REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT GARSEN

CRIMINAL REVISION NO. 74 OF 2020

ATK.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

Coram: Justice Reuben Nyakundi

Applicant in person

Mr. Mwangi for the State

RULING

The appeal raises primarily the issue of conviction and sentence of the appellant who alleges that at the time of that order he was aged below (18) eighteen years old.

Background

The appellant was charged with the offence of defilement with a child contrary to Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that on diverse dates between 31.3.and 5 April 2019 at [particulars withheld] village, in Tana Delta Sub-County within Tana River County intentionally caused his penis to penetrate the vagina of AKT a child aged (15) years old.

On consideration of the matter, it's on record that the appellant pleaded guilty to the charge and later on conviction sentenced him to 15 (fifteen) years imprisonment.

He now appeals to this Court against being convicted and sentenced to 15 (fifteen) years imprisonment which in his view was under age. It is against that background of facts that I come to consider the legal position.

Determination

The essence of all appeals Court is to primarily deal with two aspects of the impugned Judgment. First decisions on conviction and thereafter verdict on sentence.

The Law

According to the principles in **Bernard Kimani Gicheru v R CR Appeal No. 188 of 2000** the Court's decision is clear and unambiguous on this issue:

> ***"It is now settled Law, following several authorities by this Court and by 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 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 to wrong material or acted on 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."***

Appellate Courts are under a duty to re-evaluate and re-examine both convictions and sentence verdicts to prevent substantial miscarriage of

justice on the part of the convict.

As a matter of principle, the discretion of the Court remains unfettered when it comes to sentencing the convicted offenders. It can therefore only be said that the rationale behind the letter and spirit under the Sexual Offences Act is to avoid disparities which are likely to occasion prejudice and an injustice at the very end.

The Court of Appeal in **Dismas Wafula Kilwake v Republic {2018} eKLR** opined and took this position on the standard of review thus observed as follows:

> ***"We hold that the provisions 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 legislative and the society take the offence of defilement. In appropriate cases therefore, the Court, freely exercising its discretion 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."***

In the instant case the problem before the trial Court was therefore, whether in sentencing the appellant it was mistaken about his age. From the record it is clear that upon conviction, the trial Court set out the sequence of events so that the vital evidence on the age of the appellant could be ascertained. In addition to the Learned trial Magistrate observations a medical report on age assessment was demanded by the Court. It is noted that the medical report by **Dr. Ariga** of Malindi Sub-County Hospital assessed the age of the appellant at 18 (eighteen) years old. The position taken by the appellant was that on the face of it the offence was committed while under the age of maturity.

In this context, the appellant submits that the trial Court should have applied Section 190 as read with 191 (1) of the Children Act to impose an alternative penalty in place of the custodial 15 (fifteen) years imprisonment. Difficulties may arise an appeal to subject that issue on age as a ground to invalidate the decision without sufficient evidence essential or the Court to act as provided for under **Okeno v R {1973} EA.**

As was pointed out in **J.K.K. v R {2013} eKLR**:

> ***"the dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 (seventeen) years, when he was first arraigned in Court in March 2009. It is now four years later which means he is now over the age of 18 (eighteen) years, therefore, he is not suitable to be subjected to any of the sentences provided under the Childrens Act. The purposes of the sentences provided for under the Childrens Act are meant to correct and rehabilitate a young offender….. The offence committed by the appellant is very serious. The appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of Judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence."***

However, from the medical evidence, the prosecution provided a case to be met by the appellant. It overwhelmingly established that the natural and reasonable inference given the expert age assessment to say the least, the prosecution evidence stands unchallenged. Therefore, if the conclusion to which the proof tends to be true, and the appellant offers no explanation or contradiction then the Court has every right to adopt such an inference to make a finding on guilt as an adult offender and not a minor.

I agree that there is a statutory basis for that evidence which I tend to agree proves the fact of age. However, it is here I take up some of the key points made by the appellant in this appeal whether the fact of 18 (eighteen) years was proved beyond reasonable doubt by that medical test called in by the Court. The jurisdiction requirements here was for the Court to request the medical officer to determine the age of the appellant whose real age was unknown at the time of plea and conviction.

The purpose was for the Court to ascertain whether the appellant had reached the age of majority. Assessing and interpreting age related factors by the medical officer involves various estimation methods to qualify as expert evidence under Section 48 of the Evidence Act.

For purposes of this Judgment an Article on Dental Age assessment (www.researchgate-nel>publication,291343131) outlined by **Manjunath Puranik** identified different vital parameters applied to estimate the age of a person they include:

> ***"dental age, bone age, mental age, and other factors such as menarche, voice change, height, and weight are considered as proxy indicator for biological age and body development. Dental maturity is more relevant as it is less affected by nutritional and endocrine status."***

As indicated above the evidence on age estimation raises serious legal questions more so in the criminal justice system. In the sense of using it as an element to pass sentence against a convicted offender. The approach of the Court in this matter is to strongly avoid relying on borderline medical assessment reports on age so as not to misclassify a minor by treating him as an adult.

It should bear in mind that depending on the various indicators and methods used to estimate age of an individual there may be circumstances of variation of ascertaining the age with precision. In the instant case its clear the Court was not told the methods of age assessment estimation applied by **Dr. Anga** of Malindi Sub-County Hospital. In such a case the benefit of doubt should be resolved in favour of the offender or accused person.

In my view on this element, the trial Magistrate misinterpreted the evidence which clearly provides that the appellant was about eighteen (18)

years old.

Leaving this dilemma in age aside for a moment the question for this Court is whether there are factors of significance in the present case to afford the appellant an alternative sentence. The essence of this appeal is encapsulated in the cited passage of the Judgment of the **Supreme Court in Francis K. Muruatetu v R {2017} eKLR.**

> ***" which he undertook an analysis and stressed the need for taking into account key guidelines while exercising discretion in sentencing an offender. As summarized the underlying factors include:***
>
> ***(a). Age of the offenders***
>
> ***(b). Being a first offender***
>
> ***(c). Whether the offender pleaded guilty***
>
> ***(d). Character and record of the offender***
>
> ***(e). Commission of the offence in response to gender based violence remorsefulness of the offender***
>
> ***(f). The possibility of reform and social re-adaptation of the offender***
>
> ***(g). Any other factor that the Court considers relevant.***

In accordance with our sentencing policy guidelines the trial Court ought to factor in the embodied penological principles to use.

> ***(a). Proportionality – the sentence must be proportionate to the gravity of the offending behavior. It should be proportionately and appropriately reflect the seriousness of the offence parsimony – the sentence should not be more severe than is necessary to meet the purposes of sentencing deterrence, which is concerned with punishing an individual for the wrong doing with a possibility of deterrence. Retribution, which rests on the notion that an offender deserves to be punished for the offence.***

In **Veen v The Queen No. 2 {1987 – 88} 164 CLR 465** the Court held thus:

> ***"However, sentencing is not a purely logical exercise and the troublesome nature of the sentencing discretion arises in large measure from unavoidable difficulty in giving weight to each of the purpose of punishment. The purposes of criminal punishment are various, protection of society, deterrence of the offender and of others, who might be tempted to offend, retribution and reform. The purposes overlap and gone of their can be considered in isolation from the others when determining which is an appropriate sentence in a particular case. They are guide posts to the appropriate sentence but sometimes they point the different directions."***

In my view, the sentencing guidelines and the dictum in **Muruatetu case** provide critical steps for a sentencing Court take in achieving consistency and fairness. The jurisprudence on this issue has evolved to where the nature and degree of harm caused or threatened most often remain to be the only relevant considerations.

In my view there is need to lower the stigmatized rate of high number of youths being incarcerated in respect of the offences under the Sexual Offences Act. The legislative direction on minimum sentences reasonably did not take away the discretion of trial Courts to consider a range of factors as espoused in the **Muruatetu case** and the sentencing guidelines. In practical terms I do not think the trial Court should not lose sight of the nature and extent of the offenders social/cultural context and how those factors may have had an impact on the commission of the offence.

In rending this decision on appeal, I bear in mind all such considerations and personal circumstances of the appellant like his age, being a first offender, the entry of a plea of guilty in the first instance and the likelihood of re-offending. By contrast its apparent that there was a failure on the part of the Learned trial Magistrate to invoke some of these core principles in sentencing young adults. To use statement and observations made in **R v Clarke {2018} EWCA CRIM 185 – The Lord Chief Justice** stated:

> ***"Reaching the age of 18 (eighteen) has many legal consequences, but it does not present a cliff edge for the purposes of sentencing. So much has long been clear. Full maturity and all the attributes of adulthood are not magically conferred on young people on their 18th birthday. Experience of life reflected in scientific research e. g. "the age of adolescence, the latter, cum/child adolescent, the youth and maturity of an offender will be factors that inform any sentencing decision, even if an offender has passed his or her 18th birthday."***

It is further argued and is an important feature in sentencing young adults that:

> ***"where a custodial sentence is imposed, the juror or Judge should take into account the impact of prolonged custody on the young adults well being and life chances.* (See Centre for Youth & Criminal Justice {2018} info that 71 (Laps/cyc/org.uk/wp – content (uploads/2018/03/inforsheet/71PDF).**

Its equally a matter of common sense that even where the facts of the case are similar, the extent to which inevitable disparity in sentencing is likely to occur for the very simple reason that Judges and Magistrates are endowed with discretion, poses a great challenge to achieve parity and uniformity thus:

> ***"Hall on reducing disparity by judicial self-regulation sentencing factors and guidelines Judgments {1991} 14 N2 ULR 208, observed:***
>
> ***"Sentencing is not a rational mechanical process, it is a human process and subject to all the frailties of the human mind. A wider variety of factors, including the Judge's background, experience, social values, moral outlook, penal philosophy and views to the merits or demerits of a particular penalty inference the sentencing decision."***

Applying the above principles in the case at bar, there cannot be any problem with the conviction of the appellant. The plea as tendered by the appellant was an unequivocal. The difficulty arises whether the fifteen years period of imprisonment should be retained or varied by this Court.

As an appeals Court, I must bear in mind the broad aims of the legislature in enacting various types of punishments for particular offences as well as exercise of discretion pursuant to the Supreme Court guidelines in **Muruatetu v R (supra).** Looking the approach taken by the legislature in determining punishment for sexual offences, on the face of it significant. Focus was on the victim and public interest as opposed to the rehabilitation and transformation of the offender.

A principle which might prove important is propounded in the Constitution under Article 25 (a) which provides:

> ***"Freedom from torture and cruel inhuman or degrading treatment or punishment. Invariably for the charge which the appellant was charged the statutory sentence is set at fifteen (15) years imprisonment. This wide statement ought to confine decisions made by trial Courts within that period. The problem in this context is whether minimum sentences are immune with the criterion laid down in by the Supreme Court in Muruatetu case. For the sake of these principles sentences meted out ought to be in conformity with the sentencing guidelines punctuated by the criterion Muruatetu dictum."***

The issue in question in this appeal is whether the age, antecedents, the degree of participation, the possibility of rehabilitation or re-offending, and the personal circumstances of the appellant were taken into account in the final verdict.

In **R v Keke (404 of 2010 {2013} NWHC 450** the Court considered and rightly so that:

> ***"One most consideration in sentencing is about the offenders' age. For ages between 19 and 25, commission of a crime may be a result of impetuous, immaturity, youth or adventure. A severe sentence may be perceived by a young offender as reflecting a harsh society on which to avenge. Long prison sentences for young persons may actually delay integration to enable a young life to start a new life and lead a meaningful life. For young offenders, therefore, a short, quick and sharp sentence may achieve the ends of justice and deter future offending."***

I think that the **Muruatetu** predominant principles made it clear by expressing that the object of discretion is to provide sentencing Courts with the power to leverage in the light of all the circumstances of the case to determine a fair and just sentence to achieve the ends of justice of the case.

Nonetheless two conclusions may be made with the impugned Judgment in this context. The first is that age of the appellant was generally an estimation. He would be as well be under the age of 18 (eighteen) years old. Although the Learned trial Magistrate dealt with a number of procedural points on this aspect he did however fail to appreciate the evidence presented on the age given about the appellant. I accept as true that the evidence was on a balance of probabilities.

The second conclusion is that if he indeed having found the appellant was eighteen (18) years old, the Learned trial Magistrate did not seem to give effect to the aims and principles in the **Muruatetu case (supra)** and sentencing policy guidelines to affix the fifteen (15) year prison sentence. It must also be said that sentencing guidelines are relevant indicators though not binding. They provide a framework to the trial Judge/Magistrate in exercising discretion in this solemn duty of imposing sentence.

At the outset it looks like minimum sentences narrow the scope of discretion of the trial Judge or Magistrate but room left by judicial decisions is crucial to some extent to exercise Judgment geared at direct and indirect gains for the offender.

In all the circumstances of this case, I am of the view that the Judgment on sentence did not adequately comply with the above imperatives and in a way the appellant was prejudiced. Upon that view, I have taken of this case, it's necessary for me to state that conviction is confirmed, but the sentence imposed was not in compliance with the Law. The appeal on sentence is accordingly allowed. The appellant be and is hereby set free and is at liberty unless otherwise lawfully held.

DATED, SIGNED AND DELIVERED AT GARSEN THIS 27TH DAY OF NOVEMBER 2020

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R. NYAKUNDI

JUDGE