REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CRIMINAL APPEAL NO. 20 OF 2019 [SO]

CORAM: HON R.E ABURILI J

FREDRICK OTIENO ODERO...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the judgment and sentence imposed by Hon E. N. Wasike,

Senior Resident Magistrate in Bondo Sexual Offence Case No. 45 of 2017

delivered on 24th August 2018)

JUDGMENT

1. The appellant **FREDRICK OTIENO ODERO** 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. Particulars were that on the 26.11.2017 at around 0130 hours at Omia Malo sub-location in Rarieda Barding sub-county within Siaya County, he intentionally caused his penis to penetrate the vagina of FAO, a girl aged 17 years. The appellant also faced the alternative charge of committing an indecent act with an adult contrary to Section 11(a) of the Sexual Offences Act No. 3 of 2006.

2. The appellant pleaded not guilty to both the main and alternative charge and the matter proceeded to full hearing. The trial magistrate Hon. E.N. Wasike, Senior Resident Magistrate after considering the evidence of the four prosecution witnesses against the unsworn statement of the appellant found that the prosecution had proved their case against the appellant beyond reasonable doubt, convicted him and after considering the appellant’s mitigations, sentenced him to serve 15 years imprisonment.

3. Aggrieved by the said sentence and conviction, the appellant initially filed grounds of appeal as below:

> ***a) That the trial court failed to appreciate that the prosecution case was not properly investigated.***
>
> ***b) That the trial magistrate erred in law by failing to consider that very crucial witness who is PW1’s brother did not testify.***
>
> ***c) That the trial court failed to appreciate that the prosecution case had nothing medically linking him with the offence.***
>
> ***d) That the medical evidence adduced in court was not conclusive enough to prove penetration.***
>
> ***e) That the trial court failed to consider that the prosecution evidence was marred with contradictions and inconsistent hence not reliable witnesses.***
>
> ***f) That his defence statement was not given due consideration whereas the same was capable of awarding him an acquittal.***
>
> ***g) That he humbly prays to be served with trial court proceedings and wished to attend the hearing of the appeal.***

4. This court upon admission of the appeal on 22/9/2021 served the appellant with the record of appeal. Thereafter, the appellant filed *amended grounds of appeal on the 25.10.2021 setting out the following grounds:*

a) ***That I was an offender who came into conflict with the law for the very first time thus a layman and a law pauper.***

b) ***That I was not aware of the dire consequences of the offence in question***

c) ***That I was not in my right state of mind during the trial***

d) ***That I was a young man aged 18 years during the occurrence of the offence.***

e) ***That the court be pleased to consider that this is an old matter before a court of law.***

f) ***That the long incarceration would inevitably ruin my future and dreams of prosperity.***

g) ***That the court be pleased to consider that the sentence is/was excess due to its mandatory nature.***

h) ***That the court be consider the appellant mitigation and defence statement.***

i) ***That I have tremendously reformed, rehabilitated and thus remorseful to the latter.***

5. The above amended grounds of appeal demonstrate an abandonment of the appeal against conviction and seeks to challenge only the sentence imposed on the appellant by the trial court. Because a party is bound by their pleadings and submissions cannot substitute pleadings or evidence, I shall determine the lawfulness or propriety of the sentence imposed on the appellant.

6. As directed by this court on 22/9/2021, the appeal was canvassed by way of written submissions.

The Appellant's Submissions

7. It was submitted that the events surrounding the occurrence of the offence remained a mirage as the complainant was not clear on where she left her friend Margaret whom she alleged to have accompanied her. The appellant further faulted the prosecution's failure to call the aforementioned Margaret as a witness who would have shed light on the occurrence of the fateful date. The appellant further submitted that the complainant's demeanour in regard to the offence spoke towards a complainant who was an adult and above 18 years as she had the courage to sneak away from home in the middle of the night to go to the funeral.

8. The appellant further relying on Section 333 (2) of the Criminal Procedure Code further urged this court to consider the period of time he had spent in custody since his date of arrest to the time of conviction.

9. The appellant submitted that mandatory minimum sentences such as the one imposed on him disregarded the individual characteristic of each case and thus infringed on his right to dignity as provided in Article 28 of the Constitution and further that the same was against the Judiciary Sentencing Policy that provide that *in as much as they reduce sentencing disparities, they fetter the discretion of the court sometimes resulting in grave injustices particularly for appellants.* The appellant quoted the case of **S v Malgsa [2001] (2) (SCA) 1235 PARGRAPH 25.**

10. The appellant submitted that the circumstances of the offence must be considered when it comes to sentencing as was held in the case of **Alister Antony Pereira v State of Maharashtra** and further that where the punishment was excessive, it served neither the interest of justice nor of society.

11. The appellant urged the court to consider his mitigation specifically that he was a first offender and argued that the long incarceration would ruin his future prospects in life and that he was ready to reconcile with the said parties as it was the court's prerogative to consider the said mitigating factors as well as his defense statements as was held by Odunga J in the case of **Simon Kipkurui Kimoni v R** and also in the case of **Sekitoleko v Uganda.**

The Respondent's Submissions

12. It was submitted on behalf of the Respondent State that the prosecution proved its case against the appellant. Regarding the complainant's age, which was proved by PW4 who produced a birth certificate which indicated that the complainant was 17 years. Reliance was placed on the Ugandan case of **Francis Omuroni versus Uganda,** *where the Court of Appeal in Criminal Appeal No. 2 of 2000 held that****: "in defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from the medical evidence, age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense."***

13. Regarding penetration, it was submitted that the same was proved by the testimony of PW1 who gave graphic details on how she was accosted and defiled and further by PW2 who testified that on examination of the complainant, *the hymen was raptured, vaginal mucosa was bleeding and there was tenderness and swelling on the vulva"*

14. On identification of the complainant it was submitted that the complainant was with the appellant the previous day and the whole night and further that the appellant was arrested while with the complainant. It was submitted that the investigations done uncovered an offence with all the ingredients of defilement.

15. On the prosecution's failure to call PW1's brother who was an important witness, it was submitted that Section 143 of the Evidence Act

provides that unless specifically provided, there is no particular number of witnesses who should be called to prove a fact.

16. On the alleged inconclusiveness of the medical evidence to prove penetration, it was submitted that all signs of penetration were present.

17. The respondent further submitted that the appellant's defence was fully considered and rightly dismissed and further that the appellant only addressed how he was arrested and not the accusations themselves.

Analysis & Determination

18. I have considered the appellant's grounds of appeal as amended and the written submissions filed by both parties, the evidence adduced before the trial court as well as the applicable law in this appeal. The appeal, as per the amended grounds of appeal, is against sentence of 15 years imprisonment imposed on the appellant. The court will therefore be concerned with the legality or propriety or appropriateness of the sentence imposed on the appellant and not the merits of the appeal against conviction. It will also consider relevant factors *inter alia,* the penalty clause, mitigating and or aggravating factors, and the objects of punishment.

19. In this case the appellant was charged under section 8(1) as read with section 8(4) of the Sexual Offences Act. The said section provides that:

> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

20. The law therefore prescribes a statutory minimum sentence for the offence of defilement under section 8(4) of the Sexual Offences Act. Previously, the principle laid down in the decisional law by the Supreme Court in **Francis Karioko Muruatetu & Another v Republic [2017] eKLR,** was that, provisions of law which exclude or fetter discretion of a court of law in sentencing were inconsistent with the Constitution. This principle had been applied by courts in Sexual Offences Act as well as in robbery with violence cases.

21. The Court of Appeal on its part stated that pursuant to the Supreme Court's decision in the **Muruatetu (2017)** case, if the reasoning is applied, the sentence stipulated by **section 8(2), (3) and (4)** of the **Sexual Offences Act** which is a mandatory minimum should also be considered unconstitutional on the same basis. The reasoning for the holding by the Supreme Court and the Court of Appeal was that the mandatory minimum or maximum sentences deprived the Court of its legitimate jurisdiction to exercise discretion in sentencing. It was further observed that mandatory sentence fails to conform to the tenets of fair trial which are an in-alienable right guaranteed under **Articles 50** and **25** of the Constitution. See **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR,** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] e KLR**

22. However, the Supreme Court in the case of **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR** clarified the position and stated that:

> ***"It should be apparent from the foregoing that <u>Muruatetu</u> cannot be the authority for stating that <u>all provisions of the law</u> prescribing mandatory or minimum sentences are inconsistent with the Constitution. It bears restating that it was a decision involving the two Petitioners who approached the Court for specific reliefs. The ultimate determination was confined to the issues presented by the Petitioners, and as framed by the Court.***
>
> ***[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. <u>Muruatetu</u> as it now stands cannot directly be applicable to those cases.***
>
> ***[16] To the extent directly relevant to the matters under review in these directions, we note the Attorney General in his Report, together with the Task Force recommended, that:***
>
>> ***a) Life imprisonment be substituted where the Penal Code previously provided for the death penalty, with the option of life imprisonment without parole for the most serious of crimes; and that if not abolished, the death penalty should only be reserved for the rarest of rare cases involving intentional and aggravated acts of killing.***
>>
>> ***b) All offenders, subject to the mandatory death penalty, including those convicted and sentenced prior to 2010, who are serving commuted sentences, will be eligible for re-sentencing, including all offenders sentenced to death as at the time of the decision which was made on 14th December 2017.***
>>
>> ***c) Where an appellant has lodged an appeal against a conviction and/or sentence, the appellate court must, at any stage before judgment, remit the case to the trial court for re-sentencing.***
>>
>> ***We note that the other recommendations in the Task Force report go beyond the terms of the orders of 14th December 2017, and deal, for example, with matters that are in the legislative province of Parliament or in the courts' exclusive jurisdiction and judicial discretion.***

[17] The appellants in this matter, we have since learnt, were presented to the High Court and heard on their plea for re-sentencing; therefore, we make no further comment on them.

[18] Having considered all the foregoing, to obviate further delay and avoid confusion, we now issue these guidelines to assist the Courts below us as follows:

i. The decision of Muruatetu and these guidelines apply <u>ONLY</u> in respect to <u>sentences of murder under</u> Sections 203 and 204 of the Penal Code; (emphasis added)

ii. ………..;"

23. Taking into consideration the decision of the Supreme Court in **Muruatetu 2021** (supra), it is clear that the mandatory sentence provided in section 8 (4) of the Sexual Offences Act is lawful unless otherwise changed and any sentence to the contrary is illegal. It must be noted that the mandatory minimum sentences under the Sexual Offences Act are indicative of the seriousness of the offence and signify the legislative intent to protect the rights of the child. The trial court record shows that the trial magistrate considered the mitigations given by the appellant and the seriousness of the offence of defilement. I have also considered the circumstances under which the offence of defilement against the minor was committed. the appellant accosted the minor on her way back home and took her to a nearby house and defiled her after threatening to kill her using the panga that he was holding to subdue her. She only found refuge after he slept then she text her brother in Kisumu who informed her relatives at home who went to rescue her. I find the appellant's claim that the victim behaved as if she was an adult that is why she went to a disco at night hence his defiling her, very outrageous. It is no excuse that one finds a minor on the road at night and descends on her. The appellant did not deserve the discretion of the court in sentencing. I find the sentence imposed on him lawful and not unconstitutional as alleged.

24. This Court was also implored to consider Section 333(2) of the Criminal Procedure Code. Judicial pronouncements as well as judicial writings emphasize that courts must give full effect to section 333(2) of the Criminal Procedure Code. The said section provides that:

> ***"Subject to the provisions of section 38 of the Penal Code (Cap. 63) 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.***
>
> ***<u>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 (emphasis mine).</u>***"

25. This duty is also contained in the *Judiciary Sentencing Policy Guidelines (under clauses 7.10 and 7.11) where it is provided that:*

> ***"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."***

26. The duty to take into account the period an accused person had remained in custody pending the conclusion of his trial in sentencing (under section 333(2) of the Criminal Procedure Code) was acknowledged by the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] Eklr** where the Court of Appeal stated:

> ***"The appellants have been in custody from the date of their arrest on 19th June 2012. 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. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(s) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."***

27. **See also Bethwel Wilson Kibor vs. Republic [2009] eKLR) where the Court of Appeal stated that:**

> ***"By proviso to section 333(2) of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. Ombija, J. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody.***
>
> ***The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence."***

28. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced be taken into account in meting out the sentence where it is not hindered by other provisions of the law.

29. The record herein consists of the Bondo trial court typed proceedings, judgment and sentence. It is discernible from the said Court record that the appellant was arrested on the 26.11.2017 and brought to court on the 27.11.17, a day later, when the trial court granted the appellant a bond of Kshs. 100,000 with one surety of similar amount. However, there is no evidence on record of the appellant's bond being processed which is an indication that the appellant did not raise the bail that he was granted by the trial court. Accordingly, he was in custody during his trial period before he was convicted and sentenced to serve 15 years imprisonment.

30. In the circumstances, I find and hold that the appellant is entitled to have his sentence computed taking into account the period that he had been in prison remand custody and commencing from the date of his arrest on 26/11/2017. On this basis, I find the appellant's appeal partially successful. The conviction of the appellant is sustained. The sentence imposed on the appellant being 15 years imprisonment is upheld save that the said sentence shall be calculated from 26/11/2017 when the appellant was arrested.

31. I so Order.

32. File is closed.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 14TH DAY OF DECEMBER, 2021

R.E. ABURILI

JUDGE