REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

CRIMINAL APPEAL NO. 280 OF 2017

JOHN MUASYA MUSYOKA...APPELLANT

-VERSUS-

REPUBLIC..RESPONDENT

JUDGEMENT

1. The Appellant was charged with offence of defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on the 7th day of September, 2013 at [particulars withheld] village, Kalungu location in Kibwezi District within Makueni County intentionally and unlawfully caused his male organ namely penis to penetrate the vagina of NN a child aged 15 years.

2. Alternative charge he was charged of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. Particulars of the offence were that on the 7th day of September, 2013 at [particulars withheld] village, Kalungu location in Kibwezi District within Makueni County, intentionally and unlawfully touched the vagina of NN a child aged 15 years.

3. He pleaded not guilty and matter went into full trial. He was found guilty and was convicted and sentenced to serve 20 years imprisonment.

4. Being unhappy with the above verdict, he lodged instant appeal and set out the following grounds of appeal;

(i) There was contradicting evidence.

(ii) Section 169 CPC was not complied with.

(iii) The burden of prove was not discharged.

5. When matter came for directions, the same was agreed to be canvassed via submissions. The prosecution left the court to determine matter on evidence on record.

6. The Appellant on his part filed grounds of clemency in which he stated that;

(i) He has improved in behavior by being in prison for the period served.

(ii) He was a first offender.

(iii) That he has reformed.

(iv) He is remorseful and reformed spiritually and mentally.

(v) Was the only boy in the family.

(vi) Was a young man committed to principles of life.

7. He has sought non-custodial sentence preferably probationary term. He apparently abandoned the challenge on conviction and sort to do a mitigation instead. He addressed court and stated that he was jailed for 20 years and his custodial period was not factored in. He sought leniency of court.

8. The **duty of this court as the first Appellate court** is to re-evaluate the evidence and draw independent conclusions as was held in ***Okeno vs Republic (1972) E.A. 32*** where the court held: -

> ***"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 function 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."***

9. After going through the evidence on record, the court found that the evidence of PW1, the complainant established how accused now Appellant forcefully took PW1 to his house and had sex with her.

10. The next morning the PW2 and PW4 got information from PW1 mother that PW1 was at Appellant house. She proceeded to Appellant house who refused to open the door. They broke down his door and retrieved the PW1 from his house and Appellant was arrested. The Pw3 witnessed the PW1 being removed from Appellant's house.

11. The doctor PW5, established that the PW1 was defiled after examining her. He produced P3 form. The sample of spermatozoa obtained from PW1 pants were via DNA tested and found to match blood sample obtained from the Appellant. PW6 Investigating Officer, produced the report from Government Analysist. The age assessment report indicated that PW1 was 17 to 18 years. That was after 2 years of the date of the alleged offence.

12. Thus the trial court and this court agree with P3 report that PW1 was 15-16 years at the time of commission of the offence.

13. The accused in his defence denied the offence but never challenged PW1, PW2, Pw3 and PW4 evidence nor the doctor's and Government Analysist reports.

14. Thus this court agrees with trial court that the ingredients of offence vide ***Ngui vs R in Machakos Cr. A No. 296/010*** were established i.e penetration, minority age and identification of offender were well proved beyond reasonable doubt. The conviction was founded on concreate prosecution evidence.

15. On sentence, the Appellant mitigated that he was an orphan, had wife and children who depended on him, thus he sought leniency. The prosecution stated that the Appellant to be treated as a first offender.

16. On Sentence the court stated that though it considered the mitigation tendered by Appellant, its hands were tied by law thus awarded the Appellant a mandatory sentence of 20 years. The court did not consider the period Appellant was in custody nor the fact that Appellant was a first offender.

17. In ***BW vs Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR,*** the Court of Appeal has considered the constitutionality of mandatory minimum sentences under the Act; and adopted what the Supreme Court decision held in ***Francis Karioko Muruatetu & another vs Republic SC Petition No. 16 of 2015 [2017] eKLR*** that the mandatory death sentence prescribed for the offence of murder by section 204 of the Penal Code was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution.

18. From the above, it is settled that mandatory minimum sentence is unconstitutional and the court is bound to re-examine the sentence in view of the Legislature position that offences of defilement are serious offence and merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed.

19. Thus this court in line with such cited authority will tamper with the sentence and award a sentence considering mitigation without being tied by the mandatory minimum sentencing element.

20. The court makes the following orders ;

> ***(i) The appeal is dismissed on conviction***
>
> ***(ii) The sentence is set aside and substituted with a jail term of 15 years to run from the date of arrest 9/9/2013.***

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MAKUENI THIS 11TH DAY OF OCTOBER, 2019.

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C. KARIUKI

JUDGE