REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 15 OF 2018

FRANCIS OWINO OTIENO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from the judgment, Conviction and sentence dated by Hon G. Adhiambo, Senior Resident Magistrate in Ukwala SRM Sexual Offence Case No. 1 of 2018 on 12th February 2018)

JUDGMENT

Introduction

1. The Appellant **FRANCIS OWINO OTIENO** was charged before the Senior Resident Magistrate's Court at Ukwala in Sexual Offense Case No. 1 of 2018 with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence are that on 28.12.2017 at around 9.00 a.m, the appellant while at [particulars withheld] village in Ugunja sub-county within Siaya County he intentionally caused his penis to penetrate the vagina of S.J.A. [full name withheld for legal reasons], a child aged 4 years.

2. The appellant also faced the alternative charge of Committing an Indecent Act with the child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006**.**

3. The appellant pleaded not guilty to both the main and alternative charges and the matter proceeded for hearing.

4. The trial magistrate, Hon. G. Adhiambo after hearing seven prosecution witnesses and considering the appellant's mitigation, as the appellant elected to keep silent and not offer a defense, proceeded to convict and sentence the appellant to serve ***life imprisonment.***

5. Aggrieved by the said conviction and sentence, the appellant filed his initial petition of appeal based on three grounds as follows:

a) **THAT he pleaded not guilty to the charge.**

b) **THAT the exhibit displayed didn't have blood stains as alleged by the medical officer.**

c) **THAT the case was fabricated to fix him as a result of land dispute he had with the Complainant.**

d) **THAT he raised the land grudge dispute but it was never given attention by the trial magistrate.**

e) **THAT he prayed to be given court proceedings so that he can adduce more grounds in this case.**

f) **THAT he wished to be present during the hearing of this appeal.**

6. The appellant, through his advocates then on record Messrs Oduol Achar subsequently filed further grounds of appeal and in the submissions in support of the appeal, stated that the appellant was only challenging sentence imposed on him. The grounds of appeal for consideration therefore are:

a) That, the Learned Trial Magistrate failed to appreciate the accused person's mitigation and hence arriving at a wrong conclusion on the same.

b) That, the sentence imposed on the Appellant is manifestly harsh and excessive in the circumstances.

Submissions

7. The appeal was canvassed by way of written submissions. On the part of the appellant, it was submitted by Mr Oduol Achar Advocate, attacking only sentence meaning the grounds of appeal against conviction were abandoned.

8. It was submitted that the appellant was unrepresented at the trial and thus he did not appreciate the seriousness of the offence he was charged with and as such he was unable to offer an appropriate mitigation and defence and consequently the sentence meted against him prejudiced him.

9. It was further submitted that the sentence of life imprisonment passed against the appellant was unconstitutional following the supreme court decision in the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR** and therefore the trial court's hands should no longer be tied by mandatory nature of a prescribed sentence and subsequently this court ought to set aside the sentence passed on the appellant and make any other orders as it deems fit to meet the ends of justice.

Analysis and Determination

10. In determining this appeal, this court being a first appellate court is alive to and takes into account the principles laid down in the case of **Okeno vs. Republic (1972) EA 32** where the Court of Appeal for Eastern Africa stated:

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (Pandya V R 1975) E.A. 336 and to the appellate Court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions (Shantilal M. Ruwala V. R [1957] E.A. 570. It is not the junction of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see (Peters V Sunday Post 1978) E.A. 424."***

11. However, as the appeal is against sentence only, I shall determine the question of whether this court should interfere with the life sentence imposed on the appellant by the trial court, upon convicting him of the offence of defilement of a child aged 4 years.

12. In his written submissions dated 20th February 2020, the appellant's counsel prayed that this court allows the appeal, set aside the judgment of the subordinate court on sentence and be pleased to make any other orders as it deems fit to meet the ends of justice.

13. The appellant's main concern with the judgment of the trial court is therefore in the life imprisonment sentence imposed on him. It was submitted by his advocates on record that the trial court's sentence was unconstitutional following the Supreme Court's decision in the **Muruatetu** case. It was further submitted that the appellant was not represented, was underage and as such was unable to render an appropriate mitigation or put up a defence.

14. The record shows that the Appellant was given an opportunity to defend himself after the prosecution closed its case but he opted to remain silent, which was within his constitutional and legal right. However, the fact that the appellant has abandoned his appeal against conviction is a clear indication and concession that he committed the offence of defiling a 4 year old baby and therefore his conscience has guided him not to lie to the court about what happened.

15. Upon conviction of the appellant by the trial court, the prosecution submitted that he was a first offender. The trial magistrate then gave the appellant an opportunity to mitigate and the appellant stated that he had nothing to say in mitigation.

16. The law on the power and jurisdiction of an appellate court to interfere with any sentence passed by a trial court is well settled in **Ogalo s/o Owuora v R [1954] 24 EACA 70** that:

> ***"This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice."***

17. Similarly, the former Court of Appeal for Eastern Africa stated in **Wanjema v Republic [1971] EA 494** that:

> ***"An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case."***

18. I have examined the sentencing remarks by the trial Magistrate and I find nothing to demonstrate that the Learned Trial Magistrate exercised her discretion wrongly or that she omitted relevant factors or took into account irrelevant or extraneous factors or employed a wrong principle. Trial Courts have a greater deal of discretion when it comes to punishment and meting out the appropriate sentence and other determinations.

19. The law basically provides various range of sentences from which a Judge or Magistrate can opt to effect and apply in specific cases. The same law provides for a minimum mandatory sentences especially in Sexual Offences.

20. The appellant faced a charge of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. The victim of

the defilement was aged 4years less one day at the time of the offence. The appropriate sentence on conviction is provided in Section 8(2) of the Act to be mandatory life imprisonment. The learned trial Magistrate therefore considered and paid due regard to the minimum legislated sentence for the offence of defilement. To that extend, she did not err in any way.

21. In the **Francis Muruatetu Case**, decided in December 2017 and which has turned out to be a landmark case as far as mandatory sentences are concerned, the Supreme Court outlawed mandatory death penalty for murder and declared it unconstitutional and struck down section 204 of the Penal Code to the extent that it prescribed mandatory death sentence upon conviction for murder. The reasoning in the Muruatetu Case was that the mandatory sentences deprive the trial court of the discretion in meting out appropriate sentences having regard to the circumstances of each case. In addition, it was held that the mandatory sentences deprive the convict of the opportunity to mitigate before being sentenced.

22. The reasoning in the above Francis Muruatetu case has been extended to mandatory minimum sentences imposed under the Sexual Offences Act and by extension, to all other statutes prescribing minimum sentences by the Court of appeal in **Dismas Wafula Kilwake v R [2018] eKLR**, and in **Jared Koita Injiri v Republic [2019]e KLR** where the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

> ***"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.***
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> ***Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.***
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> ***The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."***

23. The Court of Appeal in **Christopher Ochieng v R [2018] eKLR** stated as follows:

> ***"In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8(1) 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… Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another v Republic (supra) we should set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of sentence by the trial court."***

24. Guided by the Supreme Court in the Muruatetu decision and persuaded by the case of **Christopher Ochieng v R** (supra), **Dismas Wafula Kilwake v Republic (supra)** and **Jared Koita Injiri v Republic** (supra) decisions in relation to sentencing, it is my considered view that the life imprisonment meted upon the appellant cannot stand. This is o bearing in mind the fact that the impugned penalty was imposed without making any reference to the above decisions of the Supreme Court and Court of Appeal.

25. It is only for the above legal reasons that I would interfere with the sentence imposed on the appellant by the trial court while observing that the appellant committed a heinous act against a baby. He does not in my humble view deserve any mercy of any court of law and justice.

26. In the end, I hereby set aside the life imprisonment imposed on the appellant and substitute it with sixty (60) years imprisonment

27. Accordingly, the appeal against conviction is dismissed and the appeal against sentence is allowed to the extent that the life imprisonment imposed on the appellant is hereby set aside and substituted with sixty (60) years imprisonment to be calculated from 12/2/2018 as the appellant was on bond.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 6th Day of October, 2020 virtually via Microsoft teams. Appellant in prison.

R.E. ABURILI

JUDGE