REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 2 OF 2020

EIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant, *EIN* was charged and convicted of the offence of incest contrary to *Section 20 (1)* of the *Sexual Offences Act*.

The particulars supporting the charge alleged that on 21st September 2017 in Embu North subcounty within Embu County, he intentionally caused his genital organ to penetrate the genital organ of CNN, a child aged 13 years who was to his knowledge, his niece.

2. Upon conviction, the appellant was sentenced to serve forty (40) years imprisonment. He was aggrieved by his conviction and sentence. He proffered an appeal through a petition of appeal filed on 27th January 2020 but on 25th August 2020, he amended his grounds of appeal and abandoned his appeal against conviction. He decided to pursue his appeal against sentence only.

3. In his amended grounds of appeal, the appellant complained that the learned trial magistrate erred in law and fact by failing to consider that he was a first offender and was entitled to the benefit of the least severe punishment; by failing to consider his plea in mitigation and failing to exercise her discretion in sentencing resulting in the imposition of the mandatory minimum sentence prescribed by the law.

4. At the hearing, both the appellant and the respondent chose to rely entirely on their written submissions. In a nutshell, the appellant submitted that the sentence meted by the trial court was very harsh considering that he was a first offender; that following his experiences in prison, he is now rehabilitated and ready to rejoin the society; that the long period of incarceration will make it difficult for him to rebuild his life after completion of sentence. Relying on the Supreme Court's decision in ***Francis Karioko Muruatetu & Another V Republic & 5 Others, [2017] eKLR*** and ***Evans Wanjala Wanyonyi V Republic, [2019] eKLR***, the appellant implored me to set aside the sentence imposed by the trial court and substitute it with a lenient sentence.

5. The appeal is contested by the respondent. In her submissions, learned prosecuting counsel *Ms. Mati* urged the court to dismiss the appeal for lack of merit. She pointed out that there was evidence in the court record showing that the learned trial magistrate exercised her discretion in sentencing and found a term of 40 years imprisonment appropriate for the appellant after considering the aggravating factors disclosed in the case.

6. Further, counsel submitted that the punishment prescribed by the law for the offence of incest was life imprisonment and, in her view, the sentence of forty years imprisonment was too lenient. She invited the court to consider the seriousness of the offence and the relationship between the appellant and the victim.

7. I have considered the grounds of appeal and the rival submissions made by both parties. I have also read the trial court's record. This being an appeal against sentence, it is important to consider the principles that guide an appellate court in deciding whether or not to interfere with the sentence meted by the trial court.

8. As a general rule, sentencing is always at the discretion of the trial court but needless to state, that discretion must be exercised judiciously in accordance with the law bearing in mind the objectives of sentencing as set out in the *Sentencing Policy Guidelines, 2016* published by the Kenya Judiciary.

9. An appellate court should be slow to interfere with the sentence passed by a trial court and will only disturb it if it is established that the sentence was illegal or that in sentencing, the trial court failed to take into account relevant factors or took into account irrelevant ones or that it applied the wrong legal principles. An appellate court can also interfere with the sentence if in its view, the sentence was harsh or manifestly excessive in the circumstances of the case. See: ***Bernard Kimani Gacheru V Republic, [2000] eKLR; Macharia V Republic, [2003] KLR 115***.

10. In this case, in her pre-sentence notes, the learned trial magistrate stated as follows:

> ***"The court considers the mitigation by the accused. The court considered the impact of the offence on the victim who was apparently concerned about her relations with the extended family as a result of the incident. The court bears in mind the provisions of the law with regard to the sentence in incest cases vis a vis the development of the law with regard to life sentences. The court sentences the accused to serve 40 years imprisonment. The sentence shall commence from 22nd September 2017"***

11. It is clear to me from the above passage that when sentencing the appellant, the learned trial magistrate was well aware of the jurisprudence that has developed with regard to imposition of minimum mandatory sentences prescribed by the law following the Supreme Court's decision in the ***Muruatetu case [supra]***.

In this case, the Supreme Court declared as unconstitutional minimum mandatory sentences to the extent that they deprived a trial court of its legitimate discretion in sentencing. The Supreme Court's decision was subsequently applied to the minimum mandatory sentences prescribed for sexual offences under the Sexual Offences Act. See: ***Christopher Ochieng V Republic [2018] eKLR***; ***Evans Wanjala Wanyonyi V Republic [2019] eKLR*** among others.

12. In this case, I have no doubt in my mind that the learned trial magistrate exercised her discretion in sentencing after considering the appellant's mitigation and the impact of the offence on the victim. The record however shows that the trial court did not give the prosecution an opportunity to address it on whether or not the appellant was a first offender or on any other matter relevant to sentencing that would have assisted it in reaching a fair determination on the sentence most appropriate for the appellant in this case. This in my view was an error on the trial court's part.

13. Under *Section 216* of the *Criminal Procedure Code*, a trial court is required to receive evidence prior to passing sentence to inform it on the proper sentence to impose on a convict. I am alive to the fact that this provision is not couched in mandatory terms but in my view, it is important for trial courts to comply with it since, one, it is part of our law and, secondly, it serves a useful purpose in the sentencing process.

14. In my opinion, the provision is meant to enable the trial court to receive material information relevant to sentencing from the prosecution, the convict and other stakeholders in the criminal justice system, for instance, the probation services to help it determine whether or not the convict was a first offender or whether there were any special circumstances pertaining to the convict or the case at hand that would require consideration when exercising its discretion in deciding the suitable sentence to impose in each case.

15. The appellant has maintained that he is a first offender and though he did not make this claim in his plea in mitigation, his claim has not been disputed by the respondent. Am minded to give the appellant the benefit of doubt and accept his claim that he was a first offender. Under *Section 20 (1)* of the *Sexual Offences Act*, a person convicted of the offence of incest where the victim is a female aged below eighteen (18) years of age is liable to imprisonment for life. It is noteworthy that the victim in this case was 13 years old.

16. In exercising her discretion, the learned trial magistrate did not seek to establish whether or not the appellant was a first offender which is one of the most important factors a trial court ought to consider when making its sentencing decision. I have considered the gravity of the offence and the impact it had on the victim but having accepted the appellant's claim that he was a first offender, I am persuaded to find that a sentence of 40 years imprisonment was rather harsh and manifestly excessive in the circumstances of this case.

17. In view of the foregoing, I have come to the conclusion that the appellant's appeal against sentence is merited and it is hereby allowed. The sentence meted by the trial court is hereby set aside and is substituted with a sentence of twenty years imprisonment which shall commence from the date of sentence by the trial court.

It is so ordered.

DATED and SIGNED at NAIROBI this 24th day of November 2020.

C. W. GITHUA

JUDGE

DATED and DELIVERED at EMBU this 26th day of November 2020.

L. NJUGUNA

JUDGE

In the presence of:

Appellant present in person

Ms Mati for the respondent

Esterina: Court Assistant