REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei - J

CRIMINAL APPEAL NO. 111 OF 2019

REPUBLIC.....APPELLANT

VERSUS

JOHN KIOKO.....RESPONDENT

(Being an appeal against the sentence of the Chief

***Magistrate Court at Machakos in Criminal Case No. SO 12 of 2019*)**

REPUBLIC.....PROSECUTOR

VERSUS

JOHN KIOKO.....ACCUSED

JUDGEMENT

1. The Appellant herein, is dissatisfied with the sentence of the trial court where it sentenced the respondent to a non-custodial sentence of 3 years under the guidance of a probation officer.

2. The appellant stated that the trial court did not consider the principle of proportionality; that the sentence is illegal considering the circumstances of the offence and that the sentence was too lenient and did not consider the sentiments of the primary victim.

3. It was submitted by the state that the court ought to relook at the sentence and impose a sentence that was in line with the Sexual Offences Act. In response, the respondent submitted that he ought to be allowed to continue serving his sentence as he did not commit the offence.

4. The singular issue to be determined is whether the appeal has merit and whether the court may enhance the sentence of the trial court.

5. 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."***

6. 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.

7. I have noted that the learned trial magistrate did not consider section 8(3) of the Sexual Offences Act that provides for the sentence to be meted on the respondent. The provision states that;

> **"***(3) 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.*

8. It is clear that the foregoing provision imposes an obligation on the trial court to mete 20 years sentence as the appropriate sentence. Failure to comply with the foregoing provision renders any other sentence a contravention of the law.

9. 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***."

10. The trial magistrate is vested with wide discretion which an appellate court can only interfere with, if it occasioned a failure of justice, and justice will apply both ways to the victim and to the accused. The court finds that there was error and illegality of principle when the learned magistrate sentenced the respondent to a non-custodial sentence of 3 years under the guidance of a probation officer. This was a departure from the statutory sentence imposed by the said section 8(3) of the Sexual Offences Act which imposes a sentence of twenty years. The learned trial magistrate thus went into error by relying on the probation officer's report. The victim's age as per the birth certificate was 15 years at the time of the commission of the offence. The pre- sentence report seems to have clouded the mind of the learned trial magistrate and ended up not taking into consideration the circumstances of the primary victim who apparently was not interviewed in the report. This therefore calls for a reversal of the sentence and the appropriate sentence to be imposed. It is noted that the Respondent did not file a cross appeal against both conviction and sentence.

11. In the result, the appeal has merit. The same is allowed. The sentence by the trial court is hereby set aside and substituted with a sentence of twenty years' imprisonment.

It is so ordered.

Dated and delivered at Machakos this 2nd day of February, 2021.

D. K. Kemei

Judge