



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 129 OF 2018

CHULA OMARI CHULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original sentence in the Chief Magistrate Court at Kwale*

*S.O. No. 36 of 2017 by Hon. P.W. Mwangi (PM) dated 9<sup>th</sup> July 2017)*

*Coram: Hon. R Nyakundi*

*Mr. Muthomi for the Respondent*

*Appellant in Person*

**JUDGMENT**

The Appellant was charged with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The particulars of the offence was that on the 13<sup>th</sup> day of April 2017 in Msambweni District of Kwale County within Coast region, unlawfully and intentionally committed an act which caused his penis to penetrate into the vagina of UCO a girl aged 9 years.

The Appellant was charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act. The particulars of the offence are that on the 13<sup>th</sup> day of April 2017 in Msambweni District of Kwale County within Coast region, indecently committed an act to UCO a girl aged 9 years by touching her genital organ (vagina).

The Appellant pleaded not guilty and after hearing, he was acquitted on the main charge but was convicted on the alternative count and sentenced to 20 years imprisonment

Aggrieved by the said sentence, the Appellant filed his amended grounds of appeal reproduced verbatim that: -

**1. That the learned trial Magistrate erred in both law and fact buy sentencing me to serve 20 years imprisonment of indecent act without considering that the same was harsh unjust, unfair, unconstitutional and against the objectives of the sentencing policy guidelines.**

**2. That the learned trial Magistrate erred in both the law and fact by sentencing me to serve 20 years imprisonment for the offence of indecent act without considering my reasonable defence.**

The Appellant filed his written submissions on 31<sup>st</sup> July 2020 in support of his appeal. He submitted that the sentence was harsh unfair, unjust, unconstitutional and was not proportional to the offence committed and against the objectives of the sentencing policy guidelines. He contended that under Article 50(2)(p) of the Constitution, he should have benefited from the least severe sentence of 10 years imprisonment as stated in section 11(1) of the Sexual Offences Act. He relied on **Francis Karioko Muruatetu & Another v Republic Petition No. 15 of 2015; S v muchumu & Another (AR 24/11) (012) ZAK APHC 6 Kwa Zulu Natal High Court** and; **Samuel Achieng Alego v Rep Cr. App No. 187 of 2015.**

Mr. Muthomi advocate for the Respondent filed his submissions dated 16<sup>th</sup> July 2020 on the same date in support of the appeal. He submitted that the court had powers to impose appropriate sentences even where minimum sentence were prescribed and that courts frowned on

mandatory sentences that placed a limitation on judicial discretion. He contended that the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to minimum sentences.

Mr. Muthomi submitted that the learned trial Magistrate's decision to mete out the sentence was due to the fact that his hands were tied by the apparent mandatory minimum sentence. He stated that the learned trial Magistrate was actuated by emotions rather than the law and did not allude to any aggravating factors that militated him to enhance the sentence from the minimum provided by law.

Counsel stated that the Appellant had a wife and two children, was remorseful and was a first offender. He urged the court to interfere with the sentence averring that the sentence was manifestly excessive and that justice would be served better by sentencing the Appellant to 5 years imprisonment.

### **Analysis and determination**

I have considered the submissions by both parties. It is clear that the appeal is against the sentence only.

It is well established that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR** where it stated: -

***“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In Bernard Kimani Gacheru v. Republic, Cr App No. 188 of 2000 this Court stated thus:***

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 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 Wanjema v. Republic [1971] E.A 493).***

The Appellant was convicted of committing an indecent act with a child under section 11 of the Sexual Offences Act and provides for a minimum sentence of 10 years. The trial Magistrate sentenced the Appellant to 20 years that I confirm was lawful and within the discretion of the court. The only question is whether the sentence was excessive and manifestly harsh taking into consideration of the facts before the court.

It is trite that the court in sentencing should taking into consideration the mitigating factors as well as aggravating factors. The Supreme Court in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** pronounced itself thus: -

***To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***

- (a) age of the offender;***
- (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;***
- (f) remorsefulness of the offender;***
- (g) the possibility of reform and social re-adaptation of the offender;***
- (h) any other factor that the Court considers relevant.***

The Judiciary's Sentencing Policy Guidelines 2016 sets out a list of aggravating and mitigating factors in paragraphs 23.7 and 23.8 respectively while paragraph 23.9.4 of the guidelines outlines the determination of a sentence where there are mitigating and aggravating circumstances

Moreover, the court should be guided by purpose of sentencing as was considered by Mativo J in **D M W v Republic [2015] eKLR** when he pronounced himself as thus: -

“I have also considered the purpose of sentencing and the principles of sentencing under the common law which are:-

- i. To ensure that the offender is adequately punished;*
- ii. To prevent crime by deterring the offender and other persons from committing similar offences;*
- iii. To protect the community from the offender;*
- iv. To promote the rehabilitation of the offender;*
- v. To make the offender accountable for his or her actions;*
- vi. To denounce the conduct of the offender*
- vii. To recognize the harm done to the victim of the crime and the community prevent*

Guided by the above principles, I hereby reduce the sentence from life imprisonment to forty years. The sentence shall run from the date of conviction by the lower court.

The 2016 Judiciary of Kenya Sentencing Policy Guidelines lists the objectives of sentencing at page 15, paragraph 4.1 as follows:

- 1. Retribution: To punish the offender for his/her criminal conduct in a just manner.*
- 2. Deterrence: To deter the offender from committing a similar offence subsequently as well as to discourage other people from committing similar offences.*
- 3. Rehabilitation: To enable the offender reform from his criminal disposition and become a law abiding person.*
- 4. Restorative justice: To address the needs arising from the criminal conduct such as loss and damages. Criminal conduct ordinarily occasions victims', communities' and offenders' needs and justice demands that these are met. Further, to promote a sense of responsibility through the offender's contribution towards meeting the victims' needs.*
- 5. Community protection: To protect the community by incapacitating the offender.*
- 6. Denunciation: To communicate the community's condemnation of the criminal conduct.”*

In *Dalmas Omboko Ongaro v Republic* [2016] eKLR the court stated that:

*10. The principles of sentencing were summarized at page 86 paragraph B of the Judiciary Bench Book for Magistrates in Criminal Proceedings (published by the Kenyan Judiciary in 2004) as follows:*

*“In determining what is the appropriate sentence to mete out...The Court may also consider the value of the subject matter of the charge (Mathai v R [1983] KLR 442) and whether there has been restitution of the property by the accused (Hezekiah Mwaura Kibe v R [1976] KLR 118).”*

*The antecedents of an accused person also come into play when the Court is considering the appropriate sentence. If an accused person is a first offender the sentence ought to reflect this fact as the aim of the Court is to encourage reform and discourage recidivism.” (Emphasis mine).*

The trial court in passing its sentence stated that: -

*“Section 11(1) of the Sexual Offences Act 2006 provides a sentence of not less than 10 years. This is mandatory. The accused was pestering his own daughter shameless. This was very undesirable of any human being and barbaric. He should be incarcerated for a long time. These animalistic behaviours of paedophiles are discouraged. I therefore jail the accused for 20 years in jail.”*

I have perused the record of the trial court and weighed the mitigating factor that the Appellant was a first offender against the aggravating factor that the Appellant being the father of the victim abused his position of trust and authority.

Additionally, the Appellant deserved a sentence that would serve as a deterrence to other would be offenders not to abuse their position of trust as a guardian to children and those in their care. Nevertheless, the court notes that the Appellant was a family man with three children depending on him and he required a sentence that would also rehabilitate him and allow him to return to his family once reformed.

However, the trial Magistrate only sort to punish the Appellant and did not consider that he was a first offender. I would therefore disagree with the Appellant that the 20 years sentence was too harsh to be interfered with by this court.

The upshot is that sentence and conviction is hereby affirmed. The appeal is dismissed in its entirety.

Right to appeal 14 days.

Orders accordingly.

**Judgment delivered, dated and signed at Malindi this 18<sup>th</sup> day of December, 2020.**

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**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

**The Appellant in person**

Mr. Onyango for the State.