REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. E010 OF 2021

GERALD NJERU MUTHAARA..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal against the judgment of Ngumi P.M sitting at Siakago Law Courts

in Criminal Case Number 40 0f 2020 and delivered on the 20th.11.2020)

JUDGMENT

A. Introduction

1. The appellant Gerald Njeru Muthaara was charged with the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No.3 of 2006.It was alleged that on the 22nd.07.2020 at [Particulars withheld] Village in Kiirie Location of Mbeere north sub county within Embu County, intentionally and unlawfully caused his penis to penetrate the vagina of LNN a juvenile girl aged 13 years old.

2. He was further charged with an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act of 2006.

3. The appellant pleaded not guilty to the charge and a full trial was conducted. The prosecution presented four witnesses in support of its case and at the close of the prosecution's case, the trial magistrate ruled that a prima facie case had been established to warrant the appellant to be put on his defence.

4. The appellant moved this court vide an undated petition of appeal on grounds as enumerated on the face of his petition filed on 22.07.2021 seeking this court to reconsider the sentence that the trial court meted out in respect to the offence he is charged with.

5. When the appeal came up for hearing on 23.06.2021, the court directed that the appeal be canvassed by way of written submissions.

6. The appellant did submit that the sentence meted out to him was harsh given the fact that he was a first offender. He further submitted that he was remorseful for his actions and therefore sought for a review of his sentence given that the time he had spent in prison had enabled him to reform.

7. The respondent opposed the appeal arguing that the trial court did take into account the sentencing guidelines as set out in the law. The respondent further argued that sentencing is a matter that rests in the discretion of the court and given the circumstances of the case before the court, the sentence should not be revised downwards.

8. I have considered the appeal before me and the written submissions by the parties and I do note that the main issue for determination is whether the sentence is harsh and excessive.

B. Determination and Analysis

9. 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] EA 32)**.

10. The Court of Appeal, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** *restated that:*

> **"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."**

11. 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.

12. In **Tito Kariuki Ngugi vs. Republic** (supra) the Court held that:

> **"….The Appellant defiled his own daughter and caused her trauma which she will have to live with for the rest of her life. The 20 years he was given against life imprisonment provided for by the section under which he was charged cannot in the circumstances of this case be said to be harsh."**

13. The trial court in sentencing the accused noted that it had considered his mitigation and equally the victim impact assessment report and that as much as the appellant was a first time offender, it was considered that it was the third time he was defiling the minor. The court went on to note the minor was grossly affected and proceeded to sentence the appellant to serve 20 years imprisonment as prescribed by the law. It is this sentence which the appellant challenges on the basis that the same was excessive.

14. In my view, and from the perusal of the trial court's record, it 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.

15. Under that section, there is nothing which can prevent a trial court from imposing a higher sentence. The sentence imposed 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 reasons for 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.

16. 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 were 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).

17. 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.

18. Section 333(2) of the ***Criminal Procedure Code*** provides as hereunder:

> **(1) ……**
>
> **(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.**
>
> **Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.**

19. According to **The Judiciary Sentencing Policy Guidelines**:

> **The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.**

20. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so. However, where the sentence does not indicate the date from which it ought to run the presumption must be in favour of the accused that the same will be

computed inclusive of the period spent in custody.

21. In the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced…**

22. From the record the appellant was arrested on the 15th.08.2020 and was admitted to bond terms and the whole period up to and including the time of his sentencing, he was out on bond.

23. In view of the above, I find that the appeal has no merit and it is hereby dismissed.

24. It is so ordered,

DELIVERED, DATED AND SIGNED AT EMBU THIS 10TH DAY OF NOVEMBER, 2021

L. NJUGUNA

JUDGE

....for the Appellant

....for the Respondent