REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 12 OF 2020

PETER MUTUA KATUTA..................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

JUDGMENT

1. The appellant herein instituted the instant appeal vide the petition filed in this court on 13.08.2021 and which appeal challenges both the sentence and conviction by the trial court (Hon. W. Ngumi) in Siakago SPM's Criminal case No. 30 of 2019. From the perusal of the said petition of appeal and the amended grounds of appeal filed contemporaneously with the appellant's written submissions, it is clear that the appellant challenges the sentence imposed by the trial court. He faults the trial court as having erred both in fact and in law for;- failing to consider that the appellant being a first offender was constitutionally guaranteed for the benefit of the law under article 27(1)(2)(4) and 51 (1) of the Constitution; for failing to consider that he was entitled to the least severe punishment as prescribed under article 50(2) of the Constitution and further for imposing a harsh and arbitrary sentence without considering the appellant's dignity and without considering the appellant's mitigating factors.

2. The appeal was canvassed by way of written submissions. The appellant in support of the appeal reiterated the fact that the trial magistrate imposed a harsh and excessive sentence without taking into account that he was a first offender and not aware of the consequences of the offence he committed. He prayed that the sentence imposed (30 years imprisonment) be substituted with a least severe sentence as the sentence imposed was inconsistent with the objectives of sentencing in accordance with sentencing policy guidelines, Kenya Prison's motto and the primary purpose of a sentence of imprisonment as per United Nation's Standard Minimum Rules (Mandela Rule No.4). The appellant further invited the court to consider the legality of mandatory minimum sentences under Sexual Offences Act and reliance made on the case of **Christopher Ochieng' –vs- Republic Criminal Appeal No. 202 of 2011** and **Jared Koita Njiri –vs- Republic Criminal Appeal No. 93 of 2014**.

3. On behalf of the respondent herein, Ms. Mati filed written submissions and wherein she submitted that the respondent was opposed to the review of the sentence owing to the development in jurisprudence by the Supreme Court relating to the mandatory sentences in sexual offences. Further that the appellant benefitted from the doctrine of the least severe sentence and that the sentence was not excessive. It was submitted that the trial court exercised its discretion properly and this court ought not to interfere with the said discretion. Reliance was made on the case of **Bernard Kimani Gacheru vs. Republic [2002] eKLR.**

4. I have considered the appeal before me and the written submissions by the parties herein. As I have noted, the appellant's appeal is basically on the sentence meted out on him on the basis that the sentence was excessive and further that the trial court did not consider the mitigation by the appellant. The appellant further raised the issue as to the trial court having imposed mandatory minimum sentence.

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**). 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 (supra)**.

6. From the above authority it is clear that where a sentence is manifestly excessive in the circumstances of the case, this court can interfere with the trial court's discretion in sentencing.

7. I have perused the trial court's record and I note that the appellant herein was charged with the offence of defilement contrary to section 8(1) as read together with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that between the months of January, March, May and June 2019 at Makima Location, Mbeere South Sub-county within Embu County intentionally inserted his penis into the vagina of PM a child aged twelve years. The appellant further faced an alternative charge of indecent act with a child contrary to section 11(1) of the Sexual Offences Act and the particulars of the offence being that on diverse dates between the months of Jan,

March, May and June 2019 at Makima Location, Mbeere South Sub-county within Embu County intentionally and unlawfully touched the vagina of PM a child aged twelve years. The trial court convicted the appellant of the main count. The appellant was offered an opportunity to mitigate and wherein he stated that he did not commit the offence and further prayed for probation sentence. He further stated that he had been in custody for long and that he had children. The trial court in sentencing the accused noted that it had considered the said mitigation and despite noting that the law provides for minimum sentence of twenty years proceeded to sentence the appellant to thirty years imprisonment. It is this sentence which the appellant challenges on the basis that the same was excessive.

8. In my view, and from the perusal of the trail court's record, it is cannot be said that the sentence herein was excessive. The appellant having been convicted with the offence of defilement under section 8(3) of the Sexual Offences Act No. 3 of 2006, the sentence provided under the said section is a minimum twenty (20) years. In my view, there is nothing which can prevent the trial court from imposing a sentence above the said minimum. The sentence imposed despite being above the minimum was within the law and within the discretionary powers of the court. This court cannot interfere with the exercise of the said discretion as the appellant did not justify the interference. He did not prove that the same was 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.

9. I note that the appellant invited the court to consider the legality of mandatory minimum sentences under Sexual Offences Act and relied on the case of **Christopher Ochieng' –vs- Republic Criminal Appeal No. 202 of 2011** and **Jared Koita Njiri –vs- Republic Criminal Appeal No. 93 of 2014**. The dicta in these cases was that mandatory minimum sentences as provided for under Section 8 of the Sexual Offences Act were unconstitutional. The Court of Appeal in the two cases relied on the jurisprudence which was developed by the Supreme Court in **Petition No. 15 & 16 (Consolidated) - Francis Karioko Muruatetu & Another –vs- 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).

10. 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 to Sexual Offences Act in subsequent decisions. In my view, this court has since been bereft of jurisdiction to review the sentence in that respect and as such, the sentence the appellant is serving cannot be reviewed on this ground.

11. Considering all the above, the appeal herein is not merited and the same is hereby dismissed.

12. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 13TH DAY OF OCTOBER, 2021.

L. NJUGUNA

JUDGE

……………………………..………for the Appellant

……………………………………for the Respondent