



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

HIGH COURT CRIMINAL APPEAL NO. 71 OF 2018

TITUS OMUSUKU OKADAPAU.....APPELLANT

VERSES

REPUBLIC.....RESPONDENT

(Appeal against sentence of Hon. J. Kingori CM- BGM Court)

J U D G E M E N T

1. **Titus Omusuku Okadapau**, the Appellant, was arraigned in court for defiling the complainant, a five (5) years old minor Contrary to the provisions of Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act. In the Alternative , he was charged with committing an Indecent Act with a child contrary to section 11 (1) of the Sexual Offences Act No. 3 of 2006.

2. Having denied the charges he was taken through full trial, found guilty, convicted and sentenced to serve thirty (30) years imprisonment for the main count.

3. At the outset, the Appellant filed a petition of appeal where he averred that the trial court relied on contradictory, speculative and framed evidence that aimed at convicting the appellant without notice that there was a bad relationship between his family and that of the complainant; and, that the court failed to see that the stepmother framed him following a land dispute so that he could be jailed.

4. However, at the hearing of the appeal that was canvassed by way of written submissions he mitigated on sentence. Hence it is taken that he did abandon the appeal against conviction.

5. It is argued that he is a young man with a promising future that would be adversely affected following long incarceration, he is a first offender who has learnt the hard way due to prison uncondusive environment. In mitigation, he pleaded for mercy. That: his family is ready to facilitate his resettlement and rehabilitation; The mandatory minimum nature of sentence was declared unconstitutional in the case of ***Christopher Ochieng -Vs -Republic (2002)*** and that he was a pauper and layman.

6. The appeal is opposed by the State. It is argued that the Appellant was found lying on the complainant by PW2, evidence that corroborated that of the complainant that the Appellant found her in her brother's house sleeping when he molested her. That the allegation that bad blood existed between his family and that of the complainant was not brought up during trial hence an afterthought. The allegations of the land dispute having existed was baseless as it was not raised during trial and the sentence provided for is life imprisonment hence the sentence imposed was lenient.

7. This being a first appellate court, its duty is to re-consider afresh what transpired during trial in order to reach an informed decision.

8. I have considered rival submissions of both the Appellant and the learned State Counsel. This court has been called upon to interfere with the sentence imposed by the trial court. Principles of interfering with sentence by an appellate court were stated in the case of ***Bernard Kimani Gacheru -Vs- Republic .*** Criminal appeal No. 188 of 2000 as follows:

“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 stated is shown to exist.(See also Wanjema v. Republic [1971] E.A 493).”

9. Section 8 (2) of the Sexual Offences Act provides thus:-

A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

10. It is argued that the mandatory nature of the sentence as stipulated, was declared unconstitutional. In the case of *Christopher Ochieng - vs- Republic (2005)* the court of Appeal being guided by the case of *Francis Karioko Muruatetu & Another -vs Republic SC Petition No. 15 and 16 of 2015* stated that mandatory nature of sentences deprives courts to exercise their discretion and therefore fails to contour to fair trial. The court proceeded to set aside a life imprisonment sentence and substituted it with 30 years' imprisonment. Courts were of the view that minimum or mandatory sentences fettered courts' discretion.

11. However, in *Francis Karioko Muruatetu & Another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR*, the Supreme Court reviewed the Muruatetu case. It clarified that the principle that was set declaring the mandatory death sentence unconstitutional was only applicable to murder cases. This means that the minimum and mandatory sentences provided for by the Sexual Offences Act are applicable.

12. There are various purposes of sentences including punishment which depends on the circumstances in which the offence was committed. The learned trial magistrate took into consideration the seriousness of the offence, the tender age of the minor and the fact of the trust bestowed upon the Appellant who ought to have been protecting the child; in meting out the sentence.

13. The upshot of the above is that the appeal is bereft of any merit. Accordingly, it is dismissed.

14. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT BUNGOMA THIS 10TH DAY SEPTEMBER, 2021.

L.N. MUTENDE

JUDGE

10.9.2021