



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KERUGOYA**

**CRIMINAL APPEAL 26 OF 2018**

**(From original conviction and sentence Criminal Case. 158 of 2016 of the Principal Magistrate's Court at KarabaWanguru –P. M. KIAMA –SPM)**

**MOSES MURATHI MUGO.....APPELLANT**

**V E R S U S**

**REPUBLIC .....PROSECUTOR**

**JUDGMENT**

1. The appellant Moses Murathi Mugo was charged before the Principal Magistrate's Court at Karaba with defilement of a girl contrary to **Section 8(1)(3) of the Sexual Offences Act** in that on 18/7/16 at [Particulars Withheld] in Karaba Location within Embu County, intentionally caused his penis to penetrate the vagina of SMM a child aged Fifteen (15) years. After a full trial he was convicted and sentenced to serve Twentyyears imprisonment.

2. The appellant was aggrieved with the conviction and filed this appeal raising six grounds.

3. The court gave directions that the appeal be disposed off by way of written submissions. The appellant filed amended grounds of appeal together with his submissions.

4. The State through submissions filed by F. S. Ashimosi, Assistant Director of Public Prosecutions opposed the appeal and urged the court to dismiss it.

5. On 28/11/2019 the appellant abandoned the appeal and urged me to consider his appeal on the sentence. What is therefore before me is appeal on the sentence. The appellant did not make any oral or written submission on the appeal on the sentence. I must assume that he wants the sentence to be reviewed downwards. The appellant was charged under **Section 8(1)(3) of the Sexual Offences Act** which provides:-

**“(1) Any person who commits an act which causes penetration with a child is guilty of an offence termed defilement**

**(3) Any person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”**

The trial Magistrate imposed a sentence of Twenty Years which is the bare minimum provided under the Act. He stated that the minimum sentence provided under **Section 8(1)(3)** provides a minimum sentence of twenty years imprisonment upon conviction. He went on to say – **“Hence the accused is hereby sentenced to serve Twenty (20) years imprisonment”**.

6. The trial Magistrate was stating that he had no option but to impose the minimum mandatory sentence provided under the **Act**.

7. The Supreme Court in the case of **Francis KiokoMutuatetu & Another –v- Republic Pet 15/2015 (consolidated with Petition No. -6-** opened the floor for those people who have been sentenced under provisions of law providing for mandatory sentence. In the case, now famed as Muruatetu's case, the Supreme Court held:-

**“Section 204 of the Penal Code deprives the court of the use of Judicial discretion in a matter of life and death. Such law can only be regarded as harsh and unfair. The mandatory nature deprives the court of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where court listens to mitigating circumstances but has**

nevertheless, to impose a set of sentence the sentence imposed fails to conform to the events of fair trial that accrue to accused persons under Article 25 of the Constitution, and absolute right.”

8. The Supreme Court in Muruatetu’s case was in agreement with the Court of Appeal decision in Godfrey Ngotho Mutiso –v- R. Cr. Appeal No. 17/2008 and stated as follows:-

**“We are in agreement and affirm the court of Appeal decision in Mutiso that whilst the Constitution recognizes the death penalty as being lawful it does not provide that when a conviction for murder is recorded only the death sentence shall be imposed.”**

9. I have considered the decision on Muruatetu’s case because what the State Counsel was addressing is the mandatory nature of the death sentence and there are other mandatory sentence especially in the Sexual Offences Act which provides for minimum mandatory sentence and just like Section 204 of the Penal Code deprives the courts of their legitimate jurisdiction to exercise discretion when sentencing Section 8(1)(3) of Sexual Offences Act in one of them as it provides a sentence of **not less than 20 years**. The problem with the section and others under Sexual Offences Act is that the court is not given discretion as he must give a sentence of Twenty years and above despite the circumstances of the case. I find that Section 8(1)(3) of the Sexual Offences Act falls in the category of the sentences impugned by the State Counsel for taking away the discretion of the court in sentencing.

10. Coming to the issue before me, I must point out that an Appeal Court will not easily interfere with the sentence of the trial court unless that sentence is manifestly excessive in the circumstances of the case or that the court overlooked some material factor, or took into account some wrong material or acted on a wrong principle. In Ogola S/o Owoura –v- R. 1954 E.A.C.A it was held:-

**“The principle upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by the trial Judge unless as was said in James –v- R (1950) 18 E.A.C.A 147 it is evident that the Judge has acted upon some wrong principle or overlooked some material factor.**

**To this one we also add a 3<sup>rd</sup> criterion, namely that the sentence is manifestly excessive in view of the circumstances of the case.”**

11. The Supreme Court in the Muruatetu case stated that:-

**“We also acknowledge that in Kenya and intentionally sentencing should not only be used for the purpose of retribution, it is also for the rehabilitation of the prisoner as well as for the protection of civilians who may be harmed by some prisoners.”**

12. There is no doubt that the sentence passed by the trial Magistrate was justified as it was the minimum provided. The appellant stated as follows in mitigation:-

**“I have a wife and children. My wife had a wound ailment (sic). I have two children in school who depend on me. My father is the one who takes care of the children. My mother is deceased. I urge the court to be lenient since my mother is now deceased.”**

13. The learned trial Magistrate stated that the Sexual Offences Act provided for a minimum sentence.

14. In the light of Muruatetu’s case it is my view that I should interfere with the sentence as the minimum nature of the sentence fettered the court’s discretion in passing sentence.

15. I hold that the appeal on the sentence has merits. I allow the appeal on the sentence. I order that the sentence of 20 years be set aside.

16. Having considered the circumstances, the mitigation and that appellant was a first offender, I sentence the appellant to Fourteen (14) years imprisonment from the date of the sentence, that is 15/6/2017. The sentence shall be reduced by the period the appellant was remanded pending trial that is from 21-6-16 to 15-6-17.

**Dated at Kerugoya this 6<sup>th</sup> day of February 2020.**

**L. W. GITARI**

**JUDGE**