REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.171 OF 2011

GODFREY MUGENDI NYAGAH *alias* MUKORINO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT
(An Appeal arising out of the conviction and sentence of Hon. M.A. Murage (SPM)

delivered on 28th June 2011 in Limuru SPM Cr. Case No.926 of 2010)

JUDGMENT

The Appellant, Godfrey Mugendi Nyagah was charged with the offence of **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 7th April 2010 in Kiambu County, the Appellant intentionally and unlawfully defiled CWW, a girl aged 5 years, by penetrating his male genital organ into her vagina. The Appellant was alternatively charged with the offence of **committing an indecent act with a girl** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant unlawfully and intentionally committed an indecent act with a CWW, a girl, by touching her vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty of the main charge of **defilement.** He was sentenced to serve life imprisonment on 28th June 2011. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

His appeal was on 17th October 2013 heard by Mary Gitumbi, J (a Judge of the Land and Environment Court). She delivered her Judgment on 15th November 2013. In the Judgment, she dismissed the Appellant's appeal and confirmed the conviction and sentence of the trial court. Aggrieved by this decision, the Appellant lodged an appeal to the Court of Appeal in **Court of Appeal Criminal Appeal No.7 of 2015**. On 5th November 2019, the Court of Appeal allowed the appeal and remitted back the appeal for hearing and disposal to the High Court. The court held that the Judge who heard the appeal had no jurisdiction to do so. This is obviously following the Supreme Court decision in **Republic –vs- Karisa Chengo & 2 Others [2017] eKLR.**

When the Appellant appeared before this court, he abandoned his appeal against conviction. Instead, he pleaded with the court to reconsider his sentence following the directions given by the Supreme Court in **Francis Karioko Muruatetu -vs- Republic [2017] eKLR**. The Appellant told the court that since his arrest on 25th August 2010, he has been in lawful custody. He had undertaken several courses while in prison. He presented to court several certificates issued by the National Industrial Training Authority which showed that he had sat and qualified as a tradesman in carpentry and joinery. He had undertaken three grade tests *i.e.* Grade III, Grade II and Grade I. In all of them he had passed. He had also undertaken various spiritual studies that has built him as a person. He also handed the court certificates signifying his spiritual journey. The Appellant told the court that in the period that he had been in prison, he had reformed. He was married with three children. He was the sole provider of his elderly mother. He urged the court to consider a reduction of his custodial sentence.

Ms. Nyauncho for the State opposed the appeal and sentence. She submitted that taking into consideration the age of the child that was defiled, the custodial sentence that was meted out on the Appellant fitted the crime. She emphasized that the victim was a child of young and tender age. She was subjected to physical and psychological damage. She was apprehensive that if the Appellant was released back to the society, he would be a danger to young innocent girls. She urged the court to dismiss the appeal on sentence.

When the trial court sentenced the Appellant, it was exercising judicial discretion. This court can only interfere with such exercise of judicial discretion if certain parameters are established by the Appellant. In **Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000** the Court of Appeal held thus:

> ***"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests 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 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 a 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."***

In the present appeal, having perused the proceedings of the trial court, it was clear that the trial court proceeded as if the only sentence that could in the circumstances be meted on the Appellant was the sentence that was imposed. It is understandable that the trial court was of that view. The sentence was meted before the Supreme Court decision of **Francis Karioko Muruatetu -vs- Republic [2017] eKLR** which declared mandatory sentences unconstitutional. Although the **Muruatetu** case dealt with mandatory death sentences in **murder**, **robbery with violence** and **attempted robbery with violence** cases under *Sections 204,* **296(2)** and **297(2)** of the **Penal Code,** the Court of Appeal extended the reasoning in the **Muruatetu** case to mandatory sentences imposed under the **Sexual Offences Act** in recent decisions in **Christopher Ochieng vs R [2018] eKLR** and **Jared Koita Injiri vs R [2019] eKLR**. For instance, the Court of Appeal in **Jared Koita Injiri** (supra) held thus;

> ***"...In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by section 8(2) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.***
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> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another vs Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

Guided by the aforestated decisions of the Supreme Court and Court of Appeal, this court has jurisdiction to relook at the sentence of the Appellant. The Appellant gave his mitigation to this court. He is a first offender. He is remorseful. He has applied himself constructively while in prison. It is apparent that he has reformed. Just like the Court of Appeal in the above case, this court cannot overlook the fact that the Appellant committed a heinous offence which has resulted in the victim of the offence sustaining physical and psychological damage. There is a possibility that if the Appellant is released back to society, at this stage, he may be a danger to young girls in the society.

In the premises therefore, this court is of the opinion that the sentence of life imprisonment meted on the Appellant was uncalled for in the circumstances. The sentence is set aside and substituted by a sentence of this court sentencing the Appellant to serve a custodial sentence of thirty (30) years imprisonment. The sentence shall be served with effect from 25th August 2010 when he was arrested and placed in lawful custody. The record shows that the Appellant was in remand custody during the entire period of his trial before his conviction. It is so ordered.

DATED AT NAIROBI THIS 6TH DAY OF MAY 2020

L. KIMARU

JUDGE