REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 155 OF 2018

MOSES NGAIRA LIYONDI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Appeal from the original sentence in Criminal Case No. S.O. 51 of 2018 at the Senior Principal Magistrate's Court – Kimilili Law Courts by Hon. G. Ollimo - RM)

JUDGMENT

1. The Appellant, MOSES NGAIRA LIYONDI, was charged in the main count of defilement contrary to **section 8(1)** as read together with **section 8(4)** of the **Sexual Offences Act No. 3 of 2006** (*hereinafter referred to as the Act*). The particulars thereunder were that he, on the diverse dates between the 14th May 2018 and 20th day of July 2018 at [Particulars Withheld] village in Bungoma District within Bungoma County and Kitale town Trans Nzoia County, intentionally caused his penis to penetrate the vagina of MO (*name reducted*) a child aged 16 years.

2. The Appellant faced an alternative charge of Indecent Act contrary to **section 11(1)** of the **Act**; that on the diverse dates between the 14th May, 2018 and 20th July, 2018 at [Particulars Withheld] village in Bungoma District within Bungoma County and Kitale town Trans Nzoia County, intentionally touched the vagina of MO with his penis a child aged 16 years.

3. A brief summary of the Prosecution case is that the Appellant Approached MO and beseeched her to abandon the school that she was attending and accompany him to Kitale where he promised to facilitate her studies. She left the school believing the Appellant would pay her fees to attend a school in Kitale but instead he took her to his house where he defiled her numerous times on diverse dates between the 14th May, 2018 and 20th July 2018. She ultimately conceived. The Appellant was arrested on 21st July, 2021 following investigations and was subsequently charged.

4. The Appellant gave sworn testimony in his defence and denied the allegations of defilement and the alternative charge of indecent assault. He stated that he was an innocent 22-year old electrician who had fallen victim of extortion. He said that the minor's mother demanded Kshs. 80,000/- from him while at the police station and that his failure to produce the money led to the charges herein. The trial Magistrate considered the rival arguments and proceeded to convict the Appellant under **section 8(1)** as read with **section 8(4)** of the **Sexual Offences Act**. He sentenced him to fifteen (15) years' imprisonment.

5. Being dissatisfied with both the conviction and sentence, the Appellant filed an appeal on 7th December, 2018. Whereas he initially approached this court to quash both the conviction and sentence, the Appellant substituted the said appeal with the present one in which he contested only the fifteen (15) years' sentence. He urged that he was a first offender, was remorseful, reformed and rehabilitated. He also contended that the sentence imposed was too harsh in the circumstances and that the court failed to consider his mitigating factors being that he is the sole bread winner of his family who are now suffering.

6. The learned state counsel M/s Mburu opposed the appeal on behalf of the Respondent stating that the sentence imposed was adequate in the circumstances. However, on 15th September, 2021 while appearing before court, M/s Nyakibia for the State conceded the appeal on sentencing on the basis that there was a peer relationship between the Complainant and the Appellant, which was neither violent nor forced, and that the parties have a child together. Counsel stated that the DPP had initially overlooked the case which should have been subjected to the diversion program.

7. This being a first appeal, this Court is mandated to re-evaluate and re analyse the evidence adduced before the trial court afresh and arrive at its own independent conclusion bearing in mind the fact that unlike the trial court, it neither heard nor saw the witnesses as they testified. The Court of Appeal in the case of ***Gabriel Kamau Njoroge vs. Republic [1987] eKLR*** restated the duty of the first Appellate court as

follows:

> **"It is the duty of the first Appellate court to remember that parties are entitled to demand of the court of first appeal a decision on both questions of fact and of law and the court is required to weigh conflicting evidence and draw its own inferences and conclusions, bearing in mind always that it has neither seen or heard the witnesses and make due allowance for this."** See also the case of **Kagori Kaboi vs. Republic [2020] eKLR.**

8. From the pleadings and submissions, the Appellant is desirous of having the sentence varied. He has abandoned his appeal against the conviction.

9. It is clear from the pleadings and submissions that the issue for determination is whether the sentence of fifteen (15) years' imprisonment is harsh and excessive in the circumstances and whether the trial court was right to impose the mandatory minimum sentence.

10. The Appellant has submitted that the minimum mandatory sentence of fifteen (15) years meted by the trial court was too harsh and excessive in the circumstances. It is his submission that the Complainant was aged seventeen (17) years at the time of commission of the offence. The Complainant herself testified that she was seventeen (17) years old at the hearing. The trial magistrate, however, found that she was sixteen (16) years old according to the birth certificate at the time of the offence. No evidence was produced by the Appellant to rebut the documentary evidence of a birth certificate. The trial magistrate proceeded to sentence the Appellant to the minimum mandatory sentence of fifteen (15) years in view of the Complainant's age and in accordance with **section 8(4)** of the **Act.**

11. I have considered the principles set out with regard to appeals against sentencing. In ***S vs. Malgas 2001 (1) SACR 469 (SCA)*** the court held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

12. Further, the courts have adopted the position that sentencing is a discretion of the trial court. In ***Bernard Kimani Gacheru vs. Republic [2002] eKLR***, the Court of Appeal stated 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."**

13. The upshot of the foregoing cases is that the appellate court should shy away from interfering with the sentencing of the trial court unless the sentence was manifestly excessive or the court misdirected itself.

14. The Appellant herein has set out his mitigating factors. He states that he is the sole bread winner in a family of aged parents and young siblings and that the young siblings entirely depend on him for the provision of the basic needs of life. He further states that he is asthmatic and his condition has rapidly deteriorated while in custody. The Appellant has attached medical documents in support of this claim. He also states that he is remorseful and is a first offender.

15. The Appellant has further submitted that he has been an exemplary inmate while in custody and has engaged himself in fulfilling rehabilitating programs. He has annexed a recommendation letter dated 2nd November, 2019 in support of his good character from the officer in charge of the Kibos Maximum Security Prison. The Appellant has maintained the position that he was aged twenty (20) years at the time of the commission of the offence.

16. The Prosecution did not advance any submissions nor lead any evidence to challenge the foregoing assertions. Instead, the Prosecution conceded the appeal and submitted that it had been their intention to include this case in the diversion program. That the case had been inadvertently omitted from the program.

17. I have considered the circumstances of this case, in particular the ages of the Appellant and the Complainant, being twenty (20) years and seventeen (17) years respectively. I have also considered the recommendations by the Officer in charge of the Prison and the fact that the appeal is conceded by the Prosecution. I am satisfied that the ends of justice will be best served by quashing the conviction and setting aside the sentence as I hereby do. Consequently, the Appellant is set at liberty forthwith unless otherwise lawfully held.

It is so ordered.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF NOVEMBER, 2021

…….

L. A. ACHODE

HIGH COURT JUDGE

In the presence of……Appellant in Person.

In the presence of…….State Counsel.