REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 262 OF 2012

HAMISI MWANGEKA MWERO...............................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an Appeal from the whole judgment and sentence of

Honourable D. M. Machage- SRM dated 7-11-2012

in Mariakani Criminal Case No. 337 of 2011)

BETWEEN

REPUBLIC..COMPLAINANT

VERSUS

HAMISI MWANGEKA MWERO.......................................ACCUSED

JUDGEMENT

1. The appellant, **Hamisi Mwangeka Mwero**, was charged in the Principal Magistrate's Court at Mariakani in Criminal Case No. No. 337 of 2011 with the offence of with the offence of defilement contrary to section 8(3) of the ***Sexual Offences Act. No. 3 of 2006***. The particulars were that the appellant on the 15th day of August, 2011 at Mwateni Village in Kinango District within Coast Province, intentionally and unlawfully caused penetration of his male genital organ namely penis to penetrate into a female genital organ namely vagina of M C, a child aged 15 years. Alternatively, the appellant was charged with the offence of Committing an Incident Act with a Child contrary to section 11(1) of the ***Sexual Offences Act. No. 3 of 2006,*** the particulars being that on the 15th day of August, 2011 at Mwateni Village in Kinango District within Coast Province, committed an indecent act with a child namely MC by touching her private parts namely vagina of M C, a child aged 15 years.

2.The prosecution's evidence was that for some time the appellant who was working in a shop was telling the complainant that he loved her but the complainant would put him off. On 25th April, 2011, the appellant called the complainant to shop at night at about 10 pm and upon arrival, the appellant stripped the complainant naked, removed he clothes and defiled her. Upon completing the act at 5 am, the appellant told the complainant to go, after which the complainant left. The matter was then reported to the

police and the complainant taken to the Hospital and was issued with a P3 form. Thereafter the appellant was arrested. According to the complainant, they were staying in the same village with the appellant about 200 metres away from each other. The complainant however disclosed that she had agreed with the appellant during the day and when she knocked the door the appellant opened for her.

3. The age of the complainant was proved by the mother (PW2) who testified that she was born on 27th February, 1997 hence was about 15 years and to confirm the age she produced the birth certificate.

4. In his defence, the appellant admitted that he knew the complainant but denied the offence. According to him, he was not aware of the reasons why he was arrested as he was not informed of the offence he had committed.

5. In his judgement the Learned Trial Magistrate found the appellant guilty of the alternative offence of indecent act and sentenced him to serve 10 years.

6. In this appeal the appellant only complains of the severity of the sentence. 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".'**

7. 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."**

8. Section 11(1) of the ***Sexual Offences Act*** provides that:

> ***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.***

9. What the said section provides for is for mandatory minimum sentence. I have my doubts as regards the constitutionality of the minimum sentences since in my view such sentences do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances. Whereas the Court is given the leeway to impose any sentence over and above the minimum sentence, the section like any other sections prescribing for minimum sentences does not permit the Court the discretion to consider whether a lesser punishment would be more appropriate in the circumstances. In those circumstances, it is my view that such provisions do not meet the constitutional dictates. This is my understanding of the Supreme Court decision in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015,** where it expressed itself as hereunder:

> **"47. Indeed the right to fair trial is not just a fundamental right. It is one of the inalienable rights enshrined in Article 10 of the Universal Declaration of Human Rights, and in the**

same vein Article 25(c) of the Constitution elevates it to a non-derogable right which cannot be limited or taken away from a litigant. The right to fair trial is one of the cornerstones of a just and democratic society, without which the Rule of Law and public faith in the justice system would inevitably collapse.

[48] Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in appropriate cases. Where a court listens to mitigating circumstances but has, nonetheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Articles 25 of the Constitution; an absolute right.

[49] With regard to murder convicts, mitigation is an important facet of fair trial. In *Woodson* as cited above, the Supreme Court in striking down the mandatory death penalty for murder decried the failure to individualize an appropriate sentence to the relevant aspects of the character and record of each defendant, and consider appropriate mitigating factors. The Court was of the view that a mandatory sentence treated the offenders as a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death thereby dehumanizing them.

[50] We consider *Reyes* and *Woodson* persuasive on the necessity of mitigation before imposing a death sentence for murder. We will add another perspective. 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 convicts' 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.

[51] The dignity of the person is ignored if the death sentence, which is final and irrevocable is imposed without the individual having any chance to mitigate. We say so because we cannot shut our eyes to the distinct possibility of the differing culpability of different murderers. Such differential culpability can be addressed in Kenya by allowing judicial discretion when considering whether or not to impose a death sentence. To our minds a formal equal penalty for unequally wicked crimes and criminals is not in keeping with the tenets of fair trial.

[52] 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.

[53] If a Judge does not have discretion to take into account mitigating circumstances it is possible to overlook some personal history and the circumstances of the offender which may make the sentence wholly disproportionate to the accused's criminal culpability. Further, imposing the death penalty on all individuals convicted of murder, despite the fact that the crime of murder can be committed with varying degrees of gravity and culpability fails to reflect the exceptional nature of the death penalty as a form of punishment. Consequently, failure to individualise the circumstances of an offence or offender may result in the

undesirable effect of 'overpunishing' the convict."

10. Similarly in **S vs. Mchunu and Another (AR24/11) [2012] ZAKZPHC 6** Kwa Zulu Natal High Court held that:

> **"It is trite law that the issue of sentencing is one which vests a discretion in the trial court. The trial court considers what a fair and appropriate sentence should be. The purpose behind a sentence was set out in *S v Scott-Crossley* 2008 (1) SACR 223 (SCA) at para 35:**
>
> > **'Plainly any sentence imposed must have deterrent and retributive force. But of course one must not sacrifice an accused person on the altar of deterrence. Whilst deterrence and retribution are legitimate elements of punishments, they are not the only ones, or for that matter, even the over-riding ones.'**
>
> **The judgment continues:**
>
> > **'. . . [i]t is true that it is in the interests of justice that crime should be punished. However, punishment that is excessive serves neither the interests of justice nor those of society.'**

11. The Courts have always frowned on mandatory sentences that place a limitation on judicial discretion. In **S vs. Toms 1990 (2) SA 802 (A) at 806(h)-807(b),** the South African Court of Appeal (**Corbett, CJ)** held that:

> **"the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubberstamp. The imposition of mandatory sentences by the Legislature has always been considered an undesirable intrusion upon the sentencing function of the Court. A provision which reduces the Court to a mere rubberstamp, is wholly repugnant."**

12. In **S vs. Mofokeng 1999(1) SACR 502 (W) at 506 (d)**, **Stegmann, J** opined that:

> **"For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of separation of powers of the Legislature and the Judiciary. It tends to undermine the independence of the courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."**

13. Also in **S vs. Jansen 1999 (2) SACR 368 (C) at 373 (g)-(h), Davis J** held that:

> **"mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused."**

14. In my view the opinion of the Supreme Court with respect to mandatory sentences apply with equal force to mandatory minimum sentences. My view is in fact supported by the Kenya Judiciary Sentencing Policy Guidelines where it is appreciated that:

> ***Whereas mandatory and minimum sentences reduce sentencing disparities, they however fetter the discretion of courts, sometimes resulting in grave injustice particularly for juvenile offenders.***

15. The approach to be adopted in determining an appropriate sentence where a minimum sentence is prescribed was set out in **S vs. Malgas 2001 (2) SA 1222 SCA 1235** paragraph 25 as follows:

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed."

16. Having said that in this appeal, the complainant was 15 years old. She said she had agreed with the appellant during the day and she went to the appellant's house by herself. I must however emphasise that where the law provides that a person is, as a result of his or her vulnerability incapable of giving a consent, it is no defence to state that the person did actually consent. However, such circumstances, as opposed to, for example where the person is forcefully dragged into a thicket and is thereby defiled, ought to be taken into account. In other words the circumstances of each case must be considered.

17. In this case however, the appellant was convicted and sentenced on 7th November, 2012. He was however arrested on 27th October, 2011 and from the record was in custody since then, a period of 7 years shy 2 months. In imposing the sentence the Learned Trial Magistrate seems to have done so merely on the basis that the law provided the same as the minimum sentence since nothing else was said as to why the said sentence was deemed the appropriate one.

18. Whereas I appreciate that there is a view held by some jurists that in minimum mandatory sentences the Court has no discretion, in our case clause 7 of the ***Transitional and Consequential Provisions*** provide as follows:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

19. Therefore the provisions of a legislation that was in force before the Constitution of Kenya, 2010 such as the ***Sexual Offences Act. No. 3 of 2006*** must be construed with the said adaptations, qualifications and exceptions when it comes to the mandatory minimum sentences and particularly where the said sentences do not take into account the dignity of the individuals as mandated under Article 27 of the Constitution as appreciated in the ***Muruatetu Case***.

20. Apart from that the sentiments of the Court of Appeal with respect to heavy minimum sentences in the case of **Hamisi Bakari & Another vs. Republic [1987] eKLR** are worth taking note of. In that case the Court held that:

"We would note that where a heavy minimum sentence is involved, the lower courts should be particular to see that each ingredient in the charge is reflected in the particulars of the offence, and is properly proved. Seven years is a long time to serve in a case where the issues are not clear."

21. In the premises while I have no basis upon which to interfere with the conviction of the appellant I hereby reduce the sentence to the period already served. In the premises the appellant shall be released from custody forthwith unless otherwise lawfully held.

22. Orders accordingly.

Judgement read, signed and delivered in open court at Mombasa this 5th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in Person

Ms Ogweno for the Respondent

CA Gladys