REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 21 OF 2020

JMM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. This appellant herein filed a petition of appeal dated 10.11.2020 and wherein he challenges the conviction and sentence by the trial court in Siakago Senior Principal Magistrate's Court Sexual Offence No. 12 of 2019. The trial court convicted the appellant of the offence of defilement contrary to section 8(1) as read together with section 8(2) of the Sexual Offences Act No. 3 of 2016 and sentenced him to serve thirty five (35) years imprisonment.

2. The appellant raises five (5) grounds of appeal. However, from the reading of the submissions filed in support of the said grounds and which submissions he entirely relied on, the appellant challenges the sentence as being harsh and excessive.

3. In the said submissions, the appellant submitted that the sentence was harsh and excessive taking into account that he is a senior citizen and first offender whereas the sentence imposed amounted to a denial of his right to dignity as its nature has totally disenfranchised the appellant's ability to have future prospects. He further invited this court to consider the legality of the sentence under the Sexual Offences Act and reliance was made on the case **Yanyawale –vs- Republic (2018) eKLR**, **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011**, and **Jared Koita Injiri –vs- Republic, KSM CA Criminal Appeal No. 93 of 2014)**. He further submitted that the sentence meted out is inconsistent with the objectives of sentencing as provided under the sentencing policy guidelines. He thus submitted that the sentence ought to be reviewed and a lenient one imposed in conformity with **Evans Wanjala Wanyonyi -vs- Republic [2019] eKLR.**

4. The appeal was opposed by the Learned Prosecution Counsel by way of oral submissions and wherein she submitted that the sentence was lenient as the penalty for the particular offence is life sentence and bearing in mind the aggravating circumstances that the complainant is the step daughter to the appellant and also the age of the minor.

5. The learned counsel for the victim submitted that the appellant ought to be given the maximum sentence so as to send message to the public. He further submitted that the appellant had absconded and it took time before he was re-arrested and further that he has a pending case of grievous harm before Siakago court.

6. The appellant in rebuttal submitted orally that the respondents did not carry out a DNA test and that the rape forms were never produced.

7. I have considered the grounds of appeal as raised by the appellant and the submissions by the parties herein. **As I** have already noted, the appeal herein is against the sentence. It is trite law that, this being a first appeal, this court has a duty to revisit the evidence that was before the trial court, re-evaluate and analyze it and come to its own conclusion as was laid out in the case of **Okeno v R (1972) EA 32. (**See also **Eric Onyango Odeng' v R [2014] eKLR). However, t**he circumstances under which an appellate court can interfere with the sentence imposed by the trial court are now settled.

8. As a general rule, *sentence is a matter that rests in the discretion of the trial court and it 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* **Bernard Kimani Gacheru –vs- Republic [2002] eKLR**and **Ahamad Abolfathi Mohammed & another –vs-**

Republic [2018] eKLR). The question which needs an answer therefore is whether the appellant has made a case for this court to interfere with the sentence imposed by the trial court.

9. In the case before the trial court, the appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 and the particulars of the offence being that on 2.03.2015, in Mbeere South Sub-county within Embu County unlawfully and intentionally caused his penis to penetrate into the vagina of NKM a child aged 11 (eleven) years. The sentence provided under section 8(2) for the said offence (where the victim child is aged eleven (11) years and below) is imprisonment for life. It is not in dispute that the victim was 11 years old as the same can be deduced from the evidence produced in the trial court (P3 Form and the Birth Certificate). The age has not been a subject of the instant appeal. As such, the trial court had the discretion of sentencing him to life imprisonment.

10. However, before sentencing, the appellant was offered an opportunity to mitigate and the trial court indeed noted as to having considered the said mitigation before sentencing the appellant to 35 years imprisonment despite the sentence provided for the offence, being the minimum (life) sentence, The trial court cannot therefore be faulted for meting out the sentence it did mete as it was not the mandatory minimum. It had the opportunity to exercise its discretion in sentencing. The trial court did not mete out the mandatory minimum sentence as provided for under said section and which mandatory sentences have been held to be unconstitutional. (See **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011**, **B W –vs- Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR** and ***Jared Koita Injiri –vs- Republic*, KSM CA Criminal Appeal No. 93 of 2014).**

11. **The appellant did not prove that the** *sentence was 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. It is my view that the trial court was right in meting out the said sentence. The trial court rightfully considered all material facts including the fact that the appellant was the father of the victim who had the duty to protect the child but who absconded his duties as the protector of the child and defiled her and further appreciated the objectives of sentencing and found that a deterrent and retributive sentence ought to be meted out on the appellant. The court further took into account the age of the victim before meting out the sentence. The court further considered the period the appellant had spent in custody.*

12. *As such, there was no evidence as to the trial court having overlooked some material factor, or having taken into account some wrong material, or acted on a wrong principle. Even if the court had to mete life sentence (being the one provided for the offence in issue), the same would not have been excessive or illegal as minimum mandatory sentences* **are still lawful and the trial court can in the appropriate cases exercise its discretion and impose the sentence prescribed though mandatory minimum. (See Dismas Wafula Kilwake –vs- Republic [2018] eKLR**,).

13. It is thus clear that the court exercised its discretion in sentencing and in doing so meted the appropriate sentence and which is lawful. As such, it is my view that in the circumstances of the case, the sentence cannot be said to be excessive and/ or harsh. The appellant did not satisfy and/ or prove as to any of the grounds as were pronounced in **Bernard Kimani Gacheru –vs- Republic [2002] eKLR**.

14. The appeal is hereby dismissed as it has no merits.

15. It is so ordered.

Delivered, dated and **signed** at **Embu** this **16th** day of **June, 2021.**

L. NJUGUNA

JUDGE

……....for the Appellant

……for the Respondent