REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CRIMINAL APPEAL NUMBER 58 OF 2017

BETWEEN

PATRICK MULI MUKUTHA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Machakos Chief Magistrate's Court

Criminal Case (SO 1) of 2015, Hon. C. K. Kisiangani, RM on 8th September, 2016)

REPUBLIC.....PROSECUTOR

VERSUS

PATRICK MULI MUKUTHA.....ACCUSED

JUDGEMENT

1. The appellant, **Patrick Muli Mukutha**, was charged before the Chief Magistrate's Court at Machakos in Criminal Case (SO) No. 1 of 2015 with the offence of defilement contrary to section 8(1) as read with section 8(4) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that the appellant, on the 31st day of March, 2015 at [particulars withheld] Village Wamunyu Location in Mwala Sub County within Machakos County, intentionally and unlawfully caused his penis to penetrate the vagina of FM, a girl aged 16 years. In the alternative, he was charged with the offence of committing an indecent act with a child contrary to section 11(1) of the same Act, the facts being that on the said day at the said place, he unlawfully and indecently touched the vagina of **FM**, a girl aged 16 years using his penis.

2. Upon being found guilty, the appellant was convicted of the offence of defilement and was sentenced to 15 years in prison. Not being satisfied with the sentence the appellant has lodged the instant appeal in which he only challenges the sentence.

3. According to the appellant, whereas the life sentence under section 8(2) of the ***Sexual Offences Act*** is mandatory, sentences under subsections (3) and (4) of the section are not hence the use of the term "is liable" and not shall be "sentenced to". In support of the prosecution's case the prosecution called 4 witnesses. It was therefore submitted that the court had discretion under subsections (3) and (4) to impose a custodial sentence or some other form of punishment. However, in the event that the court imposes a custodial sentence, it must impose the minimum term of imprisonment provided.

4. It was further submitted that the learned trial magistrate while imposing the sentence disregarded the provisions of section 333(2) of the ***Criminal Procedure Code*** and in this regard the appellant relied on **Musyeki Lemoya vs. Republic [2014] eKLR**.

5. The appellant therefore prayed that the appeal be allowed and that the custodial sentence be substituted with a non-custodial one.

6. In opposing the appeal, the Respondent through the learned prosecution counsel, **Ms Mogoi**, mainly dwelt on the propriety of the appellant's conviction and submitted that the trial court analysed the evidence led by the prosecution and the defence and was satisfied that it

led to irresistible conclusion that the Appellant did commit the offence. It was therefore contended that the trial court's decision was well reasoned and was supported by evidence and the court was urged to uphold the conviction of the lower court and confirm the sentence.

7. This being an appeal against the sentence only, it is important to determine the circumstances under which an appellate court interferes with the sentence by the trial court. The principles guiding interference with sentencing by the appellate Court were properly, in my view, set out in **S vs. Malgas 2001 (1) SACR 469 (SCA)** at para 12 where it was held that:

> **"A Court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court…However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"**

8. Similarly, in **Mokela vs. The State (135/11) [2011] ZASCA 166**, the Supreme Court of South Africa held that:

> **"It is well-established that sentencing remains pre-eminently within the discretion of the sentencing court. This salutary principle implies that the appeal court does not enjoy carte blanche to interfere with sentences which have been properly imposed by a sentencing court. In my view, this includes the terms and conditions imposed by a sentencing court on how or when the sentence is to be served."**

9. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

> **"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**

10. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". **(R - v- Shershowsky (1912) CCA 28TLR 263)** while in the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

> **"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)"**

11. The Court of Appeal, on its part, in **Bernard Kimani Gacheru vs. Republic [2002] eKLR** restated that:

> **"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist."**

12. In **Shadrack Kipchoge Kogo vs. Republic Eldoret Criminal Appeal No. 253 of 2003** the Court had this to say:-

> **"Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.**

13. Section 8(1), (2), (3) and (4) of the ***Sexual Offences Act*** provides as follows:

> ***8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.***
>
> ***(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.***
>
> ***(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.***

14. It is true that section 8(3) and (4) of the ***Sexual Offences Act*** applies the phrase *is liable upon conviction to imprisonment for a term of*

not less than twenty years and fifteen years respectively. **Sir Henry Webb C.J.** in **Kichanjele S/O Ndamungu versus Republic (1941) 8 EACA 64** had this to say on the proper construction of the words "**liable to**":

> **"The wording used throughout the code is "*shall be liable to*" but a consideration of the various sections shows in our judgment, that the use of the words "*shall be liable to*" does not import that the sentence mentioned in any particular section in which these words occur is merely a maximum and that the court may impose any lesser sentence below the limit indicated."**

15. The predecessor of the court went further in **Opoya versus Uganda [1967] EA 752** at page 754 where **Sir Clement DeLestang V.P**. picked up the conversation *inter alia* thus:

> **"It seems to us beyond argument that the words "*shall be liable to*" do not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed, the court might not see fit to impose it."**

16. A similar position was adopted in **D W M vs. Republic** (supra) where the Court held that:

> **"As for the sentence the 1st appellate court properly addressed its mind to the operative words in Section 20(1) of the Sexual Offences Act that the offender "*Shall be liable to imprisonment for life*" means that imprisonment for life was the maximum sentence for an offence under the section. A lesser sentence could be imposed considering that the appellant was a first offender though the offence was said to be prevalent, serious and most importantly that the appellant who was supposed to be the complainant's protector turned out to be her tormentor and perpetrator of the defilement. The judge however deemed it proper to substitute the sentence for life imprisonment with that of twenty (20) years imprisonment and it was within his powers to do so. The resulting sentence was within the limits permitted by law and we find no reason to interfere with the exercise of that discretion."**

17. In this case, however, the relevant provisions use the phrases ***"shall be liable"*** and "***not less than"*** in the same breath. As a result, the two provisions suffer from the malady of poor legal draftsmanship since the two phrases imply, in legal terms, diametrically opposed positions. In criminal law, where there is an ambiguity in phraseology of sentencing the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence, since as **Mativo, J** graphically put it in **Elizabeth Waithiegeni Gatimu vs. Republic [2015] eKLR**:

> **"The accused is entitled to the benefit of doubt not a matter of grace and concession, but as a matter of right. An accused person is the most favourite child of the law and every benefit of doubt goes to him regardless of the fact whether he has taken such a plea."**

18. It is therefore my view that the twin subsections must be read as if the sentences provided are the maximum sentences. Accordingly, bearing the totality of the above principles in mind, it is my view that the use of the words "***shall be liable to imprisonment***" in section 8(3) and (4) of the ***Sexual Offences Act*** gives room for the exercise of judicial discretion. The learned trial magistrate noted that the offence was committed against 16 years old girl who would have to live with the trauma of the offence all her life. That position cannot be faulted since as was appreciated in **Tito Kariuki Ngugi vs. Republic [2008] eKLR:**

> **"The appeal against sentence has also no merit. The Appellant…caused her trauma which she will have to live with for the rest of her life."**

19. The learned trial magistrate then proceeded to sentence the appellant to fifteen years' imprisonment which as I have found is the maximum sentence. However, the accused is a first offender. In **Charo Ngumbao Gugudu vs. Republic [2011] eKLR**, the Court of Appeal held that:

> **"It has long been a principle of sentencing that a maximum sentence should only be meted out to the worst offender under the particular section that the offender is charged. In this appeal, the appellant was a first offender aged about 22 at the time of the offence. It is true that the complainant suffered serious injuries but it is equally true that the appellant was provoked at the time that he hit the complainant. There was no basis for the finding made by the trial magistrate and upheld by the superior court, that the complainant was "*completely mentally disabled*"."**

20. In my view the sentence meted out to the appellant was clearly excessive in light of my findings above.

21. As regards section 333(2) of the ***Criminal Procedure Code***, the same provides that:

> ***(2) Subject to the provisions of section 38 of the Penal Code every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***
>
> ***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.***

22. It is therefore clear that it is mandatory that the period which an accused has been held in custody prior to being sentenced must be taken

into account in meting out the sentence. While the court may in its discretion decide that the sentence shall run from the date of sentencing or conviction, it is my view that in departing from the above provisions, the court is obliged to give reasons for doing so since the decision not to include the period spent in custody is an exception to the statutory provision that can only be justifiable upon reasonable grounds and as I have stated above, the accused is entitled to the benefit of the least severe of the prescribed punishments for an offence.

23. I associate myself with the decision in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR** where the Court of Appeal held that:

> **"The second is the failure by the court to take into account in a meaningful way, the period that the appellants had spent in custody as required by *section 333(2)* of the Criminal Procedure Code. By dint of section 333(2) of the Criminal Procedure Code, the court was obliged to take into account the period that they had spent in custody before they were sentenced. Although the learned judge stated that he had taken into account the period the appellants had been in custody, he ordered that their sentence shall take effect from the date of their conviction by the trial court. With respect, there is no evidence that the court took into account the period already spent by the appellants in custody. "Taking into account" the period spent in custody must mean considering that period so that the imposed sentence is reduced proportionately by the period already spent in custody. It is not enough for the court to merely state that it has taken into account the period already spent in custody and still order the sentence to run from the date of the conviction because that amounts to ignoring altogether the period already spent in custody. It must be remembered that the proviso to section 333(2) of the Criminal Procedure Code was introduced in 2007 to give the court power to include the period already spent in custody in the sentence that it metes out to the accused person. We find that the first appellate court misdirected itself in that respect and should have directed the appellants' sentence of imprisonment to run from the date of their arrest on 19th June 2012."**

24. The same Court in **Bethwel Wilson Kibor vs. Republic [2009] eKLR** expressed itself as follows:

> **"By proviso to *section 333(2)* of Criminal Procedure Code where a person sentenced has been held in custody prior to such sentence, the sentence shall take account of the period spent in custody. *Ombija, J*. who sentenced the appellant did not specifically state that he had taken into account the 9 years period that the appellant had been in custody. The appellant told us that as at 22nd September, 2009 he had been in custody for ten years and one month. We think that all these incidents ought to have been taken into account in assessing sentence. In view of the foregoing we are satisfied that the appellant has been sufficiently punished. We therefore allow this appeal and reduce the sentence to the period that the appellant has already served. He is accordingly to be set free forthwith unless otherwise lawfully held."**

25. According to ***The Judiciary Sentencing Policy Guidelines***:

> ***The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in custody during the trial.***

26. In this case the learned trial magistrate did not state when the sentence meted would commence. In my view it is necessarily prudent that there be an indication of the same particularly where an accused has been in custody for a long period before being sentenced. In this case, however, the appellant was arrested on 31st March, 2015 and was released on bond on 24th April, 2015 hence he was in custody from 31st March, 2015 till 24th April, 2015, a period which is to be considered in computing his sentence.

27. Having considered the circumstances of this case it is my view that 7 years imprisonment is sufficient punishment and deterrence. Accordingly, I hereby quash the sentence imposed on the appellant herein and substitute therefor a sentence of seven years' imprisonment. The said period will include the days he was in custody before he was released on bail.

28. Judgement accordingly.

Judgement read, signed and delivered in open Court at Machakos this 1st day of October, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Appellant in person

Miss Mogoi for the Respondent'

CA Geoffrey