



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**CRIMINAL APPEAL NUMBER 27 OF 2018**

**ROBERT KARIUKI GATITU.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(An appeal against conviction and sentence before Hon. S.K. Mutai in Chief Magistrate Court at Embu in SO Case No. 33 of 2016 delivered on 23<sup>rd</sup> April, 2018)***

**JUDGMENT**

1. The appellant Robert Kariuki Gitatu was charged with the offence of rape contrary to Section 3(1) (a) (b) (3) of the Sexual Offences Act No.3 of 2006. The particulars are that on the 18<sup>th</sup> day of September, 2016 at [Particulars Withheld] Village in Embu Township within Embu County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of one FRM, without her consent.

2. The appellant was alternatively charged with the offence of committing an indecent act with an adult contrary to Section 11(A) of the Sexual Offences Act No.3 of 2006 the particulars being that on the aforementioned date and in the aforementioned area, the appellant intentionally touched the vagina of one FRM with his penis and without her consent.

3. Upon conducting the hearing, the trial court found that the prosecution had proved to the required standard that the appellant had committed the offences of rape and committing an indecent act with an adult, thereby convicting the appellant on the main charge of rape and sentencing him to a term of 10 years' imprisonment.

4. Being dissatisfied, the appellant has now appealed against the sentence awarded by the trial court by raising the following amended grounds of appeal:

***(i) THAT the learned trial magistrate erred in law when he failed to consider that the appellant being a first offender was qualified for a lenient sentence.***

***(ii) THAT the learned trial magistrate erred in law when he failed to take into account the appellant's dignity while imposing a harsh sentence.***

***(iii) THAT the learned trial magistrate erred in law when he failed to consider the appellant' mitigating factors as part of the trial.***

5. In disposing of the appeal, the appellant filed written submissions on 25<sup>th</sup> August, 2020 the contents of which he fully relied on. The respondent on its part opted to rely on the evidence tendered at the trial.

6. In his submissions, the appellant argued that in awarding its sentence, the trial court relied on the proviso of Section 3(1) (a) (b) (3) of the Sexual Offences Act No.3 of 2006 which imposes a minimum sentence of 10 years and is couched in mandatory terms, and yet the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR** determined that mandatory sentences deprive the courts of the discretionary power in imposing sentences.

7. The appellants argued that owing to the mandatory sentence stipulated under the aforementioned statute, the trial court did not take into consideration the mitigating factors presented by the appellant. The appellant referred this court to the case of **Yanyawale v Republic [2018] eKLR** where the court rendered itself thus:

***“...the provisions of a legislation that was in force before the Constitution of Kenya, 2010 such as the Sexual Offences Act. No. 3 of 2006 must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under***

**Article 27 of the Constitution as appreciated in the Muruatetu Case.”**

8. It was the contention of the appellant that being a first offender, he is entitled to a lesser and more lenient sentence.

9. I have considered the submissions filed by the appellant on appeal. It is apparent from the amended grounds of appeal that the instant appeal lies solely on the sentence imposed by the learned trial magistrate. As such, I will not interfere with the conviction and will restrict myself to the sentence meted out on the Appellant.

10. Turning to the trial court proceedings and particularly the judgment, I note that the learned trial magistrate; upon indicating that the appellant was a first offender; reasoned that the offence with which he was charged requires a deterrent sentence and ultimately issued a sentence of 10 years imprisonment.

11. **Section 3(1) (a) (b) (3) of the Sexual Offences Act No.3 of 2006** under which the appellant was charged and convicted provides as follows:

***“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term which shall not be less than ten years but which may be enhanced to imprisonment for life.”***

12. It is clear that the abovementioned Section makes provision for a mandatory minimum sentence of 10 years for the offence of rape, which is the sentence meted out by the learned trial magistrate upon the appellant.

13. Suffice it to say that under the current constitutional dispensation, it is a requirement that mandatory minimum sentences be considered in light of Article 27 of the Constitution (on equal protection before the law) as read with clause 7 of the Transitional and Consequential Provisions which provide as follows:

***“All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.”***

14. The appellant referred this court to the decision by the Supreme Court in the now renowned case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** where it rendered itself thus:

***“Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.***

***Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.”***

15. To sum it up, the Supreme Court in the above-cited case held that the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional and further held that mandatory sentences interfere with the right of an accused person to a fair trial.

16. Being guided by the foregoing, the Court of Appeal in the case of **Evans Wanjala Wanyonyi v Republic [2019] eKLR** cited in the appellant’s submissions succinctly stated that:

***“...we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act... In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand.”***

17. From the foregoing, it is clear that mandatory sentences impede the constitutional right to a fair trial since they take away the discretionary power of the courts and hinder them from adequately considering mitigating factors before awarding such mandatory sentences.

18. In my view, the case is no different in the present circumstances. Upon considering the above decisions of the superior courts and upon taking into account the mitigating factors presented by the appellant before the trial court, I am satisfied that the minimum sentence imposed upon the appellant ought to be interfered with.

19. Consequently, the appeal is hereby allowed and the sentence of 10 years’ imprisonment is hereby set aside and is substituted with an imprisonment term of 8 years.

**Dated, signed and delivered at NAIROBI this 23<sup>rd</sup> day of October, 2020.**

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent