REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 79 OF 2018

FESTUS CHEMOITE MANDU.....APPELLANT

VERSUS

REPUBLIC.....DEFENDANT

(Being an appeal from the original conviction and sentence of Hon. C.O.Obulutsa, CM,

in Criminal Case No. 204 of 2018 at the Eldoret Chief Magistrate's Court

dated 28 September 2018)

JUDGMENT

[1] This appeal was filed herein by the Appellant, **Festus Chemoite Mandu,** on **8 October 2018,** against both conviction and sentence passed in **Criminal Case No 204 of 2018** by Eldoret Chief Magistrate's Court on **28 September 2018**. The Appellant had been arraigned before the lower court charged, in the main, 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.** The particulars were that, on the 26th day of September, 2018, at Likuyani Sub-County within Kakamega County, the Appellant intentionally and unlawfully caused his genital organ, namely penis, to penetrate the genital organ, namely vagina, of **AA**., a girl aged 8 years.

[2] In the alternative, the Appellant was charged with indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on the 26th day of September, 2018, at Likuyani Sub-County within Kakamega County, the Appellant intentionally and unlawfully caused his genital organ, namely penis, to come into contact with the genital organ, namely vagina, of **AA.,** a girl aged 8 years.

[3] The record of the lower court shows that the Appellant admitted the substantive charge, was convicted on his own plea of guilty and was sentenced to life imprisonment. He appealed both his conviction and sentence on the following grounds:

> **[a]** That the Learned Trial Magistrate erred in both law and facts when he sentenced him to life imprisonment without observing that he was not given time to settle down and prepare his defence;
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> **[b]** That the Learned Trial Magistrate erred in both law and fact by convicting and sentencing him to serve life sentence and yet he was not examined to prove that he was the real culprit;
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> **[c]** That the Trial Magistrate erred in both law and fact in failing to make an order for medical examination as to his mental status at the time;
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> **[d]** That the Trial Magistrate failed to warn him that the offence carries up to life imprisonment;

[4] The Appellant urged his appeal by way of written submissions, whereby he faulted the Trial Magistrate for not allowing him time to prepare his defence as by law provided; for failing to warn him of the seriousness of the offences he was charged with; and in convicting him to life imprisonment without considering that he is an old man of 79 years. He further submitted that the Trial Magistrate fell into error in convicting and sentencing him without regard to the fact that he was never taken for medical examination; nor were his specimens taken for forensic analysis to prove that he committed the offence of defilement.

[5] The Appellant argued that it was imperative that his mental status be ascertained before his conviction; contending that this was the first time for him to be arraigned before court. He also posited that he was entitled to a detailed explanation as to the nature of the offence as well as legal representation. He also took issue with the sentence that was passed against him, contending that it is not only excessive but unconstitutional. He relied on **Francis Karioko Muruatetu and Another vs. Republic** to support his arguments.

[6] The appeal was opposed by Learned Counsel for the State, **Mr. Mulamula.** He urged the Court to dismiss the appeal, contending that the Appellant pleaded guilty to the Charge of defilement and was duly warned of the seriousness of the offence. He further pointed out that after the facts were read and admitted by the Appellant, he again pleaded with the court in mitigation saying he had been led by the devil; and therefore that his plea was unequivocal.

[7] I have perused and considered the appeal, the record of the lower court as well as the submissions made herein. Although, the appeal is expressed to have been brought against both conviction and sentence, **Section 348** of the **Criminal Procedure Code, Chapter 75** of **the Laws of Kenya** is explicit that:

> **"No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court, except as to the extent and legality of the sentence."**

[8] Accordingly, any grounds or submissions made herein by the Appellant that seem to attack the soundness of his conviction are clearly untenable. In this respect, I agree fully with the position taken **Olel vs. Republic [1989] KLR 444**, that:

> **"Having considered the submissions by both learned counsel on the interpretation of section 348 ... we have come to the conclusion that where the plea is clearly an unequivocal plea of guilty, an appeal against conviction cannot lie. The section itself is quite clear on that and permits of no confusion or difficulty in its interpretation. It does not merely limit the right of appeal but bars it completely in cases of an unequivocal plea of guilt. That is the fact of what the marginal note also states..."**

[9] Having analyzed the record of the lower court as indicated herein above, there can be no controversy that the Appellant was duly warned of the seriousness of the offence. It is similarly manifest from the record that his plea was unequivocal; for it complied strictly with the formula laid down in ***Adan vs. Republic* [1973] EA 446** by **Spry, V.P**. that:

> ***"When a person is charged, the charge and the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand. The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty. The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused an opportunity to dispute or explain the facts or to add any relevant facts. If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a change of plea to "not guilty" and proceed to hold a trial. If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused's reply must of course be recorded."***

[10] As to the sentence, the Appellant was sentenced, in respect of the Main Count, to life imprisonment; which is the penalty provided for in **Section 8(2)** of the **Sexual Offences Act**. It is noteworthy that the age of the Complainant was specified in the Charge Sheet as falling within the age bracket specified in **Section 8(2)** of the **Sexual Offences Act**. The P3 Form that was produced before the lower court gave the estimated age of the Complainant as 8 years; and the Appellant admitted those facts before the lower court without any equivocation. It is therefore my finding that the Appellant's plea was unequivocal and that no error can be attributed to the trial court with regard to the manner in which the plea was taken.

[11] The Appellant submitted, on the authority of **Francis Karioko Muruatetu & Another vs. Republic [2017] eKLR** that the sentence imposed on him is unconstitutional. Obviously, that is a misapprehension on the part of the Appellant granted that **Section 8(2)** of the **Sexual Offences Act** does provide for the penalty of life imprisonment. Indeed, the Supreme Court made it manifest in **the Muruatetu Case** that it was not there dealing with the constitutionality of the death penalty, but its mandatory nature. Hence, it held that:

> **[58] To our minds, any law or procedure which when executed culminates in termination of life, ought to be just, fair and reasonable. As a result, due process is made possible by a procedure which allows the Court to assess the appropriateness of the death penalty in relation to the circumstances of the offender and the offence. We are of the view that the mandatory nature of this penalty runs counter to constitutional guarantees enshrining respect for the rule of law.**
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> **[59] We now lay to rest the quagmire that has plagued the courts with regard to the mandatory nature of Section 204 of the Penal Code. We do this by determining that any court dealing with the offence of murder is allowed to exercise judicial discretion by considering any mitigating factors, in sentencing an accused person charged with and found guilty of that offence. To do otherwise will render a trial, with the resulting sentence under Section 204 of the Penal Code, unfair thereby conflicting with Articles 25 (c), 28, 48 and 50 (1) and (2)(q) of the Constitution**.

[12] The Supreme Court added, at paragraph 69 of its Judgment that

> **"...For the avoidance of doubt,** *this decision does not outlaw the death penalty***, which is still applicable as a discretionary maximum punishment."**

[13] Applying the same principle to mandatory minimum sentences as provided for in the **Sexual Offences Act**, the Court of Appeal had occasion to express itself in **Jared Koita Injiri vs. Republic [2019] eKLR,** thus:

> **Arising from the decision in** *Francis Karioko Muruatetu & Another vs Republic, SC Pet. No. 16 of 2015* **where the Supreme Court held that the mandatory death sentence prescribed for the offence of murder by** *section 204* **of the** *Penal Code* **was unconstitutional. The Court took the view that;**
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> *"Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right."*
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> **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."**

[14] Thus, while I would confirm the Appellant's conviction, there is merit in his appeal on sentence in respect of the Main Count. Accordingly, the sentence of life imprisonment is hereby set aside and substituted with imprisonment for 30 years, to be served from the date of his conviction by the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF JUNE 2019

OLGA SEWE

JUDGE