



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 144 OF 2018

MARTIN MUKHISA WAFULA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgement and sentence of Hon. G. A. Ollimo, RM., dated 16th November, 2018 in the SPM'S Court at Kimilili S. O. A. Criminal No.5 of 2018, Republic vs Martin Mukhisa Wafula)

JUDGEMENT

The appellant has appealed against the prescribed minimum and mandatory sentence of 20 years' imprisonment which was imposed upon him in respect of the offence of defilement contrary to section 8 (i) as read with section 5(iii) of the Sexual Offence Act No. 3 of 2006.

In ground 3 of his petition of appeal, the appellant has faulted the trial court for imposing a harsh sentence in the circumstances of the case.

Furthermore, in his supplementary grounds of appeal, which includes his written submissions, the appellant has submitted that the sentences imposed is unconstitutional in that it breached his fundamental fair trial rights. He has further submitted that the sentence was harsh, excessive and unjust, under article 25 (a) of the Constitution of Kenya. Additionally, he has further submitted that the trial court failed to take into account his mitigation. And in so doing it breached his right to a fair trial as enshrined in articles 25 (c) and 50(2)(p) of the Constitution.

Finally, he submitted that he was entitled to the benefit of the least severe of the prescribed punishment for the offence.

Mrs. Nyakibia, for the respondent supported the sentence imposed. She relied on their submissions. She cited a number of authorities both of South African and Kenyan origin. Among them, she cited the Court of Appeal decision in Benard Kimani Gacheru Vs Republic (2002) eKLR, in which the Court of Appeal pronounced itself in respect of the discretion of the trial court in matters of sentence as follows: -

“it is now settled law, following several authorities by the 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 fact, 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 to interfere with the discretion of the trial court on sentence unless, any one of the matters already is shown to exist.”

I have considered the submissions of the appellant and those of counsel for the Respondent. As a result, I find that the law applicable is contained in Article 163(7) which reads as follows: **“All courts, other than the Supreme Court, are bound by the decision of the Supreme Court.”**

In view of the foregoing the Supreme Court by July 6th, 2021 in **Francis Karioko Muruatetu and Another Vs Republic, Katiba Institute and 5 others (No.2)(Amicus Curiae) (2021) eKLR**, ruled that not all provisions of the law prescribing mandatory or minimum sentences are inconsistent with the constitution.

I further find that the trial court did not have the discretion to impose any other sentence other than the prescribed minimum and mandatory sentence. The authorities cited by Ms. Nyakibia are therefore inapplicable to the instant appeal.

In the circumstance of this appeal, I find that this court is bound by the foregoing decision of the Supreme Court.

It therefore follows that the imposed prescribed minimum mandatory sentence is constitutional.

In the result that the appellant's appeal hereby fails and is hereby dismissed in its entirety.

Judgment dated, signed and delivered in open court on this 8th day of September, 2021 at Bungoma.

J. M. Bwonwong'a

Judge

In the presence of:

Court Assistant – Mr. Kizito

The appellant

Ms. Nyakibia for the Respondent.