REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E032 OF 2021

AHW.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence of the Principal's

Magistrate's Court at Maua in Criminal Case No. 11 of 2020

delivered on 13th March 2021 by Hon. C. K. Obara PM)

JUDGMENT

1. The Appellant, AHW, was charged with the offence of 'Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006.' The particulars of offence as set out in the charge sheet dated 16th January 2020 were as follows: -

> ***'On the 14th day of January 2020 at around 1400 hrs at Kinna Location, in Garbatulla Sub-County within Isiolo County intentionally cause his penis to penetrate the anus of SMA, a child aged 11 years.'***

2. He was charged with an alternative charge of 'Committing an Indecent Act with a Child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006.' The particulars of offence were as follows: -

> ***'On the 14th day of January 2020 at around 1400 hrs at Kinna Location, in Garbatulla Sub-County within Isiolo County intentionally touched the anus of SMA, a child aged 11 years with his penis.'***

3. The Appellant pleaded guilty and was thus convicted based on his own plea of guilty and sentenced to 30 years imprisonment.

The Appeal

4. Being dissatisfied with the Sentence meted by the trial Court, he has preferred the instant appeal raising the following grounds of appeal: -

> ***i) That the learned trial magistrate failed to note that the Appellant herein was of tender age at the commission of the aforementioned offence.***
>
> ***ii) That the Appellant was a first offender.***
>
> ***iii) That the Appellant is too remorseful of what he did.***
>
> ***iv) That the Appellant prays for leniency and mercy.***

Appellant's Submissions

5. The appeal was canvassed by way of written submissions. The Appellant filed submissions on 15th September 2021. He urges that the he was a minor of tender age of 16 years when he committed the offence. He urges that he is not supposed to be incarcerated with adults as this

is contrary to Section 19 (1) of the Children's Act. He urges that it was a great misdirection for the trial Court to order for him to be held together with adult criminals.

6. He further urges that he was a first offender and that he realized he had done wrong which is why he pleaded guilty. He urges that he is remorseful for what he did. He urges that the offence indeed happened and it has caused a lot of suffering on both himself and the victim and that he has been praying to God to give them peace. He urges that the events emanated from watching adult movies and pornography which led to high and uncontrollable emotions.

7. He urges that he is remorseful to the complainant's family and to his own family who have had to undergo shame. He urges that he is still a minor and has a whole life ahead of him. He urges that when he comes out of prison, he will have time to reconcile with the victim. He urges that there have been efforts to promote reconciliation between him and the victim's family.

8. He urges that he has changed and is now saved and God fearing. He urges that the prison authorities can attest to the fact that he has no criminal records in the prison. He cites *Mulamba Ali Mabanda vs Republic*, Criminal Appeal No. 12 of 2013.

9. He urges that the sentence of 30 years imprisonment is harsh and arbitrary and urges the Court to consider his mitigation.

Prosecution's Submissions

10. The Prosecution filed submissions dated 15th September 2021. They have submitted on the conviction despite the Appeal being on sentence only. They urge that the Appellant was convicted on his own plea of guilty which was unequivocal.

11. On sentencing, they urge that the victim impact assessment report filed by the Probation Office indicated that the victim was still recovering and that he portrayed signs of stress and withdrawal in the first few weeks when he went back to school. That the victim was unable to concentrate in class and often refused to go to school. That this shows that the victim, an 11-year-old boy in Grade 2 was deeply traumatized by the Appellant who sodomized him and this affected his normal routine. They urge that the report indicated that cases of sodomy were prevalent in the community and there was thus need for a deterrent sentence. They urge that the sentence was thus not harsh or excessive taking into consideration the injuries the victim sustained.

Issue for Determination

12. The Appellant's grounds of Appeal raise one main issue which is the question of *whether there is reason to disturb the sentence of the trial Court.*

Determination

13. Under Section 348 of the Criminal Procedure Code, if an Accused person is convicted of his own plea of guilty, the said conviction may not be challenged. The said Section provides as follows: -

No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent or legality of the sentence.

14. The present appeal is rightfully limited to the aspect of sentencing. The Appellant has not raised any question on the unequivocality of his plea of guilty and in his submissions, he maintains that what he did was wrong and he is remorseful.

15. The leading authority on the question of interfering with sentence is that of ***Wanjema vs 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."***

16. The penalty section for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act is a ***sentence of imprisonment for life.*** The Appellant got a sentence of 30 years and this Court thus finds that the same was in fact lenient.

17. The Court has observed that at the point of sentencing, the trial Court, following the ratio in *Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 (Consolidated) of 2015* (2017) eKLR, exercised its discretion and sentenced the Appellant to a lesser term than the mandatory life imprisonment sentence provided for by the Act. The trial Court took into account his mitigation including his sentiments of remorse, but it also considered the effects the ordeal had on the complainant who is said to have been traumatized by the ordeal. The trial Court also acknowledged that the Appellant was only 21 years with a whole life ahead of him. In the circumstances, the trial Court fully exercised its discretion in sentencing the Appellant. This Court also finds that the trial Court, in arriving at the sentence of 30 years imprisonment, must have given credit to the Appellant's plea of guilty as is required. See ***Wanjema v. R*** (1971) EA 493,494.

18. Despite the trial Court's exercise of discretion in sentencing the Appellant, this Court observes that as the sentencing was done in March 2021, the trial Court did not have the opportunity to consider the directions later issued by the Supreme Court in July 2021. On 6th July 2021, the Supreme Court gave directions and clarified the position as to the applicability of the ratio in the *Francis Muruatetu* case. They held that the holding in *Francis Karioko Muruatetu vs Republic* (2017) eKLR was only with respect to the offence of murder and was not intended to have a blanket application to all other offences. It held as follows: -

"[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 296 (2), and attempted 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."

19. These Directions are binding on this Court by virtue of Article 163(7) of the Constitution of Kenya which provides that ***'all courts, other than the Supreme Court are bound by the decisions of the Supreme Court.'***

20. Further, this Court observes that even if the holding in the *Francis Muruatetu* case was applicable to all other offences, what was declared unconstitutional was not the death penalty itself but the mandatory nature of the death penalty. The Supreme Court held as follows: -

"a) The mandatory nature of the death sentence as provided for under Section 204 of the Penal Code is hereby declared unconstitutional. For the avoidance of doubt, this order does not disturb the validity of the death sentence as contemplated under Article 26(3) of the Constitution."

21. In the circumstances, it does not follow that in every other case which has a mandatory sentence, the imposition of that sentence would be taken to limit the discretion of the Court passing the sentence. If in the circumstances of the case, the Court is of the view that the sentence provided for is the appropriate sentence required in order to meet the objectives of sentencing, then it would so impose the same.

22. Further, the Court considers that at the point of sentencing, the Court took the age of the Appellant to be 21 years of age, an adult, and this explains why he was incarcerated with adults. Although the Appellant has urged that he is still a minor as of date, there is no document on record to ascertain this assertion. The Court considers that if at all he was not an adult, when the trial Court indicated his age as 21 years at the point of sentencing, the Appellant ought to have objected to the same.

23. The Court rejects the Appellant's contention that the Constitutional provisions under Article 159 (2) (c) providing for the promotion of alternative dispute resolution infers that alternative dispute resolution processes are an appropriate substitute for criminal trials for serious offences such as defilement.

24. In addition, the Court adds that the provisions of Article 159 (2) (c) of the Constitution ought not to have a blanket application as a substitute to the formal criminal justice system, which is generally most suitable for criminal offences. In ***Republic vs Peter Kinoti Nyamu***, Meru Criminal Case No. E048 of 2021, this Court had a chance to examine the applicability of alternative dispute resolutions to solve criminal disputes. In the said case, I cited a paper entitled ***Interpreting the Constitution: Balancing the General and the Particular*** published in the book ***Ethnicity, Nationhood and Pluralism: Kenyan Perspectives***, edited by Yash Pal Ghai and Jill Cottrell Ghai (2013) where learned author Yash Pal Ghai commented on the decision of ***R vs Mohamed Abdow Mohamed*** (2013) eKLR, in which case the Court allowed an application to terminate proceedings on account of a request by the accused to resolve the murder case out of court as follows:

"…The safety of people inside or outside the community from criminals suffers if they are dealt with in the traditional manner instead of being tried openly in court, which ensures publicity. By imprisoning the guilty accused, he or she is withdrawn from society for periods of time…

…If we were to follow the Mohamed, we would weaken the state legal system and the authority of the courts and the police, replacing them in significant ways by "traditional" (communal) notions of justice and institutions. It would increase problems of law and order. It would undoubtedly weaken the sense of national unity which comes from a country's legal system-and notions of justice and fairness. It would certainly upset the balance between the state, community and the individual in the constitution.

There are further problems with this case, as noted by Pravin Bowry (a leading Kenyan criminal lawyer) (2013). He says that, most unusually for criminal proceedings, evidence was received on the basis of affidavits. He raises pertinent questions: "Does the case now dictate that in Kenyan criminal law customary and Islamic law are applicable? Can a criminal offence by excused by law by payment of bloodmoney? Has the court jurisdiction or mandate to "settle" criminal cases, receive affidavit evidence in murder trials and "discharge" an accused in a ruling without conviction?" He reminds us of Article 2(4) of the constitution which states that the constitution is the supreme law of the country and "any law including customary law that is inconsistent with it is void to the extent of inconsistency, and any act or omission in contravention of this Constitution is invalid". The approach of the judge also negates the purposes of criminal law, including those of punishment. He criticises the judge for failing to consider the extent to which criminal responsibility has developed in the institutional context, including policing, criminal procedure and practices of punishment. There is also very real danger of further corruption creeping into the system of criminal justice if this case was upheld-of the communal groups paying money to the police, or DPP or the judge (or all together) to ensure endorsement of the traditional settlement.

It is clear that the functions we associate with the criminal law would not be achieved with any degree of effectiveness, functions such as providing predictability, so they know what acts are prohibited and the punishment for them, so they can organise their conduct and activities accordingly. In this way it fulfils its main mission of maintaining order in society. Its three principal tasks are retribution (punishment), deterrence, and rehabilitation. By ensuring that criminals will be punished, it prevents the public taking the law into their hands, with its undesirable consequences. This way the criminal law and procedure ensure security to the people and protect their rights. None of these concerns were considered by the court."

25. Although the above extract was a discussion within the context of the offence of murder, and not defilement, the Court finds that the same reasoning applies to the offence of defilement that the Appellant was charged with.

26. As to his mitigating circumstances, the Court considers that they are largely a repetition of what he stated in the trial Court and that the trial Court took them into account. The Court considers the seriousness of the offence of defilement which in this case was bordering sodomy, save for the fact that the victim was an underage. The offence will have long lasting psychological, emotional and physical effects on the victim boy child, who, as per the victim impact assessment report was said to be showing symptoms of stress and withdrawal. While the Court accepts that the Appellant is a young man, with a whole life ahead who has expressed remorse and claims to have reformed, the Court considers that the objectives of sentencing which are intended to serve other functions such as deterrence and retribution, in addition to rehabilitation must be met. The Court thus considers that the 30 years imprisonment term, of course, with remission is appropriate in the circumstances, and in fact lenient, relative to the life imprisonment sentence provided for the offence of Defilement under Section 8 (2) of the Sexual Offences Act.

27. The Court does not therefore find any reason to disturb the sentence of the trial Court.

28. The Court however notes that in passing the sentence, the trial Court did not take into account the period of pretrial detention in accordance with Section 333 (2) of the Criminal Procedure Code, and this Court will thus order that this period be taken into account.

Conclusion

29. Based on his own unequivocal plea of guilty, the Appellant was convicted for the offence of Defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006. He was sentenced to 30 years imprisonment. His appeal is rightfully limited to the aspect of his sentence, which he urges is harsh and it took away the discretion of the trial Court by reason of its mandatory nature. The Court has however considered that the Supreme Court, in July 2021 issued directions clarifying that the ratio in *Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 (Consolidated) of 2015* (2017) eKLR is only applicable to cases of murder contrary to Section 204 of the Penal Code, and not to all other offences. The Court, therefore, sees no basis to disturb the finding of the trial Court on sentencing.

30. Contrary to his claim that he was incarcerated together with adults despite him being a minor, the trial Court, at the point of sentencing confirmed that he was 21 years old. The Appellant has not referred the Court to any other document stating otherwise.

31. In addition, the Court considers that alternative dispute resolution mechanisms are not suitable for criminal cases of serious nature such as sexual offences.

32. The Court will, however, order that in serving his term, the period of pre-trial detention that the Appellant spent in custody be taken into account, in accordance with Section 333 (2) of the Criminal Procedure Code.

ORDERS

33. Accordingly, for the reasons set out above, the Court makes the following orders: -

> ***i) The Court upholds the 30 years imprisonment sentence imposed by the trial Court for the offence of Defilement Contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act against the Appellant.***
>
> ***ii) The Court hereby orders that in computing the Appellant's term, the period of pre-trial detention spent in custody from 16th January 2020 up to the date of sentencing on 13th March 2020 shall be taken into account and therefore, the sentence shall commence on 16th January 2020.***

Order accordingly.

DATED AND DELIVERED THIS 11TH DAY OF NOVEMBER 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

AHW, the Appellant in person.

Ms Nandwa, Prosecution Counsel for the Respondent.