REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NO. E002 OF 2021

DAVID MAILU MUNGUTI..APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Being an appeal from the sentence of the Hon. D. Orimba, SPM

in Kangundo SPM SO Case No. 39 of 2018)

REPUBLIC..PROSECUTOR

VERSUS

DAVID MAILU MUNGUTI...ACCUSED

JUDGEMENT

1. The appellant herein, **David Mailu Munguti,** was charged before Kangundo SPM's Court in Criminal Case No. 39 of 2018 with the offence of incest contrary to section 20(1) of the ***Sexual Offences Act No.3 of 2006***. The particulars were that on the 4th August 2018 at [particulars witheld] village, Kakuyuni sub-location, Kakuyuni location, Kangundo sub-county, within Machakos county being a male person caused his penis to penetrate the Vagina of FM a female person aged 7 years who to his knowledge was his daughter.

2. In the alternative he faced the charge of committing an indecent act with a child contrary to 11(1) of the ***Sexual Offences Act No.3 of 2006***. The particulars were that on 4th day of August 2018 at [particulars withheld] village, Kakuyuni sub-location, Kakuyuni location in Kangundo sub-county within Machakos county intentionally touched the vagina of FM aged 7 years with his penis who was to his knowledge his daughter.

3. The appellant was convicted and sentenced to serve ten years imprisonment for the offence of committing an indecent act with a child. Dissatisfied with the decision of the trial court, the Appellant appeals to this court challenging the sentence meted against him based on two grounds. The first ground is that the period he spent in custody while awaiting trial was not considered by the learned trial magistrate in imposing the sentence. The second ground is that the sentence meted against him was excessive in the circumstances.

4. Regarding the first ground the State has conceded that the trial court erred in not considering the period that the appellant spent in custody. The proviso to section 333(2) of the ***Criminal Procedure Code*** provides as hereunder:

> ***(1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.***
>
> ***(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***

Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

5. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where no reasons are given as to why that benefit ought not to inure to an accused person, the presumption must be in favour of the accused that the same will be computed inclusive of the period spent in custody.

6. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."**

7. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

> **"By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."**

8. According to ***The Judiciary Sentencing Policy Guidelines***:

> ***The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.***

9. From the charge sheet, the appellant was arrested on 7th August, 2018. Though he was admitted to bond of Kshs 300,000/- there is no evidence that he was in fact released. He was sentenced on 13th December, 2018. In sentencing the appellant, there was no mention of the period the appellant was in custody. By omitting to do so the learned trial magistrate failed to take into account statutory provisions guiding the imposition of sentences and that is a legal justification warranting interference with the exercise of the discretion on sentencing.

10. As regards the second ground of appeal, it is important to set out the circumstances under which an appellate court interferes with sentence. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

11. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> **"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

12. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs. 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."**

13. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". **(R - v- Shershowsky (1912) CCA 28TLR 263)** while in the case of **Shadrack Kipkoech Kogo - vs - 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 (see also Sayeka –vs- R. (1989 KLR 306)"**

14. The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated 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 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 states is shown to exist."**

15. In **Shadrack Kipchoge Kogo vs. Republic** Criminal Appeal No. 253 of 2003 the Court of Appeal stated that: -

> **"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into an account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred."**

16. In **Bernard Kimani Gacheru vs. Republic [2002] eKLR the Court of Appeal** restated 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 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 states is shown to exist."**

17. In this case the appellant was convicted under section 11(1) of the ***Sexual Offences Act.*** The said section provides that:

> ***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.***

18. The appellant herein was sentenced to 10 years which is, *prima facie,* the mandatory minimum sentence.

19. Having considered the above authorities, the relationship between the appellant and the victim and the circumstances of this case, I find no reason to warrant interfering with the sentence imposed. That sentence was legal and being what is prima facie minimum sentence, it cannot be said to have been excessive.

20. In the premises, I direct that the sentence imposed on the appellant will be computed form 7th August, 2018. Save for that, the appeal fails and is dismissed.

21. It is so ordered.

Judgement read, signed and delivered in open court at Machakos this 22nd September, 2021.

G V ODUNGA

JUDGE

In the presence of:

The Appellant online

Mr Ngetich for the Respondent

CA Martha