REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 38 OF 2017

BETWEEN

TOM WAFULA WAWIRE……APPELLANT

AND

REPUBLIC....……..……..RESPONDENT

(Being an appeal against conviction and sentence of 20 years imprisonment for the offence of Defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act, 2006 in a judgment delivered by Hon. E. Malesi, Senior Resident Magistrate on 17th March, 2017 in Kakamega Criminal Case No. 62 of 2016)

CORAM: LADY JUSTICE RUTH N. SITATI

JUDGMENT

Background and Brief Facts

This appeal stems from the judgment of the learned Trial Magistrate aforementioned which was filed by the appellant on 31st March, 2017 seeking his sentence to be set aside and conviction quashed on the following self-drafted grounds:-

> ***a. THAT the learned trial magistrate erred in law and fact by not considering that the charge sheet was defective and not at any cost acceptable in the country.***
>
> ***b. THAT the learned trial magistrate grossly erred in law and fact by believing in mixed and inconsistent evidence which ran parallel.***
>
> ***c. THAT the learned trial magistrate erred in law and fact by failing to appreciate that the case against the appellant was a fabrication aimed at preventing the appellant from doing business in town.***
>
> ***d. THAT the learned trial magistrate erred in law and fact by not giving the appellant a chance to call his witnesses.***
>
> ***e. THAT the learned trial magistrate erred in law and fact by convicting the appellant on the basis of flimsy grounds and shoddy evidence.***
>
> ***f. THAT the learned trial magistrate erred in law and fact by failing to follow up on the exact dates when the alleged offence was committed.***

The appellant was charged with the offence of ***defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, 2006*** and an alternative charge of ***committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006.*** The particulars are that the appellant on 15th August, 2015 at [particulars withheld] village, Budonga location, [particulars withheld] sub-county within Kakamega County intentionally caused his penis to penetrate the vagina of a girl name S.O. who was 14 years of age.

At the conclusion of the trial, the learned trial magistrate convicted the appellant on the main charge of ***defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, 2006*** and sentenced him to 20 years imprisonment.

This is the first appeal and as such this court is guided by the principles set out in the case of ***David Njuguna Wairimu -vs- Republic [2010]***

eKLR where the Court of Appeal stated:-

> ***"The duty of the first appellate court is to analyse and re-evaluate the evidence which was before the trial court and itself come to its own conclusions on that evidence without overlooking the conclusions of the trial court. There are instances where the first appellate court may, depending on the facts and circumstances of the case, come to the same conclusions as those of the lower court. It may rehash those conclusions. We do not think there is anything objectionable in doing so, provided it is clear that the court has considered the evidence on the basis of the law and the evidence to satisfy itself on the correctness of the decisions."***

In the earlier case of **Okeno -vs- Republic [1972] EA 32,** the Court of Appeal held, inter alia, that:-

> ***"An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -vs- Republic [1957] EA. (336) and the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusion. (Shantilal M. Ruwala -vs- Republic [1957) EA. 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 he lower court's finding and conclusion; 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 -vs- Sunday Post [1958] EA 424."***

Submissions

The respondent conceded the appeal stating that it was not safe to convict the appellant on the evidence before the court. The respondent admitted that they ought to have adduced additional evidence linking the appellant with the offence in that the medical evidence could not prove penetration in the absence of DNA. The respondent further admitted that there was doubt in this case as to whether he was involved in the alleged offence and urged the court to give the appellant the benefit of the doubt.

The Court of Appeal in the case of ***Nelson Ambani Mbakaya -vs- Republic [2016] eKLR*** held that:-

> ***"Although it is the right of the respondent to decide whether to oppose or concede an appeal, that in itself is not binding upon this Court which is nevertheless obliged to consider and determine the appeal on its merit. (See Godfrey Ngotho Mutiso -vs- Republic, Cr. App. No. 17 of 2008; Norman Ambich Miero & Another -vs- Republic, Cr. App. No. 279 of 2005 (Nyeri); John Ndemi Emmanuel -vs- Republic [2016] eKLR")***
>
> **Issues for Determination**
>
> ***a. Whether the charge sheet was defective.***
>
> ***b. Whether the complainant's age was assessed and determined correctly by the trial court.***
>
> ***c. Whether there was improper, intentional and unlawful penetration of the vagina of SO and whether it was necessary to medically examine the child born by SO.***
>
> ***d. Whether the appellant was positively and properly identified.***
>
> ***e. Whether the charge sheet was defective.***

Analysis and Determination

Section 134 of the Criminal Procedure Code provides that a charge sheet should be drafted in such a way that:-

> ***"i. it discloses an offence known in law***
>
> ***ii. the offence is disclosed and stated in a clear and unambiguous manner such that the accused person pleads to a specific charge which is easily understandable so as to also enable the accused person prepare the defence; and***
>
> ***iii. The charge should contain all the essential ingredients of the offence."***

Looking at the charge sheet on record, the statement of offence was that the appellant was charged with ***"Defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006."*** The particulars of the offence are that ***"On the 15th August, 2015 at*** *[particulars withheld]* ***village, Budonga location,*** *[particulars withheld]* ***sub-county within Kakamega County intentionally caused his penis to penetrate the genital organ namely vagina of a girl named S.O. who was aged 14 years."***

> ***Section 8(1) of the Sexual Offences Act, 2006*** provides that ***"A person who commits an act which causes penetration with a child is guilty of an offence termed defilement***." ***Section 8(3) of the same Act*** provides that ***"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***."

I find that the charge contained all the essential ingredients of the offence of defilement including penetration, age and the identity of the appellant. Even though the statement of offence ought to have indicated that the appellant was charged with ***defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act***, I find that the said error or omission was not fatal as ***section 8(1) as read with Section 8(3) of the Sexual Offences Act, 2006*** disclosed an offence that is known in law and the prescribed punishment. Additionally, the record shows that he charge was read out to the appellant in Kiswahili, a language he understood to which he responded in the negative. It is clear to me that the appellant understood the charges and was not confused or embarrassed as to what charge he was pleading to. This means that there was no miscarriage of justice at all and the appellant was not prejudiced based on how the statement of offence was framed in the charge sheet.

I therefore find that ground of appeal by the appellant lacking in merit and the same cannot stand.

Whether the SO's age was assessed and determined correctly by the trial court

One of the elements required to prove the offence of defilement is correctly ascertaining the age of the victim. The appellant averred in one of his grounds of appeal that the trial magistrate failed to note that the age of the complainant was not proved beyond reasonable doubt.

Section 8(1) and (3) of the Sexual Offences Act, No. 3 of 2006 provides as follows:-

> ***"8. Defilement***
>
> ***(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***
>
> ***(2) ……..***
>
> ***(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."***

Section 11(1) of the Sexual Offence Act No. 3 of 2006 provides as follows:-

> ***11. Indecent act with child or adult***
>
> ***(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

The ***Sexual Offences Act No. 3 of 2006*** defines "**child**" within the meaning assigned to it in the Children's Act No. 8 of 2001 which defines a '**child**' as "***……any human being under the age of eighteen years."***

In the case of ***Joseph Kieti Seet -vs- Republic [2014] eKLR,*** H.C. at Machakos, Criminal Appeal No. 91 of 2011, Mutende J. held as follows:-

> ***"It is trite law that the age of a victim can be determined by medical evidence and other cogent evidence. In the case of Francis Omurani -vs- Uganda, Court of Appeal Criminal Appeal No. 2 of 2000, it was held thus:-***
>
> ***"In defilement cases, medical evidence is paramount in determining the age of the victim and the doctor is the only person who could professionally determine the age of the victim in the absence of any other evidence. Apart from medical evidence age may also be proved by birth certificate, the victim's parents or guardian and by observation and common sense….."Also see Aburili J. in Martin Okello Alogo -vs- Republic [2018] eKLR.***

The Court of Appeal in ***Hadson Ali Mwachongo -vs- Republic [2016] eKLR*** stated as follows regarding the issue of age of the victim in sexual offences:-

> ***"Before we conclude this judgment, it is necessary to say a word on computation of the age of the victim. The Sexual Offences Act provides for punishment for defilement in a graduated scale. The younger the victim, the severer the punishment. Where the victim is aged 11 years or less, the prescribed punishment is 20 years imprisonment while defilement of a child aged 16 years to 18 years is punishable by 15 years imprisonment. Rarely will the age of the victim be exact, say exactly 8 years, 10 years, 13 years, etc as at the date defilement to be treated as 11 years old or as more than 11 years old? If the victim is treated as more than 11 years old, to what term is the offender to be sentenced since the victim has not attained 12 years for which a sentence is prescribed. In the same vein, in the present appeal where the victim was aged 15 years and a couple of months old, but was not yet 16 years old, is the appellant to be sentenced as if the victim was exactly 15 years or as if she was 16 years old?....."***
>
> ***"The importance of proving the age of a victim of defilement under the Sexual Offences Act by cogent evidence cannot be gainsaid. It is not in doubt that the age of the victim is an essential ingredient of the offence of defilement and forms an important part of the charge because the prescribed sentence is dependent on the age of victim. In Alfayo Gombe Okello -vs- Republic Cr. App. No. 203 of 2009 (Kisumu), this Court stated as follows*:-**

> ***"In its wisdom parliament chose to categorize the gravity of that offence on the basis of the age of the victim, and consequently the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under Section 8(1)." (***See the Court of Appeal in ***Eliud Waweru Wambui -vs- Republic [2019] eKLR)***

S.O. testified as PW1 and gave sworn testimony that she was born on 2nd February, 2002 and identified her birth certificate which was produced by PC John Oketch (PW4) as Pexhibit 1. The birth certificate indicated that S.O. was born on 2nd February, 2002. Brigid Ahinduka testified as PW3 and stated that when she examined S.O. on 4th April, 2016, she was 15 years old. The birth certificate on record provided the best evidence of S.O.'s age which means that she was approximately 13 years and seven months of age at the time of the offence and I find that the same was rightly concluded by the trial court and that any improper and unlawful sexual activity with her fell within the ambit of '**Defilement**' under ***section 8(1)*** and the punishment thereof within ***section 8(3) of the Sexual Offences Act, 2006.*** Consequently, the appellant's complaint that S.O's age was not properly proved by the prosecution is baseless

Whether there was improper, intentional and unlawful penetration of the vagina of S.O. and whether it was necessary to medically examine the child born to S.O.

The appellant averred in one ground of appeal that there was no medical report to prove that the child who was born to S.O. was a result of their sexual intimacy. S.O. testified that she had gone to fetch firewood when she was accosted by the appellant who took her into the nearby bush and defiled her by penetrating her vagina with his penis. SO stated that she had tried to scream but the appellant gave her Kshs 50/= and told her to keep quiet. SO testified that she missed her monthly period for seven months in a row after that sexual encounter with the appellant and found out that she was pregnant but then she miscarried on her eighth month on 30th April, 2016. SO stated that she had never had sex with any other person apart from the appellant or any other person subsequently and that the still born baby was buried in the appellant's home in his absence. On cross examination, SO stated that the appellant forced her to have sex with him and that the appellant ran away after the incident. The appellant did not dispute the fact that the still born baby was buried in his home.

Patrick Wechuli, who testified as PW2 and stated that he was SO's father and that SO informed him that she had been defiled by the appellant and that she was pregnant. However, SO had stated in her testimony that she never informed PW2 of what had happened. On cross examination, PW2 stated that he only came to know of the incident after he discovered that SO was pregnant and then went to the police around 4th April, 2016. PW2 added that the appellant was arrested but then escaped and disappeared until he was re-arrested in June, 2016.

Brigid Ahinduka (PW3), the clinical officer who examined SO on 4th April, 2016 stated that SO informed her that she was defiled six months prior and the medical examination revealed that she was 24 weeks pregnant. PW3 added that SO's vagina was normal and that there was evidence of defilement because of the pregnancy which she was supposed to deliver in May, 2016. PW3 produced the P3 form and ante-natal care book as Pexhibit 2 and Pexhibit 3 respectively. The P3 form indicated that the probable type of weapon causing injury to SO was a penile shaft.

The Sexual Offences Act, 2006 defines "**penetration**" as

> ***"the partial or complete insertion of the genital organs of a person into the genital organs of another person"***

The Court of Appeal, in the case of ***Sahali Omar -vs- Republic [2017] eKLR***, noted that:

> ***'.....penetration whether by use of fingers, penis or any other gadget is still penetration as provided for under the Sexual Offences Act.'***

In the case of **PKW -vs- Republic [2014] eKLR**, the Court of Appeal observed as follows:-

> ***"Hymen also known as vaginal membrane is a thin mucous membrane found at the orifice of the female vagina with which most female infants are born. In most cases of sexual offences we have dealt with, courts tend to assume that absence of hymen in the vagina of a girl child alleged to have been defiled is proof of the charge. That is however an erroneous assumption. Scientific and medical evidence has proved that some girls are not even born with hymen…..There are times when hymen is broken by factors other than sexual intercourse.***
>
> ***……the evidence of broken ruptured or torn hymen is not automatic proof of penetration through a sexual intercourse. It is upon the prosecution to establish, beyond reasonable doubt that it was ruptured during the alleged rape or defilement……."***

It is thus not necessary that the hymen be broken to prove penetration.

Section **36 (1) of the Sexual Offences Act, 2006** provides that:

> ***"36. Evidence of medical, forensic and scientific nature***
>
> ***(1) Notwithstanding the provisions of Section 26 of this Act or any other law, where a person is charged with committing an offence under this Act, the court may direct that an appropriate sample or samples be taken from the accused person, at such place and subject to such conditions as the court may direct for the purpose of forensic and scientific testing, including a DNA test, in order to gather evidence and to ascertain whether or not the accused person committed an offence."***

The provisions of ***section 36 (1)*** above are couched in discretionary rather than mandatory terms. The above provision was deliberated on by the Court of Appeal in the case of ***Robert Mutungi Mumbi -vs- Republic Criminal Appeal No. 52 of 2014 (Malindi)*** where the appellate court stated:

> ***"Section 36 (1) of the Act empowers a Court to direct a person charged with an offence under the Act to provide samples for tests, including for DNA testing to establish linkage between the accused person and the offence. Clearly that provision is not couched in mandatory terms."***

The court added that DNA testing was not the only evidence which may prove the commission of a sexual offence.

The evidence on record clearly shows that there was penetration of SO. The evidence of SO which was corroborated by that of PW3 clearly and conclusively proves that SO was penetrated intentionally and improperly.

Section 36(1) of the Sexual Offences Act, No. 3 of 2006 and the authorities cited above indicate that it was not mandatory for a DNA examination to be conducted on the deceased baby to prove that the appellant was the one who indeed defiled SO. In fact, it did not matter whether or not SO was impregnated. Penetration is all that the respondent needed to prove. Any other available evidence including that of the victim is sufficient to prove the fact of penetration. Therefore that ground of appeal by the appellant that the baby to SO ought to have been medically examined to ascertain whether he was the father cannot hold water as the same was neither mandatory nor necessary.

Whether the appellant was positively and properly identified

SO testified that the appellant was someone well known to her as she used to see him herd the neighbour's cattle and that he used to sell vegetables to SO's mother. SO's evidence was corroborated by that of PW2 who stated that she knew the appellant as he used to graze the neighbour's cattle. PW4 produced a letter from the school which indicated that SO had informed the deputy head teacher that she had been defiled by the appellant (Pexhibit 4). The appellant corroborated SO's testimony in his defence when he stated that he used to supply SO's mother with vegetables.

The court in the case of ***Titus Wambua -vs- Republic [2016] eKLR*** cited the Court of Appeal in ***Karanja & Another -vs- Republic [2004] 2 KLR 140, at page 147 (Githinji JA, Onyango Otieno & Deverell Ag JJA),*** to the effect that:-

> ***"The law as regards identification under difficult conditions is now well settled. In the case of Cleophas Otieno Wamunga -vs- Republic, Court of Appeal Criminal Appeal No. 20 of 1989 at Kisumu, this court stated as follows:-***
>
> ***"We now turn to the more troublesome part of this appeal, namely the appellant's conviction on counts 1 and 2 charging him with the robbery of Indakwa (PW1) and Lilian Adhiambo Wagude (PW3). Both these witnesses testified that they recognized the appellant among the robbers who attacked and robbed them……What we have to decide now is whether that evidence was reliable and free from possibility of error so as to find a secure basis for the conviction of the appellant. Evidence of visual identification in criminal cases can bring about a miscarriage of justice and it is of vital importance that such evidence is examined carefully to minimize this danger. Whenever the case against a defendant depends wholly or to a great extent on the correctness of one or more identifications of the accused which he alleged to be mistaken, the court must warn itself of the special need for caution before convicting the defendant in reliance on the correctness of the identification. The way to approach the evidence of visual identification was succinctly stated by Lord Widgery, CJ in the well-known case of Republic -vs- Turnbull [1976] 3 ALL ER 549 at page 552 where he said:-***
>
> ***'Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone who he knows; the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."***

In the case of ***Lawrene Chamwanda & Another -vs- Republic [2016] eKLR C. Mwita J.*** observed that:-

> ***"……The complainant gave the identity of her assailants and on the basis of that information, the appellants were arrested and stolen items recovered. This was in line with the holding in the case of Simiyu & Another -vs- Republic [2005] 1 KLR 192 on the need to give a description of the attackers where the complainant alleges to have identified or recognized them. (See Lessavay -vs- Republic [1988] KLR 783), Francis Kariuki Njiru & 7 others -vs- Republic [2001] eKLR.***

It is my finding in the instant case that the appellant was properly and positively identified by recognition based on the testimony of SO which was corroborated by PW2 and the appellant himself. I have no doubt that the said identification of the appellant was free from error as the appellant was a person well known to SO and PW2. In any event the incident took place in broad daylight as so went about her duty of collecting firewood.

Whether the learned trial court erred by relying on the evidence of the complainant, and whether it properly considered the defence

It is the appellant's contention in his written submissions that the learned trial court fell into error by relying on the evidence of the complainant, an admitted minor to convict him. In answering this question I shall refer to Section 124 of the Evidence Act, Cap 80 Laws of Kenya which provides as fellows:-

> ***"124. Corroboration required in criminal cases. Notwithstanding the provisions of Section 19 of the Oaths and Statutory***

Declarations Act, (Cap. 15), where the evidence of the alleged victim is admitted in accordance with that section on behalf of the prosecution in proceedings against any person for an offence, the accused shall not be liable to be convicted on such evidence unless it is corroborated by other material evidence in support thereof implicating him:-

"Provided that where in a criminal case involving a sexual offence the only evidence is that of the alleged victim of the offence, the court shall receive the evidence of the alleged victim and proceed to convict the accused person if for reasons to be recorded in the proceedings, the court is satisfied that the alleged victim is telling the truth."

What this court understands by the above stated proviso to s***ection 124 of the Evidence Act*** is that a trial court can proceed to convict an accused person on the evidence of that single witness in a case involving a sexual offence if the court believes the victim is truthful and records the reasons for such belief. See ***George Kioyi -vs- Republic Criminal Appeal No. 270 of 2012 at Nyeri*** *and also* ***Jacob Odhiambo Omumbo -vs- Republic – Criminal Appeal No. 80 of 2008 at Kisumu***.

The above preposition was amplified in the case of **Chila –vs- Republic [1967] EA 722 at P. 273** where the Court of Appeal for Eastern Africa expressed itself as follows on the issue:-

"The Judge should warn the assessors and himself of the danger of acting on the uncorroborated evidence of the complainant, but having done so, he may convict in the absence of corroboration if he is satisfied that her evidence is truthful. If no such warning is given, the conviction will normally be set aside unless the appellate court is satisfied that there has been no failure of justice. In this case as earlier stated, the trial magistrate after concluding that "I have assessed the minor and I find him fit to proceed with this trial. She can be sworn" went on to state:-

"The witness/minor appeared confident and believable when describing the events and I have no doubt in my mind that she was able to identify the accused person as the perpetrator of the offence."

For the present case, I am satisfied that the learned trial court properly relied on the evidence of the complainant in convicting the appellant herein, and I also so find.

The appellant also complained that the learned trial court did not consider his defence. A look at the trial court's judgment however, reveals that the learned trial magistrate considered the appellant's defence but found the same not credible. This complaint by the appellant is therefore baseless and it is dismissed.

The appellant further complained that he was not given a chance to call his witnesses but the record shows that after the prosecution closed its case, the learned trial court duly complied with ***section 211 of the Criminal Procedure Code***. Thereafter the appellant told the court, **"I shall give a sworn statement. I do not have witnesses."** It was thus the appellant's own choice to call no witnesses. After the appellant testified and was cross-examined, he told the court, **"I close my case."**

It follows therefore that he appellant's complaint that he was not given an opportunity to call all witnesses is a figment of his own imagination without any support. The same is dismissed.

The final issue that needs consideration is one of sentence. ***Section 8 (3) of the Sexual Offences Act provides*** that "***A person who commits on 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."*** The trial court in this case imposed that minimum sentence of twenty years.

The sentencing landscape in this country has, since the Supreme Court decision in ***Francis Karioko Muruatetu & Another -vs- Republic [2017] KLR***, changed drastically. In the said case, the Supreme Court held, among other things that:-

"Article 28 of the constitution provides that every person has inherent dignity and the right to have that dignity protected. It is for this Court to ensure that all persons enjoy the rights to dignity. Failing to allow a judge discretion to take into consideration the convict's mitigating circumstances, the diverse character of the convicts, and the circumstances of the crime, but instead subjecting them to the same (mandatory) sentence thereby treating them as an undifferentiated mass, violates their right to dignity.

"We are in agreement and affirm the Court of Appeal decision in Mutiso that whilst the constitution recognizes the death penalty as being lawful, it does not provide that when a conviction for murder is recorded, only the death sentence shall be imposed. We also agree with the High Court's statement in Joseph Kaberia Kahinga that mitigation does have a place in the trial process with regard to convicted persons pursuant to Section 204 of the Penal Code. It is during mitigation, after conviction and before sentencing, that the offender's version of events may be heavy with pathos necessitating the court to consider an aspect that may have been unclear during the trial process calling for pity more than censure or on the converse, impose the death sentence, if mitigation reveals an untold degree of brutality and callousness.

As a consequence of this decision, paragraphs 6.4-6.7 of the sentencing guidelines are not longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:

a. age of the offender;

b. being a first offender;

c. whether the offender pleaded guilty;

d. character and record of the offender;

e. commission of the offence in response to gender-based violence;

f. remorsefulness of the offender;

g. the possibly of reform and social re-adaptation of the offender;

h. any other factor that the court considers relevant.

More recently, the Court of Appeal, in the case of ***Evans Wanjala Wanyonyi -vs- Republic [2019] eKLR***, and applying the Supreme Court reasoning in the ***Muruatetu Case***, held that:-

"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This court in Christopher Ochieng -vs- Republic [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri –vs- Republic, Kisumu Criminal Appeal No. 93 of 2014 considered the legality of minimum mandatory sentences under the Sexual Offences Act. This court noted that the Supreme Court in Francis Karioko Muruatetu & Another -vs- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional, that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; 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. Guided by the aforestated Supreme Court decision, this court in Christopher Ochieng –vs- Republic (Supra) stated:

"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…….....Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & Another -vs- Republic (Supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with sentence of 30 years' imprisonment from the date of sentence by the trial court."

In the instant case, the learned trial magistrate imposed the least sentence permissible as per the aforementioned ***section 8(3) of the Sexual Offences Act, 2006.*** However as stated above, the Court of Appeal has since held that the minimum mandatory sentences stipulated by the ***Sexual Offences Act, 2006*** are unconstitutional. This means that courts can now consider factors such as but not limited to mitigation from accused person while following the guidelines set by the Supreme Court of Kenya in the ***Muruatetu case*** (above) together with pre-sentencing reports/statements from victims, if any, in deciding the appropriate sentences to be imposed on accused persons convicted of sexual offences.

In this case the respondent told the court upon conviction of the appellant that the appellant had no record of previous criminal antecedents, meaning this was his first offence. In mitigation, the appellant asked for leniency and stated that he had a family that depended on him.

I find that the appellant was remorseful. He is currently aged 29 years old and that means that there are chances that he will be able to learn from his mistake, be rehabilitated and be re-integrated back to the community. I find that the sentence of 20 years that was meted out to him by the trial court was harsh and excessive based on the aforementioned circumstances and reasons. I accordingly set aside the sentence of twenty years and in lieu thereof I sentence the appellant to ten (10) years imprisonment with effect from 17th March, 2017.

Conclusion

In conclusion I make the following final orders in this appeal:-

a. The appeal on conviction be and is hereby dismissed.

b. The appeal on sentence is allowed only to the extent that the sentence of twenty (20) years imprisonment is set aside and in lieu thereof a sentence of ten (10) years imprisonment is imposed with effect from 17th March, 2017.

c. Right of appeal within 14 days from the date of this judgment.

Orders accordingly.

Judgment written and signed at Kapenguria.

RUTH N. SITATI

JUDGE

Judgment delivered, dated and countersigned in open court at Kakamega on this 9th day of October, 2019.

WILLIAM M. MUSYOKA

JUDGE