



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NUMBER 19 OF 2018

JOHN KARIUKI KAMOTO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

On the 30th November, 2017 the Senior Principal Magistrate’s Court at Runyenjes found the Appellant guilty of Sexual Assault Contrary to Section 5 (2) of the Sexual Offences Act No. 3 of 2006. He was convicted and sentenced to serve fifteen (15) years imprisonment. Being aggrieved by the sentence, he filed the present appeal raising the grounds contained in the amended grounds of appeal, which are that;

1. The sentencing Magistrate erred in law and facts by failing to consider that the Appellant was entitled to the guaranteed benefit of the law under Article 27 (1) (2) (4) of the Constitution and hence imposed a harsh sentence.
2. The trial court erred in law and in fact by failing to consider that the Appellant was a first offender and thus entitled and qualified for the least severe punishment as stipulated under Article 50 (2) (P) of the Constitution.

He has urged the court to grant a lesser sentence.

It is important to note that the Appeal is on sentence only.

The particulars of the charge were that; on the 18th day of December, 2016 at about 14.30hours at [particulars withheld] Sub-Location within Embu County, intentionally caused his finger to penetrate the vagina of a child aged 7 ½ years.

He also faced an alternative charge of Committing an Indecent Act with “PW” a Child Contrary to Section 11(1) of the Sexual Offences Act no 3 of 2006. The particulars were that; on the 18th day of December, 2016 at about 14.30 hours at [particulars withheld] Sub-Location within Embu County, intentionally touched the vagina of “PW” a child aged 7 ½ years with his fingers.

In support of the charge, the prosecution called a total of four (4) witnesses. In his submissions, the Appellant submitted that this court has unlimited original jurisdiction in both Criminal and Civil matters and as such he sought the courts intervention in sentencing, in compliance with Article 25(C), 27(1) (2) and 50 (2) (P) of the Constitution.

He further submitted that being a first offender, he was entitled and qualified for the least severe of the prescribed punishment under Section 5(1) (2) of the Sexual Offences Act no. 3 of 2006 and under Article 50(2) (P) of the Constitution. He contended that the trial court failed to take into account his mitigation as well as the right to equality which includes the full and equal enjoyment of all fundamental freedoms as stipulated under Article 27 (2) as read with Article 50 (2) (P) of the Constitution. He submitted that the sentence of fifteen (15) years imposed on him was harsh and that in imposing the said sentence, the trial court failed to take into account the purpose of sentence of imprisonment which is not only retributive but also rehabilitation of the offender.

He urged the court to take into account the fact that he was arrested at a youthful age and that the experience and the suffering that he has undergone while in prison has helped him in self-realization. He has urged the court to be lenient on him and impose a soft sentence in conformity with the holding in the HC. CR. Application No. 29 of 2019 (Embu).

He submitted that the sentence failed to conform with the sentencing guidelines and urged the court to consider the poor state of his health. He also brought the court’s attention to Section 333(2) of the Criminal Procedure Code which, he submitted, was not complied with by the trial court when sentencing him in that the period he had spent in custody was not taken into account.

In her submissions, counsel for the Respondent submitted that the prosecution’s case was cogent and that all the witnesses were credible and

had no motivation to lie, adding that, the Appellant was granted ample opportunity to cross examine the witnesses and therefore, Article 27 of the Constitution was fully complied with.

She submitted that the Appellant's defence was weak thus warranting the conviction and sentence imposed by the trial court. She urged the court to be guided by the decision in the case of **Bernard Kimani Gacheru vs. R (Cr. Appln. 188/2000** in which the court held that sentencing rests in the discretion of the trial court and that sentencing must depend on the particulars of each case.

The court has considered the submissions by the Appellant and the counsel for the Respondent. As already pointed out, the Appeal herein is on sentence only.

The Appellant submitted that the sentence is excessive and harsh and that the court should give him a lenient sentence for reasons that he has set out in his submissions.

From the record, he was convicted on the main charge of Sexual Assault Contrary to Section 5(1) of the Sexual Offences Act which provides as follows;

(1) Any person who unlawfully-

(a) penetrate the genital organs of another person with; -

(i) Any part of the body of another or that person; or

(ii) An object manipulated by another or that person except where such penetration is carried out for proper and professional hygienic or medical purposes;

(b) Manipulates any part of his or her body or the body of another person so as to cause penetration of the genital organ into or by any part of the other person's body; is guilty of an offence termed sexual assault.

The sentence is provided under Sub-Section (2) which reads;

“A person guilty of an offence under this section is liable upon conviction to imprisonment for a term not less than 15 years which may be enhanced to imprisonment for life.

In his submissions and in support of his grounds of Appeal the Appellant has relied on Article 25 (C); 27(1) (2) (4) and 50 (2) (P) of the Constitution.

The court has perused the aforesaid articles and notes that Article 25(C) is on the right to a fair trial, Article 27(1) and (2) is on equality and freedom from discrimination while Article 50(2)(P) is on the benefit to the least severe of the prescribed punishment for an offence but this only becomes applicable if the prescribed punishment for the offence has changed between the time the offence was committed and the time the sentence was imposed, which is not the case herein.

A cursory perusal of all those Articles reveals that the trial court did not contravene any of them when sentencing the Appellant to serve the imprisonment term of 15 years.

As rightly submitted by counsel for the respondent, sentencing is a matter that rests in the discretion of the trial court as it was stated in the case of **Bernard Kimani (supra)** as follows;

“It is now settled law following several authorities by this court and the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with the 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 discretion of the trial court on sentence unless any of the matter already stated is shown to exist”.

The record shows that the Learned Magistrate considered the mitigating circumstances and also called for a social inquiry report, which it also took into account. The trial could also had the advantage of seeing the witnesses testify and also the Appellant when he gave his defence. There is nothing to suggest that the Learned Magistrate overlooked some material factor or took into account some wrong material or that he acted on wrong principle.

On the Appellant's health condition, the court has perused the attached medical report dated the 8th January, 2020 and has noted the contents thereof. The report has not stated that his condition is so dire as to require this court's intervention by way of a non-custodial sentence. In fact, the report is so sketchy and does not contain a detailed account of the condition that the Appellant is suffering from.

The Appellant has also not stated that the medical services offered at the prison are inadequate so as not to give him the support that he requires. In any event, he could still be attended to in a referral hospital for specialized treatment if the need arises.

For the reasons that the court has given, I find nor reason to interfere with the sentence that was imposed by the trial court. the same is upheld. However, I note that as rightly submitted by the Appellant the period that he had spent in custody was not taken into account at sentencing, which is contrary to Section 333(2) of the Criminal Procedure Code. In that regard, I do hereby direct that the sentence of fifteen (15) years shall run from 21st December, 2016 when he was arraigned in court and charged as there is no indication that he managed to raise the bail and/or comply with bond terms.

In the end the Appeal is hereby dismissed and the sentence of 15 years imprisonment imposed by the trial court is upheld.

It is so ordered.

Dated, Delivered and signed at **EMBU** this **23rd** day of **October, 2020**.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent