REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 15B OF 2020

NEPHAT KINYUA KATHIOMI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

A. Introduction

1. The appellant herein was convicted for the offence of defilement contrary to section 8(1) as read together with section 8(3) of the Sexual Offences Act No. 3 of 2016 in Runyenjes Senior Principal Magistrate's Court Criminal Case No. 16 of 2019 and subsequently sentenced to twenty (20) years imprisonment.

2. Aggrieved by the conviction and sentence, he appealed to this court vide a memorandum of appeal dated 31.08.2020 and wherein he raised twelve (12) grounds of appeal. However, the said grounds were amended vide the amended grounds of appeal filed on 15.12.2020 and wherein the appellant challenged the sentence as being harsh and excessive.

3. The appellant filed his written submissions and which submissions he relied on in arguing the appeal and wherein he reiterated the amended grounds of appeal.

4. Ms. Mati the Learned Prosecution Counsel made oral submissions and wherein she conceded to the appeal but only to the extent that it seeks reduction of the sentence as the trial court did not exercise its discretion. However, she prayed that the court do consider the age of the minor and the circumstances under which the offence was committed.

B. Issues for determination

5. I have considered the grounds of appeal as raised by the appellant herein and the submissions by both parties.

C. Applicable law and determination

6. 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).**

7. However, as I have already noted, the appeal herein is against the sentence. The circumstances under which an appellate court can interfere with the sentence imposed by the trial court are now settled. In the case of **Bernard Kimani Gacheru –vs- Republic [2002] eKLR** the Court of Appeal 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 (emphasis court's)."**
>
> *(See also* **Ahamad Abolfathi Mohammed & another –vs- Republic [2018] eKLR).**

8. I perused the court record and I note that the appellant was charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The sentence provided under Section 8(3) is a mandatory minimum twenty (20) years' imprisonment. The appellant was sentenced to twenty (20) years' imprisonment on 8.07.2020. The accused was given an opportunity to mitigate and the trial court noted that: -

> **"Accused' mitigation noted. He is a first offender. The offence is however serious. Accused to serve twenty (20) years' in prison as from 19/08/2019."**

9. What can be seen from the above is that the court imposed the mandatory minimum sentence as provided by the law. The Court of Appeal has in several cases considered the constitutionality of mandatory minimum sentences under the Sexual Offences Act while applying the *dictum* in **Francis Karioko Muruatetu & another –v- Republic SC Petition No. 16 of 2015** on the unconstitutionality of the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code and held the said mandatory minimum sentences to be unconstitutional. (See for instance the cases of **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).**

10. One of the reasons for this has been that the court is deprived of its discretion in sentencing as its hands are always tied by the mandatory minimum sentences provided by the law. However, the said 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,).

11. In the instant case, the trial court noted that it had considered the mitigation by the accused person but still noted that the offence was serious. 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 any of the grounds as were pronounced in **Bernard Kimani Gacheru –vs- Republic [2002] eKLR**.

12. However, as I have earlier noted, the appellant faced charges of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006. I have perused through the charge sheet and it is indicated that the victim CMN was 17 years old. This age is further supported by the Birth Certificate of the minor which indicates that she was born in the year 2002 and the offence having occurred in April 2019. As such, the appellant ought to have been charged under section 8(1) as read together with 8(4) of the Act. Section 8(4) provides that; -

> **"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years."**

13. This being the case, it is my considered view that the trial court acted on a wrong principle of law. Section 362 of the Criminal Procedure Code gives this court the powers to call for and examine the record of any criminal proceedings before any subordinate court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. Section 364 provides that: -

> **"364(1) In the case of a proceeding in a subordinate court the record of which has been called for or which has been reported for orders, or which otherwise comes to its knowledge, the High Court may-**
>
> **(a) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 354, 357 and 358, and may enhance the sentence;**
>
> **(b) in the case of any other order other than an order of acquittal, alter or reverse the order.**

15. The effect of the above provisions is that this court can revise a sentence *suo moto* if the same comes to its knowledge. The sentence meted upon the appellant herein was definitely illegal and improper as was not supported by the facts presented. It is my considered view therefore that the same ought to be reviewed and be substituted with the fifteen (15) years imprisonment as provided by the law. The same should run from the date of arrest being 19.08.2019.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF JUNE 2021

L. NJUGUNA

JUDGE

……..….for the Appellant

……for the Respondent