REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 96 OF 2018

BETWEEN

LINUS MURUNGA NYONGESA...APPELLANT

AND

REPUBLIC..RESPONDENT

(An appeal from the conviction and sentence in SO Criminal Case No. 05 of 2017 in the Senior Principal* Magistrate's Court at Kimilili *by Hon. G. Ollimo (RM) on 07.09.18)

JUDGMENT

The Trial

1. On 07th September, 2018 the Appellant herein **LINUS MURUNGA NYONGESA** was convicted for the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as ***the Act***) and was sentenced to serve 20 years' imprisonment.

The Appeal

2. Aggrieved by this decision, the appellant lodged the instant appeal on 20.09.18. From the 8 grounds of appeal Appellant raises one ground that the sentence is harsh.

3. When the appeal came up for hearing on 07.08.19, the Appellant chose to wholly rely on the grounds of appeal and written submission filed on 24th July, 2019.

4. Mr. Akello, Learned Counsel for the state stated that sentence is at the discretion of the trial court.

Analysis and determination

5. The appellant is appealing only on sentence. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No.135 of 2016** (unreported) held at Page 25 of its judgment as follows:

> ***"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:***
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> ***"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. (See also Wanjema v. Republic [1971] E.A.493."***

6. The offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 attracts a maximum mandatory sentence of 20 years' imprisonment. The Court of Appeal has in several cases considered the constitutionality of mandatory minimum sentences under the Act; ***B W v Republic*** **KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR.** In ***Jared Koita Injiri v Republic*****, KSM CA Criminal Appeal No. 93 of 2014** the court adopted what the Supreme Court held in ***Francis Karioko Muruatetu & another v Republic*** **SC Petition No. 16 of 2015 [2017]eKLR** that the mandatory death sentence prescribed for the offence of murder by **section 204** of the ***Penal Code*** was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under **Article 25** of the Constitution**.**

7. Since the mandatory minimum sentence has been declared unconstitutional, I am bound to re-examine the sentence having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed by the legislature. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under the ***Act***. It observed as follows:

> **[W]e hold that the provisions of 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 Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances 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.**

8. The Sentencing Policy Guidelines require the court, in sentencing an offender to a custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

9. **Section 354** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under **subsection 3(b)**, "**in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence".**

10. I have considered the fact that the Appellant is a relatively young person. 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 and procuring a minor to be defiled. The psychological effect of the offence on the 12-year-old victim cannot be underestimated. The Appellant has shown remorse for his actions.

11. From the foregoing, I am persuaded to interfere with the 20-year sentence imposed on the Appellant. The sentence of 20 years is substituted with a sentence of 10 years. The sentence will run from the date of conviction which is ***07th September, 2018***.

DELIVERED AND SIGNED AT BUNGOMA THIS *09th* DAY ON *August* 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Brendah

Appellant - Present in person

For the State - Mr. Akello