REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 22 OF 2018

PAUL MUREITHI KARUNGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was convicted with three counts of the offence of defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve thirty-five (35) years imprisonment in each of the counts and ordered to run consecutively.

2. Aggrieved by the said decision, he lodged the instant appeal vide Petition of Appeal dated 18/06/2018 wherein he challenged both the trial court's conviction and sentence. However, the grounds of appeal were subsequently amended vide the amended grounds of appeal filed contemporaneously with the appellant's submissions wherein the appellant challenged the sentence by the trial court for being harsh and/or excessive and prayed the same to be substituted with a lesser sentence in compliance with article 50(2)(p) of the Constitution of Kenya.

B. Submission by the parties

3. The appeal was canvassed by way of written submissions wherein the parties advanced their respective positions in regard to the appeal. The appellant submitted that the sentence was harsh and excessive. The respondent on her part (through Ms. Leah-the Learned Counsel for the State) submitted that sentence is at the discretion of the trial court and the trial court acted judiciously in meting out the sentence against the appellant herein.

C. Issues for determination

4. As I have noted hereinabove, the instant appeal is against the sentence. The principles upon which an appellate court would interfere with sentence were laid down by the Court of Appeal in **Bernard Kimani Gacheru –vs- Republic, Cr App No. 188 of 2000** where it was held that;

> ***"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 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 the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.....***
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> *{See also **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** **(unreported) and Shadrack Kipchoge Kogo –vs- R Criminal Appeal No. 253 Of 2003}.***

5. The issue which needs to be determined from the above therefore is whether the appeal herein presents any of the above conditions so as to warrant interference with the sentence subject of the said appeal.

D. Application of law and determination

6. The appellant was charged with three counts of defilement all of which were contrary to Section 8(1) as read together with 8(3) of the Sexual Offences Act. Section 8(1) defines defilement as ***"committing an act which causes penetration with a child."*** Section 8(3) on the

other hand provides that "***A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."*** At the time of meting out the sentence against the appellant herein (on 12/06/2018), the law provided for the minimum sentence and the appellant was sentenced to 35 years imprisonment for the three counts facing him. This in my opinion was within the sentence provided under the section he was charged with.

7. As such, it is my view that from the express provision of the Act, the sentence of 35 years in each count was neither manifestly excessive in the circumstances of the case nor did the trial court overlook some material factor. Further, the trial court cannot be said to have taken into account some wrong material or acted on wrong principles. The Act provides for the minimum sentence and not the maximum.

8. However, there is now new jurisprudence pursuant to the Supreme Court's decision in the now well-known decision in **Francis Karioko Muruatetu & Another –vs- Republic [2017] eKLR, Petition No. 15 of 2015 whereby the Learned Judges held that Section 204 of the Penal Code is unconstitutional since it provides for compulsory death sentence. This, according to the Supreme Court denies the trial court discretion while sentencing and thus the same is in violation of right to a fair trial.**

9. The dictum in the said case has been applied in Sexual Offences Act by the Court of Appeal to the effect that provisions of the said Act which provided for minimum mandatory sentence was unconstitutional. For instance, the Court of Appeal in the case of **Dismas Wafula Kilwake vs Republic [2018] eKLR** the Court extended the reasoning of the Supreme Court in the Muruatetu decision to mandatory minimum sentences provided under the Sexual Offences Act and held that Section 8 of the Sexual Offences Act must be interpreted in a way that does not take away the discretion of the Court in sentencing. **Pursuant to this jurisprudence,** mandatory minimum sentence is unconstitutional and an appellate court is bound to interfere with it.

10. The sentence meted upon the appellant on 12/06/2018, clearly shows that the trial court in sentencing the appellant did not exercise its discretion as its hands were tied by the provisions of the law. As such, this court can review the said sentence pursuant to **Muruatetu's decision** and its application to offences under the Sexual Offences Act.

11. However, the discretion by this court in resentencing is only exercisable in appropriate cases **and if the circumstances of the case so demand. The court ought not be constrained by Section 8 to impose the provided sentences if the circumstances do not demand it. The same should be done bearing in mind that t**hose provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. (See **Dismas Wafula Kilwake vs Republic (supra)).**

12. Further, in resentencing, this court has the obligation to bear in mind that one of the primary objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is committed and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. (See **Charles Ndirangu Kibue v Republic [2016] eKLR).**

13. The court ought to also bear in mind the obligation imposed on it by the Judiciary Sentencing Policy Guidelines to take into account the aggravating and mitigating circumstances and their effects on the sentence in determining the most suitable sentence.

14. In the instant case, I note that the appellant faced three counts of defilement and which acts were committed on each of the complainants on different dates (from 21/05/2017 to 23/05/2017). I further note that the ages of the victims are 9 years for the victim in count one, 12 years for the victim in count 2 and 8 years for the victim in count 3. When the appellant was invited to mitigate by the trial court, he did not say anything. The prosecution counsel invited the court to treat the appellant as a first offender. According to the Medical Examination Report which was produced before the trial court, the appellant was 40 years at the time of the offence and thus he had just "began his life".

15. As the trial court rightfully noted during sentencing, the offences involved three victims and was of grave nature and cowardly. The same destroyed the victims' physically and psychologically. The wounds inflicted on the minors will never heal. In my opinion, the appellant at his age was like a father to the victims and who ought to be their protector and mentor. However, he turned against the very persons he ought to be protecting and nurturing. I find that such acts ought to be adequately punished. One of the objectives of sentence is to punish the accused for offences committed.

16. However, considering that the appellant is a relatively young person, and further that he is a first offender and considering the totality of the circumstances, a long custodial sentence would not serve the interests of justice. On the other hand, the law recognizes the seriousness of the act of defilement. The psychological effect of the offence on the 9 – 12-year-old victims cannot be underestimated. The Appellant despite having not offered any mitigation in the trial court has nonetheless shown remorse for his actions.

17. It is my considered view that from the foregoing, the sentence of 35 years imprisonment in each of the counts ought to be interfered with and substituted with a lesser sentence. In **Pius Njeru Nyaga v Republic [2020] eKLR**, the High Court in Embu (Muchemi J) substituted the sentence of 20 years with a sentence of fourteen and a half (14½) years imprisonment. In **Japhet Kirema Kinyua v Republic [2020] eKLR**, the High Court in Chuka (R.K Limo J) substituted fifty (50) years imposed on the appellant therein with an imprisonment of twenty (20) years.

18. In his submissions, the appellant prayed that the court do substitute the 35 years' per count with the least severe sentence and grant an order rendering the substituted sentence to run concurrently. It is therefore prudent that this court do consider the said submissions as it pertains to sentencing which is subject of this appeal.

19. The principles that apply as to whether the sentences should run concurrently or consecutively are stated in *S*ection 14 of the Criminal Procedure Code. The Court of Appeal in **Peter Mbugua Kabui v Republic [2016] eKLR** while considering the issue as to the circumstances in which a court can direct sentences to run concurrently or consecutively held that: -

> ***"As a general principle, the practice is that if an accused person commits a series of offences at the same time in a single act/transaction a concurrent sentence should be given. <u>However, if separate and distinct offences are committed in different criminal transactions, even though the counts may be in one charge sheet and one trial, it is not illegal to mete out a consecutive term of imprisonment.</u>***
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> ***<u>In the instant case, the offences were not committed at the same time and in the same transaction; they occurred on diverse dates. Furthermore, the acts complained of were perpetrated against different complainants. Thus we find that the trial court and the High Court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the two counts.</u>*** (emphasis mine)

20. I note from the particulars in the charge sheet that the offences were committed on different dates, at different times and the acts complained of were perpetrated against different complainants. As such, that being the case, the trial court did not err in directing or ordering a consecutive term of imprisonment for the conviction in the three counts.

21. It is further noted that the appellant herein was arrested on 24/05/2017 and sentenced on 12/06/2018. Despite having been admitted on bail, there is no evidence on record that the appellant was released on bond. As such, he spent about one (1) year and half a month in prison. This time was not taken into account by the trial court when meting the sentence upon the appellant herein and which contravened the provisions of section 333(2) of the Criminal Procedure Code that mandates the trial court to take into account the period spent in custody where the person has, prior to such sentence, been held in custody. This principle was highlighted in the case of **<u>Bethwel Wilson Kibor vs. Republic [2009] eKLR</u> and** the Judiciary Sentencing Policy Guidelines. I am of the considered view that the period spent in custody was a factor that required to be taken into account by the trial court during sentencing. This was a serious omission on part of the magistrate which ought to be corrected by this court. The period of one (1) year and half a month ought to be taken into account in the final orders herein.

22. As such therefore, the sentences of thirty-five (35) years imposed on the appellant on each of the three counts ought to be set aside and substituted with a lesser sentence. The said sentences ought to run consecutively as they were separate and distinct offences committed in different criminal transactions. Further, the period of one (1) year and half a month being the period spent by the appellant in custody ought to be taken into account.

23. The appeal therefore succeeds. The sentences of thirty-five (35) years on each count is set aside and substituted with a lesser term of fifteen (15) years imprisonment on each count. The same to run consecutively. The period of one year and one and half a month spent by the appellant in custody to be taken into account and to be deducted from the sentence term.

24. It is so ordered.

Delivered, dated and signed at Embu this 16th day of December, 2020.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent