

It is so ordered.

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

**C. W. GITHUA**

**JUDGE**

**In the presence of:**

The appellant

Ms. Mati for the respondent

Mr. Wambugu Court Assistant