REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 37 OF 2017

BETWEEN

FRANCIS KASIBWA SIVA……..…….…….APPELLANT

AND

REPUBLIC……..……..…….RESPONDENT

(Being an appeal against judgment, conviction and sentence in Winam Criminal Case Number 440 of 2014 by Hon. B. Kasavuli (SRM) on 28th June, 2017)

JUDGMENT

Background

1. The Appellant herein **FRANCIS KASIBWA SIVA** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (***the Act***) and infringing a child's rights to parental care contrary to section 6(1) as read with Section 20 of the Children's Act. The offences were allegedly committed against LAO a girl aged 15 years on diverse dates between 12th July, 2013 and 24th July, 2014.

2. The prosecution called 7 witnesses in support of the charges. **PW1** the complainant herein stated that the Appellant was his friend and that she had gone to his house on 24.03.14 where he spent a night and had sex with him. It was her evidence that her aunt went for her and took her to school but she was expelled as a result of which she parked her clothes and went to stay with the Appellant as husband and wife until December, 2014 when they were arrested.

3. **PW2 MAO**, the complainant's aunt stated that the complainant was born on 25.01.98 as shown on her immunization card. She recalled that on 08.07.13, complainant disappeared from home at about 07.00 pm and she found her in the house of the Appellant and took her back home. It was her evidence that complainant disappeared a week later and was traced months later and arrested together with the Appellant.

4. **PW3 DA**, complainant's brother aged 13 years recalled seeing the complainant packing her clothes and leaving home.

5. **PW4 Dr. Jane Olivia Nyakombo** produced complainant's P3 form ***PEXH. 2*** filled by her colleague Dr. Susan Arodi on 01.04.14 which showed that complainant was 16 weeks pregnant.

6. **PW5 APC Henry Mitei** arrested the Appellant and complainant on 24.03.14**. PW6 CPL Roselyne Nanjala,** the investigating officer stated that on 25.07.13, PW2 reported that he daughter was missing from home and that months later, Appellant was arrested and complainant was found to have been living with him and was pregnant. She stated that the complainant was born on 25.01.98 and produced her immunization card as ***PEXH. 1***.

7. **PW7 Tobias Ochieng Odero,** assistant chief Nyabondo sub-location stated that he saw complainant staying with the parents and was present when Appellant was arrested.

8. In his sworn defence, the Appellant conceded that he had married the complainant.

9. In a judgment dated *18th May, 2017, the A*ppellant was convicted and sentenced to 20 years' imprisonment in the 1st count and 1-year imprisonment in the 2nd count which sentences were to run consecutively.

Appeal

10. *Being dissatisfied with the sentence, the Appellant lodged the instant Appeal on 10.07.17. From the grounds of appeal and submission filed on 06.11.19, the Appellant mainly challenges the constitutionality of the sentence.*

11. The state submitted that the sentences imposed on the Appellant are lawful based on the circumstances of the case.

Analysis

12. The duty of the 1st appellate court was explained by the Court of Appeal in the case of **Kariuki Karanja Vs Republic [1986] KLR 190** that: -

> **''On first appeal from a conviction by a judge or magistrate, the appellant is entitled to have the appellate court's own consideration and view of the evidence as a whole and its own decision thereon. The court has a duty to rehear the case and reconsider the material before the judge or magistrate with such materials as it may have decided to admit.''**

13. Section 8 (3) of ***the Act*** under which the Appellant was charged in the 1st count 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**.

14. Section 6(1) as read with Section 20 of the Children's Act under which the Appellant was charged in the 2nd count provides that:

> **Notwithstanding penalties contained in any other law, where any person wilfully or as a consequence of culpable negligence infringes any of the rights of a child as specified in sections 5 to 19 such person shall be liable upon summary conviction to a term of imprisonment not exceeding twelve months, or to a fine not exceeding fifty thousand shillings or to both such imprisonment and fine**

15. The Appellant was sentenced to the mandatory minimum sentence of 20 years prescribed under the provisions of Section 8 (3) of ***the Act*** and to the maximum sentence prescribed by Section 20 of the Children's Act.

16. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on the issue of the trial court's discretion in sentencing as follows: -

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

17. The Court of Appeal 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."**

18. In yet another case, the Court of Appeal in the case of **Shadrack Kipkoech Kogo - vs - R. Eldoret Criminal Appeal No.253 of 2003** 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".**

19. I have carefully considered the appeal in the light of the evidence on record and submissions filed on behalf of both parties. I have similarly considered the provisions of **Section 354** of the ***Criminal Procedure Code (Chapter 75 of the Laws of Kenya)*** which provides that this court has power upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under **subsection 3(b)**, "**in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence".**

20. The rule against duplicity has always been applied in a practical, rather than in a strictly analytical, way for the purpose of determining what constituted one offence. Where a number of acts of a similar nature committed by one or more persons were connected with one another, in the time and place of their commission or by their common purpose, in such a way that they could fairly be regarded as forming part of the same transaction or criminal enterprise, it was the practice, as early as the eighteenth century, to charge them in a single count.

21. The offence in the 2nd count was committed in the same transaction as the 1st count. Consequently, I find that the 2nd count is a duplicity of the 1st count and the sentence in the second count is therefore unlawful.

22. The sentence in the 1st count is lawful. However, the Court of Appeal has in several cases including **B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR**, **Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR** considered the constitutionality of mandatory sentences**.** The court has adopted the holding of the Supreme Court in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that mandatory sentences are unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion to impose an appropriate sentence**.**

23. From the foregoing, I am bound to re-examine the sentence meted on the Appellant having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the sentence prescribed by the legislature. In **Dismas Wafula Kilwake v Republic [2018] eKLR**, the Court of Appeal set out the factors to be considered in sentencing under ***the Act***. It observed as follows:

> **[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**

24. The Appellant is a first offender. He was in a relationship with the complainant. The Appellant is a relatively young man and considering the totality of the circumstances, a long custodial sentence would not serve the interests of justice. I recognize the seriousness of the act of defilement. I therefore uphold the conviction. The Appellant has served 2 years and 5 months of his sentence. The sentence 20 years' sentence in the 1st count is substituted with a **5 years' sentence** from ***28th June, 2017*** *when he was sentenced whereas the 1-year sentence in the 2nd count is set aside in its entirety.*

DELIVERED AND SIGNED IN KISUMU THIS 14th DAY OF November 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi

Appellant - Present in person

For the State - Ms. Gathu