

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 28 OF 2019

STEPHEN MWANIKI MITARU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein instituted the instant appeal vide the petition dated 30.07.2019. However, in the course of hearing of the appeal, the appellant abandoned the grounds thereon and proceeded to challenge the sentence imposed by the trial court as being harsh and excessive. He argued that the court meted out the sentence without considering that the appellant was a first offender, without considering that he was qualified for the benefit of the law as enshrined in Article 50(2)(p) of the Constitution.

2. The appeal was canvassed by way of written submissions, In his submissions, the appellant submitted that the sentence imposed by the trial court (twenty years' imprisonment) was harsh and excessive and the same ought to be substituted with a more lenient sentence. Basically, the appellant urged this court to apply the principles developed by the Supreme Court in Petition No. 15 of 2015 to the effect that mandatory sentence is unconstitutional as it deprives the court of its legitimate jurisdiction to exercise discretion in sentencing and thus an affront to the right to a fair trial. He submitted that Section 8(1)(3) of the Sexual Offences Act has mandatory minimum sentence provision and the trial court did not have discretion while sentencing. Reliance was made on **Yanyawale –vs- Republic (2018) eKLR, Evans Wanjala Wanyonyi –vs- Republic (2019) eKLR**. While urging the court to substitute the sentence with a more lenient sentence he relied on the case of **Pius Njeru Nyaga –vs- Republic Criminal Appeal No. 9 of 2018 at Embu**.

3. Ms. Mati for the respondent in her written submissions submitted that she was not opposed to the review of the sentence owing to the development in jurisprudence relating to the mandatory sentences as was explained in the case of **Dismus Wafula –vs- Republic (2018) eKLR**. However, she invited the court to take into account the seriousness of the offence, and the circumstances under which the offence was committed while reviewing the sentence.

4. I have considered grounds of the appeal and the written submissions by the parties. As I have noted, the appellant's appeal is basically on the sentence meted on him on the basis that the sentence was the mandatory minimum and the same ought to be reviewed. Though the respondent conceded to the appeal while relying on the jurisprudence in **Dismus Wafula –vs- Republic (supra)**, the fact of concession does not mean the appeal must be allowed. The court is not under any obligation to allow an appeal simply because the state is not opposed to the appeal but has a duty to ensure it subjects the entire evidence tendered before the trial court to clear and fresh scrutiny and re-assess it and reach its own determination based on evidence. (See **Odhiambo v Republic [2008] KLR 565 and also Norman Ambich Mero & Another –vs- Republic (Nyeri Criminal Appeal No. 279 of 2005)**).

5. This being a first appeal, it is the obligation of the court to reconsider and re-evaluate the evidence afresh and come to its own conclusion on it (see **Okeno –vs- Republic [1972] E A 32**).

6. However, since the appellant appealed against the sentence only, this court's power is limited and it cannot 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. This is because sentencing is a matter that rests in the discretion of the trial court. (See **Bernard Kimani Gacheru vs. Republic [2002] eKLR**).

7. I have perused the trial court's record and I note that the appellant was accorded an opportunity to mitigate and the trial court noted that the appellant herein is indeed a first offender. However, while sentencing, the trial court noted that the sentencing clause under Section 8(3) of the Sexual Offences Act provides for minimum sentence for twenty years. The court proceeded to sentence the appellant herein to twenty years' imprisonment. It is this sentence that the appellant seeks review thereof on the basis that the court did not exercise discretion while sentencing.

8. He invokes Supreme Court's **Petition 15 of 2015 (Francis Kariuki Muruatetu & Another v Republic** where the Supreme Court held that the death sentence under section 204 is unconstitutional in so far as it provided for the mandatory death sentence for the reasons that it limited the trial court's exercise of discretion while sentencing) and the application of the dictum in Sexual Offences Act by the Court of Appeal in **Evans Wanjala Wanyonyi –vs- Republic (supra)**. The dictum has also been imported by the Court of Appeal in **Evans Wanjala Wanyonyi –vs- Republic (supra) and Dismus Wafula –vs- Republic (supra)** amongst other decisions and appellants and/ or petitioners have been resented in appropriate cases.

9. However, the position has since changed pursuant to the directions given by the Supreme Court on 6.07.2021 in **Petition No. 15 & 16 (Consolidated)- Francis Karioko Muruatetu & Another –vs- Republic**. The said directions are to the effect that resentencing can only be in respect of a sentence for murder charges. As such, the sentence being served by the appellant cannot be reviewed while invoking the principles as were laid down in **Muruatetu's case** and applied by the Court of Appeal in subsequent decisions. In my view, this court has

since been bereft of jurisdiction to review the sentence in that respect. The court therefore ought to down its tools (See the **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**).

10. In the end, the court finds that the appeal has no merits and the same is hereby dismissed.

11. *It is so ordered.*

DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2021.

L. NJUGUNA

JUDGE

.....*for the Applicant/Appellant*

.....*for the Respondent*