REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. E006 OF 2020

MORRIS KIOKO MUTETI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal against the sentence by Hon. D. Orimba (Senior Principal Magistrate)*

at Kangundo SPM's Court in Criminal Case No. SO 47 of 2018 delivered on 29/01/2019

REPUBLIC.....PROSECUTION

VERSUS

MORRIS KIOKO MUTETI.....STATE

JUDGEMENT

1. The Appellant herein, is dissatisfied with the sentence of the trial court where he was sentenced to 10 years' imprisonment for the alternative count of indecent act with a child contrary to section 11(1) of the Sexual Offences Act No.3 of 2006.

2. The Appellant stated that he regretted his actions and he sought that the sentence be reduced to the time served. He stated that he had since been rehabilitated and is remorseful.

3. It was submitted by the Appellant that the time spent in custody ought to be considered by dint of section 333(2) of the Criminal Procedure Code. The applicant attached copies of various certificates indicative of the skills attained while in custody and he urged the court to set him at liberty.

4. The Respondent's counsel submitted that the sentence meted on the Appellant was proper and he urged the court to uphold the conviction and sentence.

5. The singular issue to be determined is whether the court may reduce the sentence by the trial court as sought by the Appellant.

6. The East Africa Court of Appeal in the case of **Ogolla s/o Owuor v Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

> "***The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors***."

The court stated:

> "***The court does not alter a sentence on the mere ground that if members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless as was said in JAMES v REPUBLIC [1950] EACA pg 147, it is evident that the judge has acted upon wrong principle or***

***overlooked some material factor. To this, we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case*.”**

7. In the case of **Shadrack Kipkoech Kogo v R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

“***sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered***.’’

8. I have noted that the learned trial magistrate invoked section 11(1) of the Sexual Offences Act that provides for the sentence to be meted on the respondent. The provision states that;

“11.*(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years..”*

9. It is clear that the foregoing provision imposes an obligation on the trial court to mete 10 years sentence as the appropriate sentence. Failure to comply with the foregoing provision renders any other sentence a contravention of the law.

10. Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings**.** It states that:

“***Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:***

Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”

11. The trial magistrate is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and which justice will apply both ways to the victim and to the perpetrator. This court finds that there was no error or illegality of principle when the learned magistrate sentenced the appellant to a sentence of 10 years’ imprisonment. The trial court duly considered the mitigation by the appellant and proceeded to sentence him to the minimum possible sentence in law. I see no reason to interfere with the same.

12. It is noted that the appellant’s appeal is only on sentence. The appellant has raised an issue that the period spent in custody was not factored by the trial court during the sentencing. I have perused the record and note that the appellant remained in custody throughout the trial and which was not considered by the trial court. Under section 333(2) of the Criminal Procedure Code the period spent by a convict in custody ought to be considered during sentencing. The record shows that the appellant was arrested on 19.8.2018 and sentenced on the 29.1.2019. This period has to be taken into account and hence the sentence will be interfered only to that extent.

13. Accordingly, the appeal succeeds only to the extent that the sentence of ten (10) years shall commence from the date of arrest namely 19.8.2018.

It is so ordered.

Dated and delivered at **Machakos** this **4th** day of **February, 2021.**

D. K. Kemei

Judge