REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CR. APPEAL NO. 10 OF 2018

(From Original Conviction and Sentence in Criminal Case No. 1of 2017

of the Resident Magistrate's Court at Wang'uru D. N. SURE – RM).

DENNIS WACHIRA WAWERU.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT

1. The appellant was charged with the offence of defilement contrary to **Section 8(1) of the Sexual Offences Act No. 3/2006** before the Principal Magistrate's Court at Wang'uru Cr. Case No.1 of 2019.

2. It was alleged that on 24/11/2016 at [particulars withheld] village within the County of Kirinyaga he caused his penis to penetrate the vagina of DWW a child aged 14 years and 7 Months.

3. The appellant denied the charge and after a full trial he was convicted and sentenced to serve Twenty years imprisonment.

4. The appellant was aggrieved by both the conviction and sentence and lodged this appeal which raised Six (6) grounds.

5. The State opposed the appeal and filed written submissions through Geoffrey Obiri Assistant Director of Public Prosecutions which were served on the appellant.

6. On 17/6/2019 applied to withdraw the appeal on conviction. He urged the court to consider his appeal on the sentence. With that the court proceeded to mark the appeal against the conviction as withdrawn.

7. The appellant filed submissions on the sentence. In his mitigation he pleaded with the court to consider that he was a 1st offender and had shallow knowledge on the prosecution of sexual offences which resulted in his inability to gather sufficient defence to counter the evidence by the prosecution.

8. That he has been in custody for a period of Two years, a fact which has assisted him change and acquire some positive transformation. He prays that he be released to go and attend a course in Electrical Training at the Polytechnic.

9. That the trial Magistrate failed to consider the fact that he was in custody for Eight (8) months before he was sentenced.

10. That the sentence was harsh and excessive. That the conviction was based on hearsay. That the charge is a misdemeanour.

11. The State did not oppose the appeal on sentence. I have considered the appeal on the sentence and the mitigation sentencing is the discretion of the trial Magistrate and the appellate court will not normally interfere with that discretion unless –

- It has been shown that the trial Magistrate acted on some wrong principles.

- Overlooked some material factor.

- The sentence was manifestly excessive.

12. These principles were laid down by the Court of Appeal in the case of **Ogola Son of Owuora –v- Republic (1954) E. A. C. A 70.** The court stated the circumstances under which an appellate court would interfere with the sentence. It stated –

> ***"The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly 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 a trial Judge unless as was said James –v- Rex (1950) E.A.C.A it is evident that the Judge has acted upon some wrong principle or overlooked some material factor. To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case – R –v- Shershewsity (1912) CCA 28 T.L.R 364."***

13. The trial Magistrate or Judge exercise discretion in sentencing which is unfettered. Therefore, where the trial Magistrate is fettered by other considerations, it cannot be stated that he/she acted independently. The **Constitution** guarantees the independence of the Judiciary. It states at Article 160(1) – ***"In the exercise of Judicial Authority, the Judiciary as constituted by Article 161, shall be subject only to this constitution and the law and shall not be subject to the control or direction of any person or authority."***

14. The Constitution is the Supreme law of the land and any law that is in conflict with the Constitution or anything done in contravention of the Constitution is unconstitutional. Thus any law that seeks to take away the discretion of the Judge or Magistrate in sentencing by providing for mandatory and minimum sentences is unconstitutional. This has been stated by the Court of Appeal of Kenya and the Supreme Court.

15. In the case of **Godfrey Ngotho Mutiso –v- Republic Cr. Appeal No.17/2008** the court of Appeal held that a uniform sentence deprives the court discretion in considering mitigating circumstances and fails to appreciate that sometimes there maybe unequal participation in a crime which would result in different charges and sentence on the accused person.

16. On the other hand the Supreme Court of Kenya in the case of **Francis Kariuko Muruatetu & Wilson Thiumbu Mwangi –v- Republic & Others Petition 15/2015** consolidated with petition 16/2015 held that –

17. The mandatory nature of the death sentence as provided for under Section 204 is declared unconstitutional.

18. I have given this background in view of the sentence which is appealed against.

19. The trial Magistrate stated as follows when sentencing the appellant –

> ***"mitigation and record duly noted, however, my hands are tied by the sexual offence (sic) Act. Accused is sentenced to 20 years in jail."***

20. This note on the sentence was due to the mandatory nature of the sentence under the charge. **Section 8(1) & 8(3) of the Sexual Offences Act No. 3/2006** provides:-

> ***"1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***2) A person who commits an offence of defilement with a child aged Eleven years or less shall upon conviction be sentenced to imprisonment for a term of not less than Twenty years."***

21. The sentence provided is mandatory in nature because the Magistrate can only sentence the accused for Twenty years. Like **Section 204 of the Penal** which provides for a mandatory death sentence **Section 8(3) of the Sexual Offences Act** is unconstitutional. The trial Magistrate could not exercise discretion as it was fettered by the mandatory nature of the sentence.

22. The sentence of Twenty years was the bare minimum however the trial Magistrate clearly lamented after considering that the appellant was a first offender and his mitigation. From this lamentation it is evident that if her discretion was not fettered, she would have imposed a lesser sentence. The sentence was therefore not proper in the circumstances.

23. This court has jurisdiction to entertain an appeal on the sentence.

> **Section 347 (1) of the Criminal Procedure Code** provide:-
>
> ***"Save as in this part provided –***
>
> ***A person convicted on a trial held by a sub-ordinate court of the first or second class may appeal to the High Court. Under Section 354(1)(i) it is provided –reverse the finding and sentence and acquit or discharge the accused -----."***

24. While considering the sentence, the court must consider the circumstances of each case. In **Wanyema –v- Republic (1971) E.A 493 at 494** the court stated –

"A sentence must in the end however depend upon the facts of its own particular case."

25. I find that since the trial Magistrate passed the bare mandatory minimum sentence and did not exercise discretion, and also considering that such sentencing in unconstitutional, I will interfere with the sentence. I have considered the circumstances of this case and that the appellant was a 1st offender. The offence is however serious and a felony.

26. For the reasons which I have stated above, I order as follows:-

1) The appeal on the sentence is allowed.

2) The sentence of Twenty years is set aside.

3) The sentence is substituted with a sentence of Sixteen (16) years.

4) The sentence to run from 13/2/2017 when the appellant was placed in custody awaiting trial.

Dated at Kerugoya this 8th Day of May 2020.

L.W. GITARI

JUDGE