



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 60 OF 2013

JOHNSTONE MAKAU MWANDIKWAAPPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(An appeal against the sentence meted out by Hon. Michieka, Acting Principal Magistrate, in Mombasa Chief Magistrate's Court Criminal Case No. 333 of 2011).

JUDGMENT

1. On 24th April, 2013, the appellant through the law firm of J.O. Magolo & Company Advocates filed an appeal against the conviction and sentence of 20 years imprisonment imposed on the appellant. This followed a trial whereby the appellant had been charged with the offence of defilement of a girl contrary to Section 8(1) as read with Subsection (2) of the Sexual Offences Act No. 3 of 2006.
2. The particulars of the charge were that on the 26th of November, 2010 at [particulars withheld] in Kisauni District of the Coast province unlawfully caused his penis to penetrate the vagina of HM [name withheld] a girl aged 10 years.
3. On 4th October, 2018 the appellant filed mitigation grounds of appeal, with leave of the court, which means that he abandoned his appeal against conviction. He stated that he was a 1st offender and promised to be of good character. He expressed remorse for having committed the offence. He also submitted that he has been in custody for 7 years and that he had undergone several programs to improve his knowledge. He prayed for his appeal to be allowed.
4. The Office of the Director of Public Prosecutions (ODPP) had on 27th August, 2018 filed a Notice of enhancement of sentence under the provisions of Section 354(3)(a)(ii) of the Criminal Procedure Code. The respondent's submissions were filed on 8th February, 2019 but Ms Marindah, Prosecution Counsel did not address the court on the reason why they wanted the sentence enhanced. Having failed to do so, this court can safely conclude that the ODPP abandoned its quest to have the appellant's sentence enhanced. The Prosecution Counsel submitted that the appellant was sentenced to 20 years imprisonment instead of life imprisonment and that he had failed to advance a cogent reason to warrant reduction of his prison sentence. She prayed for the appeal to be dismissed.
5. On the principles of sentencing, the Court of Appeal in the case of **Arthur Muya Muriuki vs Republic** [2015] eKLR cited the case of **Shadrack Kipchoge Kogo vs Republic**, Eldoret Criminal Appeal No. 253 of 2003 where the court therein stated as follows:-

“Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was harsh and excessive that an error in principle must be inferred.”
6. In sentencing the appellant herein, the Hon. Magistrate considered the appellant's mitigation and the fact that he was a 1st offender. He also took into account the time spent behind bars during the pendency of the lower court case. He also considered that the appellant's action were callous at the very least considering that the victim was a girl aged 10 years who by all accounts had been thrust to the realm of adulthood and her innocence taken away.
7. The foregoing clearly shows that the Trial Magistrate left nothing to chance and meticulously addressed all the issues he was required to, before he sentenced the appellant.
8. I see no loophole left which this court can resort to so as to exercise its discretion in favour of the appellant. I therefore uphold the sentence of 20 years imprisonment that was imposed against the appellant.

9. The appeal against sentence is hereby dismissed.

DELIVERED, DATED and SIGNED at MOMBASA on this 5th day of July, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah for the DPP

Mr. Mohamed Mohamud - Court Assistant