



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 18 OF 2018

JOHN RUTERE NJERU.....APPELLANT

VS

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the Hon.M.N.Gicheru (CM) delivered on 7/02/2017

in C.M.Cr. Case No.13 of 2017 at Embu)

JUDGMENT

1. The appellant, **John Rutere Njeru** was charged with the offence of defilement of a girl contrary to Section 8(1) read with Section 8(4) of the Sexual Offences Act No. 3 of 2006; and alternate count of an Indecent Act with a girl c/s 11(1) of the Act.
2. After a full trial the appellant was found guilty on the main charge and was convicted and sentenced to a term of twenty (20) years;
 - (i) Being aggrieved by both the conviction and sentence, the appellant filed his Petition of Appeal on both conviction and sentence; he later abandoned the appeal on conviction and only pursued his appeal against sentence; his only ground of appeal was that the sentence imposed was harsh and excessive in the circumstances.
3. At the hearing of the appeal the appellant was unrepresented whereas Ms. Chemenjo appeared for the State; hereunder is a brief summary of the submissions made by the respective parties;

APPELLANTS SUBMISSIONS

4. The appellant submitted that the appeal was just on the sentence and that it was harsh and excessive considering he was a first offender; and stated that this court has unlimited original jurisdiction in both criminal and civil matters to re-dress the contraventions of a fair trial; and the appellant seeks the courts intervention in sentencing in compliance with Article 25©, 27(1)(2) and 50(2)(q) of the Constitution;
5. The appellant states that he is a first offender but due to the mandatory nature of sentence imposition the trial courts discretion when sentencing was limited; that the supreme Court remedies in the **Muratetu vs Republic [2017] eKLR** apply equally to Sexual Offences which attract a minimum and maximum sentence; the appellant humbly prayed that this court imposes a softer and lesser sentence to conform to the Sentencing and Policy Guidelines;
6. The appellant submitted that upon re-sentencing the court takes into consideration and admits the period spent in custody as provided by Section 333(2) of the Civil Procedure Code which the sentencing court failed to take into consideration; case-law referred to **Petition No.38 of 2019 at Embu JAMES MURITHI MARETE & ANOR VS REPUBLIC.**

RESPONDENTS SUBMISSIONS

7. The respondent was not opposed to the revision of the appellant's sentence owing to the development in jurisprudence relating to mandatory sentences as explained in the case of **Dismus Wafula vs Republic (2018)**;
8. The court record reflected that the appellant was a 1st offender with no previous conviction; the trial court considered this fact during sentencing but the respondent submits that the trial magistrate's hands were tied by the law;

9. The respondent nevertheless opposed the appeal and submitted that the sentence for the offence committed by the appellant was not harsh and excessive; and that the appellants appeal was not merited as he had not demonstrated how the trial court abused its discretion when sentencing; that the sentence imposed met the objectives set down in the Sentencing Policy Guidelines 2016 in totality;

10. The respondent urged this court when reviewing the sentence to take into consideration the seriousness of the offence of defilement, the circumstances under which the offence was committed, the age of the minor, the fact that the offence was committed repeatedly and deliberately and that a baby was borne out of the act of defilement.

ISSUES FOR DETERMINATION

11. As the appellant abandoned the appeal on conviction his appeal is limited to the sentence therefore the only issue framed by this court for determination is whether the sentence was harsh and excessive in the circumstances.

ANALYSIS

12. The appellant stated that he was abandoning the ground of appeal on conviction and submitted that the instant appeal was only on sentence; this court notes from the record that the plea was taken in accordance with the law; the Charge and particulars were read out to the appellant in a language he understood; after a full trial the appellant was found guilty and convicted accordingly; this court also notes that the sentence imposed by the trial court was the mandatory sentence as set down by Section 8(4) of the Act;

13. The appellant submitted that the sentence imposed was harsh and excessive; and counsel for the respondent made a correct observation that the trial courts hands were tied by the mandatory provisions of Section 8(4) of the Act; but was not opposed to the application of the developing jurisprudence relating to the mandatory sentence as explained in the case of **Dismus Wafula vs Republic (supra)**.

14. It is now settled law that the sentencing of an accused person is a matter that lies in the discretion of the trial court; and that the mandatory provisions of law must not be interpreted in a manner so as to take away the discretion of the court when sentencing; reference is made to the case of **Dismus Wafula vs Republic (2018) eKLR** and in the **Muruatetu vs Republic [2017] eKLR** case the Supreme Court declared that a mandatory sentence denies an accused person the right to mitigate and also takes away the trial courts discretion when sentencing;

15. Therefore, a court of law should be left to freely exercise its discretion and the sentence imposed by the trial court should be dependent on the facts and circumstances of each case;

16. This court has had the occasion to peruse the facts of the case; the complainant (**PW1**) was aged seventeen (17) years of age and had stated that she had run away from home in February, 2017 on her own accord after being beaten by her mother; **PW2** who was the mother of the complainant stated that she had reported the matter to the police on the 30/06/2017; this translates to a period of over four (4) and during this whole period the complainant was living with the appellant and to use her exact words "**I stayed with him as his wife**"; Corporal Sarah Wambui Kariuki (**PW3**) the police officer who assisted in the rescue mission reiterated these exact words that the complainant told them that "**she was living with John Rutere as husband and wife**".

17. **PW2** also told the court that the complainant had told her younger sibling that she was running away from home to look for a job and or get married; given these facts the appellant could easily have accorded himself the defence provided under Section 8(5); this court observes that there was complacency in the mothers attitude in going out to mount a search for her daughter; it took her four (4) months before she purportedly rescued the daughter; the mother knew all along that her daughter was capable of looking out for herself and was not in any grave danger;

18. It is evident the trial court interpreted the provisions of Section 8(4) of the Act in a manner that took away its discretion when sentencing;

19. This court reiterates the fact that the sentence must in the end depend upon the particular facts and circumstance of that case; there is no doubt that the trial court accorded the maximum sentence to this first offender; and going by the facts of the case the mandatory sentence is found not to be justified in the circumstances; it is also found to be manifestly harsh and excessive and therefore warrants interference by this court;

20. This court finds the sentence to be manifestly harsh and excessive for a first offender; and the circumstances and facts of the case are found not warrant such a harsh sentence; this ground of appeal has merit and it is hereby allowed;

DETERMINATION

21. For those reasons stated above the appeal on sentence is found to be meritorious and it is hereby allowed;

22. The sentence imposed though legal is found to be manifestly harsh and excessive in the circumstances of the case; it is hereby set aside and substituted with a term of five (5) years with effect from the date of arrest which is stated on the Charge Sheet as 01/07/2017;

Orders accordingly.

Dated, Signed and Delivered Electronically at Voi due to the Pandemic this 1st day of October, 2020.

HON. LADY JUSTICE A. MSHILA

JUDGE.