REPUBLIC OF KENYA

IN THE HIGH COURT

AT KIAMBU

CRIMINAL APPEAL NO. 93 OF 2017

ELIUD MUCHONDE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(An Appeal against the sentence from Sexual Offence No. 8 of 2017 at Principal Magistrate's Court - Kikuyu

***before Hon.G. Onsarigo – Resident Magistrate delivered on 29th March 2017*)**

JUDGMENT

1. The appellant **Eliud Muchonde** was convicted for the offence of **Gang Defilement of a 17 years old girl contrary to Section 10 of the Sexual Offences Act No. 32 of 2006** upon his own plea of guilt, and sentenced to serve 15 years imprisonment on the 29th March 2017.

His two co-accused denied commission of the offence.

On the 22nd September 2017, the Director of prosecutions withdrew the case against the two under Section 87A of the Criminal Procedure Code as the complainant was alleged to have escaped from a Children's centre and her whereabouts unknown.

2. The appellant's appeal is against both conviction and sentence but on the 23rd August 2018, he abandoned the appeal on conviction and urged for reduction of the sentence. It was his mitigation that he has stayed in custody for two years and only watched the commission of the offence and did not participate in the act.

3. **Section 10 of the Act** states**:**

> ***"Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person with common intention is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life."***

4. Upon his plea of guilt, the trial court, notwithstanding the prescribed sentence as stated under Section 10, nevertheless sentenced the appellant to a lesser prison imprisonment of ten years. He has urged for a further reduction of the sentence.

5. The sentence prescribed under Section 10 is heavy, being a minimum of fifteen years imprisonment. It is therefore important that the court is satisfied that the appellant, before pleading guilty fully understood the ingredients in the charge and the particulars of the offence as well as the sentence – **Hamisi Bakari and Another -vs- Republic (1987) e KLR and cited in Criminal Appeal No. 82 of 2015 Yawa Nyale -vs- Republic (2018) e KLR.**

6. Before the trial court, the facts were read and explained to the appellant on two occasions and in both, the appellant confirmed the particulars as true. His part in the Commission of the offence – as seen from the charge and particulars was watching for police officer while the other two defiled the complainant in a toilet in the female police cells at the Kikuyu police station the 17th March 2017.

7. There is no doubt that the appellant had a common intention and in the company of the other two to commit the offence and therefore liable upon conviction to the minimum sentence under the Act.

However under the current constitutional criminal justice dispensation minimum sentences are frowned upon by the courts as they take away their judicial discretion.

It is trite that the issue of sentencing vests discretion in the trial court that ought to consider what a fair and appropriate sentence should be in the individual circumstances of each case.

8. The purpose of sentence was set out in the case **S. V. Scott-Crossley 2008 (1) SACR 223 (SCA) at Par 35** that

> ***"Plainly any sentence imposed must have deterrent and restributive force. But of course one must not sacrifice an accused person on the deterrence and retribution as legitimate elements of punishment, they are not the only ones, or for that matter even the over-riding ones***
>
> ***--- It is true that it is in the interest of justice that crime should be punished.***
>
> ***However, punishment that is excessive serve neither the interests of justice nor those of the society."***

9. Thus, despite the minimum sentence under the Act, each case ought to be considered individually taking into account the peculiar characteristics of each individual. The dignity of the individual under Article 27 of the Constitution ought to be considered.

The Supreme Court of Kenya in the now celebrated **Muruatetu Case** was alive to these constitutional provisions when it declared death and life imprisonment unconstitutional.

10. In my view, the provisions of any legislation that was in force before the 2010 Constitution including the Sexual Offences Act No. 3 of 2006 that prescribes minimum sentences ought to – be interpreted in the same manner, giving the court discretion to interrogate circumstances of an offence, the gravity thereto and the victim impact as well as the situation of the offender.

11. In **S. -vs- Mofokeng 1999(1) SACR(W)** at **506 (d)** cited in **Criminal Appeal No. 8 of 2015 Daniel Otieno Yugi -vs- Republic (2018) e KLR Stagemanu J** had this to say:

> ***"For the legislature to have imposed minimum sentences severely curtails the discretion of the courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is not capable of operating with serious injustice in particular cases."***

12. In this regard, the victim then alleged to have been 17 years old, and whose documents to confirm her age were not produced to the court, and who was a suspect in another criminal case, no regard or consideration were taken when the sentence was imposed on the appellant. Indeed the victim who was placed in a children's centre absconded to an unknown place and her whereabouts remained unknown leading to the Director for Public Prosecutions to withdraw the case against the other two co-accused with the appellant.

13. The **Muruatetu** Supreme Court decision emphasized the right to fair trial as one of the cornerstones of a just and democratic society without which the rule of law and public faith would collapse – **Francis Karioko Muruatetu & Another –vs- Republic – Petition No. 154 of 2015**.

14. For the foregoing and having considered all facets of this appeal, I come to the conclusion that the sentence of fifteen (15) years imprisonment imposed on the appellant to have been excessive in the circumstances. See also **Nyamawi Nyawa –vs- Republic (2014) e KLR**. It is therefore set aside and substituted with imprisonment for three years with effect from the trial court's judgment on the 29th March 2017.

Dated and signed at Nakuru this 23rd Day of January 2019.

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J.N. MULWA

JUDGE

Dated, Signed and Delivered at Kiambu this 14th Day of February 2019.

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C. MEOLI

JUDGE