



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**CRIMINAL APPEAL NO. 26 OF 2020**

**PAUL THUO NJOROGE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the original sentence of the Principal Magistrate's Court at Isiolo in Criminal Case No. 3 of 2017 delivered on 19<sup>th</sup> February 2020 by Hon. E. Ngigi PM)*

**JUDGMENT**

1. The Appellant, Paul Thuo Njoroge, was charged with the offence of 'Sexual Assault Contrary to Section 5 (1) (a) (ii) and (2) of the Sexual Offences Act No. 3 of 2006.' The particulars of offence as set out in the charge sheet dated 31<sup>st</sup> January 2017 were as follows: -

***'On the 27<sup>th</sup> day of January 2017 at [Particulars Withheld] Area at around 1900 hrs in Isiolo County within Eastern Region, unlawfully penetrated the vagina of CK with a stone manipulated by him: a child aged 4 years old.'***

2. He pleaded not guilty, was placed on his defence and by Judgment delivered on 19<sup>th</sup> February 2020, he was convicted for the offence of Sexual Assault contrary to Section 5 (1) (a) (ii) and (2) of the Sexual Offences Act. He was then sentenced to serve 10 years imprisonment.

***The Appeal***

3. 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 erred in law when he failed to consider that the Appellant, being a first offender was qualified for a lenient sentence.***

***ii) THAT the learned trial Magistrate erred in law when he failed to take into account the Appellant's dignity while imposing a harsh sentence.***

***iii) THAT the learned trial Magistrate erred in law when he failed to consider the Appellant's mitigation factors as part of the trial.***

***Appellant's Submissions***

4. The appeal was canvassed by way of written submissions. The Appellant filed submissions on 27<sup>th</sup> August 2020. He urges that the sentence of 10 years is extremely harsh taking into account that he was a first offender and was qualified for the least severe sentence following the Supreme Court's finding in the Muruatetu case where all mandatory sentences were declared unconstitutional as they deny Courts their discretion in sentencing. He urges that the trial Court's hands were held by virtue of the mandatory minimum sentence of 10 years. He cites *Christopher Ochieng' vs Republic*, Criminal Appeal No. 202 of 2011 and *Jared Koita Njiri vs Republic*, Criminal Appeal No. 93 of 2014. He urges that a mandatory minimum sentence and a lenient sentence are not the same. He urges the Court to impose a lesser sentence. He further cites *Pius Njeru Nyaga vs Republic*, Embu Criminal Appeal No. 9 of 2018. He urges that being a first offender, he totally regrets and has now realized his mistake and has now reformed.

***Prosecution's Submissions***

5. The Prosecution filed submissions dated 29<sup>th</sup> October 2021. The Prosecution's submissions addressed the Appellant's conviction, which is not the subject of the instant appeal. The appeal herein is on sentence and the Court will thus not reproduce the Prosecution's submissions.

## **Issues for Determination**

6. The Appellant's grounds of Appeal raise one main issue which is the question of *whether the sentence meted by the trial Court was harsh and excessive.*

## **Determination**

7. 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.”**

8. The penalty section for the offence of Sexual Assault under Section 5 of the Sexual Offences Act is a ***term of not less than ten years but which may be enhanced to imprisonment for life.*** The Appellant got a sentence of 10 years and this Court thus finds that the same was within the confines of the law. The Court considers that he in fact got the least sentence that could be passed upon conviction under Section 5 of the Sexual Offence Act.

9. The Court has taken note of the Appellant's contention that the minimum mandatory sentence of 10 years imprisonment provided under Section 5 of the Sexual Offences Act limits the discretion of the Court. He has relied on the *Francis Muruatetu* case.

10. This Court, however, takes judicial notice of the recent clarification by the Supreme Court by their directions issued on 6<sup>th</sup> July 2021 in *Francis Karioko Muruatetu & Another vs Republic, Petition No. 15 & 16 (Consolidated) of 2015 (2021) eKLR*. The Supreme Court 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 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.”**

11. 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.’***

12. 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.”**

13. In the circumstances, if a Court passing a sentence is of the view that the sentence provided for (despite being of a mandatory nature) is the appropriate sentence required in order to meet the objectives of sentencing, the Court would be right in impose the same.

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

15. The Court however notes that in passing the sentence, the trial Court did not take into account the period of pre-trial 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**

16. The Appellant was convicted for the offence of Sexual Assault contrary to Section 5 (1) (a) (ii) and (2) of the Sexual Offences Act. He was sentenced to 10 years imprisonment. His appeal is limited to the sentence of 10 years imprisonment which he urges is harsh and it took away the discretion of the trial Court by reason of its mandatory nature. He relies on the decision of *Francis Muruatetu*. The Court has however considered that the Supreme Court, in July 2021 issue 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 case 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.

17. 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 Penal Code.

## **ORDERS**

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

*i) The Court upholds the 10 years sentence imposed by the trial Court for the offence of Sexual Assault contrary to Section 5 (1) (a) (ii) and (2) of the Sexual Offence Act against the Appellant.*

*ii) The Court will order that in computing his term, the period of pre-trial detention spent in custody from 31<sup>st</sup> January 2017 up to the date of sentencing on 19<sup>th</sup> February 2020 shall be taken into account, and therefore, the sentence shall commence on 31<sup>st</sup> January 2017.*

*Order accordingly.*

**DATED AND DELIVERED THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances**

**Paul Thuo Njoroge, the Appellant in person.**

**Ms Nandwa, Prosecution Counsel for the Respondent.**