REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E013 OF 2021

JM……....…….APPELLANT

VERSUS

REPUBLIC..……...PROSECUTION

JUDGMENT

1. JM, the Appellant was charged with the offence of 'Incest contrary to Section 21 as read with Section 20 (1) of the Sexual Offences Act' with the alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006' in Maua Criminal Case No. 37 of 2020.

2. The particulars of offence for the offence of Incest were as follows: -

> *'On the 12th day of June 2020 in Igembe South Sub-County within Meru County intentionally caused his penis to penetrate the vagina of LK a girl child aged 9 years who was at his knowledge, his daughter.'*

3. The particulars of offence for the offence of Committing and Indecent Act with a Child were as follows: -

> *'On the 12th day of June 2020 in Igembe South Sub-County within Meru County intentionally touched the vagina of LK a child aged 9 years.'*

4. He pleaded guilty and was convicted and sentenced to life imprisonment by the Principal Magistrate, Hon. C. K. Obara on 23rd June 2020. Being dissatisfied with the Sentence meted by the trial Court, he has preferred the instant appeal. He initially filed grounds of appeal but in his submissions made amended supplementary grounds of appeal. He raises the following grounds of appeal: -

> ***i) That the Learned Trial Magistrate erred in both matters of law and fact by failing to invoke Muruatetu case during sentencing in this instant matter and prefer a definite sentence to the Appellant.***
>
> ***ii) That may this Court be duty bound to put into consideration his mitigation factor and review his sentence.***
>
> ***iii) That may this Court be duty bound to go by our Constitution and review the sentence.***

Appellant's Submissions

5. The appeal was canvassed by way of written submissions. The Appellant filed written submissions wherein he relies on the case of *Francis Kariokor Muruatetu & Another vs Republic (2017) eKLR* to urge for a review of his sentence. He submits that in the said case, the Court held that the mandatory death sentence prescribed by Section 204 of the Penal Code was held to be unconstitutional.

6. He submits that the decision in the case has elicited debate as to whether the principles enunciated in that decision applies in cases of murder or all other cases where the statute prescribes a mandatory minimum sentence thereby depriving the trial Court with discretion to consider the mitigating circumstances and hand an appropriate sentence. It is his submission that from the Muruatetu decision, it is clear that the emerging jurisprudence is that Courts hands should no longer be tied by the mandatory nature of a prescribed sentence and that Courts should be guided by sentencing policy.

7. He urges that the Court should consider mitigating circumstances which constitute an element of fair hearing. He urges that if Courts were continue being bound by the prescriptive nature of minimum sentences, mitigation would be rendered superfluous.

8. Citing the case of *Denis Kinyua vs R (2017) eKLR*, he urges that penalties under the Sexual Offences Act may be described as a straight jacket penalties leaving no room for exercise of any discretion by the sentencing court. He urges that although this was the view then, now things have changed and the court's hands are not tied. He also relies on the case of *Gideon Majau Gitire alias Kombo, Meru Criminal Appeal No. 131 of 2018, Mithu vs State of Punjab Criminal Appeal No. 745 of 1980 and Eversley Thomson vs St. Vincent Communication No. 806/1998 U.N Doc. CCPR/70/806/1998.*

Prosecution's Submissions

9. The Prosecution filed submissions dated 24th June 2021. They urge that the matter at the lower Court did not proceed to trial, due to the fact that the Appellant pleaded guilty and was therefore convicted and sentenced on his own plea of guilty. They urge that at the time of reading the charges and facts in the lower Court, the Appellant responded and did not complain that he could not hear.

10. They urge that both the conviction and sentence were proper as the same was arrived at after the trial Court considered the facts of the case and the victim impact statement from the probation officer. They urge that the trail Court indeed took into account the age of the victim which was 9 years as per the age assessment report dated 14th June 2020 as well as the P3 form the PRC and treatment notes.

11. They urge that the Prosecutor informed the Court that the minor was subjected to a very painful experience by a person who was meant to take care of her and this shows that the Appellant was in a position of authority and he took advantage of the minor who trusted him and had no reason to doubt him at all.

12. They urge that in sentencing, the learned trial magistrate stated that she took judicial notice of the rise of sexual offences cases especially during the COVID-19 pandemic and that offenders are taking advantage of children who are at home as schools remain closed.

13. They urge that the Appellant understood the charge and its elements and he was very well conversant with the language of the Court and he has failed to demonstrate that he was subjected to unfair proceedings. They urge that the matter did not proceed to trial and thus the Appellant's rights to a fair trial were not at all infringed. They urge that since the Appellant pleaded guilty unequivocally, the appeal on conviction fails. They cite the case of *Alexander Lukoya Maliku vs R (2015) eKLR* for the proposition that an appellate court may only interfere with a guilty plea of the plea taken is ambiguous, imperfect, unfinished or that the trial Court erred in treating it as a guilty plea. They also cite the cases of *John Muendo M. vs R (2013) eKLR* and *Obedi Kilonzo Kevevo vs R (2015) eKLR* for the essentials of plea taking which they urge were followed to the latter in the lower Court.

14. They further urge that the Appellant was given sufficient time to reflect on the charge facing him and that he was thus not ambushed or forced to plead guilty. They urge that the Appellant did not offer any mitigation and this shows that he was not remorseful at all.

Determination

15. This is an appeal on the sentence of the Court. The charge faced by the Appellant is 'Incest contrary to Section 20(1) of the Sexual Offences Act.' The Appellant pleaded guilty and was convicted based on his own unequivocal plea of guilty. He was then sentenced to life imprisonment.

16. It is trite that when an accused person is convicted based on his own plea of guilty, the conviction is not up for challenge. The sentence may however be up for challenge. Indeed, the accused person in his amended supplementary grounds of appeal and in his submissions has restricted himself to the point of sentencing.

17. The Court observes that in their submissions, the Prosecution have submitted at length on the matter of the Appellant having pleaded guilty. They urge that the steps taken in recording the plea of guilty were followed to the latter and that the Court should not interfere with the conviction. They urge that going by the fact that the matter did not proceed to full trial, the Appellant cannot urge that his right to a fair trial was violated. The Prosecution's submissions' however sound, did not address the main point raised by the Appellant. The Prosecution appear to have relied on the previous ground of appeal which the Appellant in his submissions clearly sought to substitute for the 3 grounds aforementioned, which are restricted to the aspect of sentencing. The main issue for determination is ***whether or not the sentence meted out by the trial Court was proper.***

Whether or not the sentence meted out by the trial Court was proper.

18. The leading authority on the question of interfering with sentence is that of ***Wanjema v Republic, Criminal Appeal No. 204 of 1970 (1971) EA 493, 494,,*** where Trevelyan J held as follows:-

> ***'An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, took into account some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.'***

19. The penalty section for the offence of Incest is found in Section 20 (1) of the Sexual Offences Act' as follows: -

> ***20. <u>Incest by male persons</u>***
>
> ***(1) Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of an offence termed incest and is liable to imprisonment for a term of not less than ten years:***

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or the indecent act was obtained with the consent of the female person.

20. The complainant herein, a girl namely LK who is a daughter to the Appellant was 9 years old at the time of the offence. This means that the penalty section applicable falls under the proviso which provides that an accused persons committed the offence to a female person under the age of eighteen (18) years, he shall be liable to imprisonment for life. With all factors constant, this Court finds that the sentence of life imprisonment meted out to the Appellant was within the confines of the law.

21. According to the Appellant however, the section limits the discretion of the Court in the matter and the same is therefore unconstitutional. Relying on the *Muruatetu case*, he urges that this Court should set aside the sentence and exercise its discretion in sentencing him based on his mitigation. He urges that the mandatory nature of the sentence for the offence of incest takes away the discretion of the Court.

22. This Court finds fault in the Appellant's arguments, to the extent that the ratio in the *Muruatetu* case is only relevant in murder cases. This Court takes judicial notice of the recent clarification by the Supreme Court by their directions issued on 6th July 2021 which are binding on this Court pursuant to the provisions of Article 163 (7) of the Constitution, that the holding in *Francis Muruatetu* was with respect to the offence of murder and was not intended to have a blanket application to all other offences as follows: -

(14) It should be apparent from the foregoing that Muruatetu cannot be the authority for stating that all provisions of law prescribing mandatory or minimum sentences are inconsistence with the Constitution. It bears resisting that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.

(15) To clear the confusion that exists with regard to the mandatory death sentence in offences other than murder, we direct in respect of other capital offences such as treason under Section 40 (3), robbery with violence under Section 297 (2) of the Penal Code, that a challenge on the constitutional validity of the mandatory death penalty in such cases should be properly filed, presented and fully argued before the High Court and escalated to the Court of Appeal, if necessary at which a similar outcome as that in this case may be reached. Muruatetu as it now stands cannot directly be applicable to those cases.

23. Further, whilst the Appellant posits that the import and wording of Section 20 (1) of the Sexual Offences Act is couched in mandatory terms as to have a uniform application of the life sentence to all similar cases, this Court holds a different view. According to this Court, the term ***'liable'*** as used in the said section indeed confers discretion to the Court. This Court does not find that the said sentence is a mandatory one. The import of the term ***'liable'*** was discussed at length in the decision of the Court of Appeal in ***Opoya v Uganda Criminal Appeal No. 94 of 1967 EA 1967 (pg 752)*** where Sir Charles Newbold, P., Sir Clement de Lestang V. –P. and Duffus, J.A held as follows: -

"It seems to us beyond argument that the words "shall be liable to" do not in their ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words, they are not mandatory and provide a maximum sentence only and while the liability existed the court might not see fit to impose it"

24. This Court thus finds that the penalty section in question does not limit the discretion of the Court as posited by the Appellant.

25. The other point urged by the Appellant is that the lower Court failed to take into account his mitigation. The Court has however perused the Court record and observes that the Appellant, when given a chance to offer his mitigation stated that he had nothing to say. Even when the Victim Impact Assessment was read out to him, he maintained that he had nothing to say. The Victim Impact Assessment was indeed unfavourable and in fact revealed the Appellant's nonchalant attitude towards the case as follows: -

The offender is not remorseful and says that there's nothing wrong in having sexual relations with his own daughter. He is therefore not suitable for non-custodial sentence.

26. Further, this Court has had a look at the proceedings of the lower Court on sentencing and is satisfied that the trial Court, upon analysis of the circumstances of the case and upon consideration of what was said during mitigation (although no mitigation was offered) by the Appellant, was of the view that a life sentence would best serve the interests of justice. The Magistrate did not allude to having been tied down by the mandatory nature of the penalty section for the offence of incest. To use the Court's exact words, the Court held as follows: -

"The accused did not offer any mitigation. That alone shows that he is not remorseful for what he did. The act committed against the victim herein is unacceptable. It is barbaric and inhuman. I take judicial notice of the rise of sexual offences cases especially during the current COVID-19 pandemic. Offenders are taking advantage of children who are at home as schools remain closed. In order to deter other would be offenders, the accused is hereby sentenced to life imprisonment."

27. In the circumstances, this Court finds that indeed, the trial Court exercised its discretion and found the life sentence fit and just in the circumstances of the case.

28. Going as per the above test, this Court does not find any reason to disturb the finding of the trial Court on sentence as none of the factors in the aforesaid *Wanjema v R* case have been shown to exist.

Conclusion

29. Based on his own unequivocal plea of guilty, the Appellant was convicted for the offence of Incest contrary to Section 20 (1) of the Sexual Offences Act. He was thereafter sentenced to life imprisonment which sentence was within the confines of the law. This Court does

not agree that the penalty section of the offence takes away the discretion of the Court in sentencing because the term *'shall be liable'* indeed connotes discretion as per the aforesaid *Opoya vs Uganda* case. Further, even if the section imposed a mandatory sentence, *(for which it does not)*, the holding in Muruatetu case would not salvage the Appellant's situation because the application of the said case has been clarified to be limited to murder cases.

30. In addition, the record bears witness that the lower Court fully exercised its discretion on sentencing without influence by any misguided perception that the penalty section of the offence of incest provided for a mandatory sentence. This Court observes that the offence of incest has far reaching physical, social, psychological and emotional consequences to the victim. In the present case, the victim was the daughter of the Appellant, the very person to whom society has bestowed trust to protect her. Indeed, a deterrent and punitive sentence would serve the best interests of justice in the case. All in all, this Court does not find that the trial Court overlooked any material factor or took into account any immaterial factor and it does not find that the sentence was manifestly excessive in the circumstances to warrant interference as per the aforementioned ***Wanjema v R*** case. In the end, the Court makes the following orders: -

i) The Appellant's Appeal is hereby declined and the finding of the trial Court on conviction and sentence is hereby affirmed.

Order accordingly.

DATED AND DELIVERED THIS 16TH DAY OF SEPTEMBER 2021.

EDWARD M. MURIITHI

JUDGE

JM, the Appellant in person.

Ms Nandwa, Prosecution Counsel for the Respondent.