REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 7 OF 2020

STEPHEN MUNENE MAINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant herein was on 14th day of June, 2019 arraigned before the Senior Principal Magistrate's court at Siakago in Sexual Offence No. 26 of 2019 with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences act No. 3 of 2006.

2. The particulars of the offence were that on the 13th day of June 2019 at [particulars withheld] area in Mbeere North sub-county, within Embu County intentionally and unlawfully caused his genital organs namely penis to penetrate the genital organs namely vagina of DM a girl aged 4 years.

3. He faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, the particulars being that; on the 3rd day of June 2019 at [particulars withheld] area in Mbeere North Sub-County within Embu County wilfully and unlawfully touched the vagina of DM a girl child aged 4 years with his penis.

4. The case proceeded with the prosecution calling 4 witnesses. Upon the close of the prosecution's case the appellant was put on his defence and he opted to give unsworn statement.

5. In a judgment delivered on the 3rd day of February 2020, the appellant was convicted and on the 16th April, 2020, he was sentenced to 40 years imprisonment. Being dissatisfied with both the conviction and the sentence, the appellant appealed to this court vide a petition of appeal filed on 13th August 2020 which he later amended and filed on 7th September 2021 in which he raised 3 grounds of appeal as follows: -

> ***1)*** *That the trial magistrate erred in law and facts by imposing a harsh and excessive sentence without considering that the appellant was a first offender.*
>
> ***2)*** *That the trial magistrate erred in law and facts by imposing an excessive sentence without considering the appellant's mitigation of being a single parent hence qualified for an alternative dispute resolution.*
>
> ***3)*** *That the honourable trial magistrate erred in law and facts by imposing a harsh and excessive sentence without considering that the purpose of a sentence of imprisonment is not only for torment.*

6. The amended grounds of appeal only challenges the sentence as being harsh and excessive. The appellant also contends that the trial court failed to consider his mitigation.

7. This being the first appellate court, I am guided by the principles enunciated in the case of **Okeno Vs republic** where the court of appeal set out the duty of the first appellate court as follows: -

> ***An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya Vs R [1957] EA 3365) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion.***

8. The appellant herein has challenged the sentence as being harsh and excessive. On sentencing, the court of appeal in the case of **Bernard**

Kimani Gacheru Vs Republic [2002] eKLR stated;

> ***"It is now settled law, following several authorities by the court and by the High Court, that sentence is a matter that it's 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 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 the 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, any one of the matters already stated is shown to exist."***

9. Further, according to the **Sentencing Policy Guidelines 2016,** the sentence imposed must meet the objectives in totality. The objectives include; Retribution, Reference, Rehabilitation, Restorative justice, Community protection and Denunciation.

10. The appellant herein was charged under Section 8(3) of the Sexual Offences Act No. 3 of 2006 which was erroneous as the age of the minor was 4 years at the material time and therefore, he ought to have been charged under Section 8(2) of the Act. Under that sub-section the sentence provided for is life sentence. The learned trial magistrate imposed a sentence of 40 years. Though the appellant states that the same is excessive, he has not shown how the trial court acted on the wrong principle in imposing the said sentence. In fact, he was lucky that the trial court did not impose a life sentence as stipulated under Section 8(3).

11. On the alleged failure by the trial court to consider the appellant's mitigation, the record shows that the trial court considered the same. The probation officer's report was to the effect that he is not suitable for non-custodial sentence and that he was not a first offender. The offence was committed on an innocent and helpless 4 year old girl.

12. In view of the foregoing, I find that the appeal has no merit and I hereby dismiss the same and uphold the sentence meted out on the appellant by the trial court.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 2ND DAY OF NOVEMBER, 2021.

L. NJUGUNA

JUDGE

.....FOR THE RESPONDENT

.....FOR APPELLANT