REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 26 OF 2016

SAMUEL MURIITHI MBUTHIA

VURSES

REPUBLIC

JUDGMENT

Samuel Muriithi Mbuthia was barely 18 years old when he was charged with the offence of attempted defilement c/s 9(1) as read with section 9(2) of the Sexual Offences Act no. 3 of 2006 before the Karatina Principal Magistrate's Court SOAC no. 26 of 2014.

It was alleged that on the 6th Day of December 2014, in Mathira East Sub County within Nyeri County, he had intentionally attempted to penetrate the vagina of P (Not her real name) a child aged three years and eleven months.

He was unrepresented. He pleaded not guilty to the charge on the 8th December 2014. He was given a bond of Ksh 200,000 with one surety of similar amount. It is noteworthy ne never made bail and remained in remand custody throughout the trial.

The hearing of the case commenced on the 6th July 2015 and on the 14th April 2016, he was found guilty of the charge.

During sentencing the prosecution told the court that the accused was a first offender. The accused told the court in mitigation that he had dropped out of school, because his parents could not afford his education.

The trial court in sentencing him stated,

> "I have considered the mitigation of the accused person and the charges herein. The charge being referred under section 9(1) as read with section 9(2) of the sexual Offences Act leave the court with no option but to sentence the accused to 10 years' imprisonment".

It is against this sentence that the accused now appellant filed this appeal.

He filed his 1st memorandum of appeal on 19th April 2016 and an amended one dated 10th November 2016. His appeal is against the sentence. In both, he sets out six grounds of appeal. His prayer is that the custodial sentence be set aside or reduced or he be given an alternative sentence.

The grounds can be collapsed into four

- That he is a first offender who has reformed and is remorseful.
- That the sentence of 10 years is excessive as he is a young person, the only son in his family, with a bright future if given the chance
- That he had stayed for long in remand custody where his health had deteriorated and he developed stomach ulcers.

In the written submissions the appellant, waxing lyrical, implores this court "to exercise mercy". While conceding that the sentence passed by the trial magistrate was meant for correction. That "correction is kindness…I confess that this offence is matters of shame… confession is the key that opens the door to forgiveness… an achingly difficult …unnatural act... [that the court] …has the virtue to forget the past and start afresh by granting my prayers…"

He urges that court the assist him not to lose his whole life in jail 'as two wrongs do not make a right'. He also seeks for the opportunity to 'reconcile and restore my faith and trust to the offended'.

In response to his written submissions the state through its counsel Ms. Jebet submitted that the sentence given by the trial court was the minimum sentence. About his long stay in remand she submitted that she would leave that to the discretion of the court because being in remand was just like being in prison.

Considering the appellant's submissions and his plea, that given a second chance, he will be a law abiding citizen, he will make himself useful to his family and community, that his committing the offence, and the long sentence add up to two wrongs which do not make a right, brings to sharp focus the purpose of the sexual offences law; "*to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes.*"

Regarding the appellant, the only quarrel he has is with the length of the sentence. Section 9(2) of the Sexual Offences Act no. 3 of 2006, provides that the minimum sentence for the offence of attempted defilement is 10 years. The trial court could not have pronounced any other sentence. The same law does not provide for any alternative sentence or non-custodial sentence

I am alive to the fact that trauma from sexual offences can, and does leave victims with lifelong scars both physical, psychological. On the other hand, we are sending young men who are literally boys to long periods in prison for offences that may require a different approach. Apart from locking them in prison, there is nothing specific attached to the sentence to ensure rehabilitation, reintegration and to prevent re offending.

The law provides minimum sentences whose effect is to take away the discretion of the court to deal with a case according to its peculiar circumstances, essentially placing every offender in certain sexual related offences on exactly the same finishing line, leaving the court with the discretion of adding the extended period so to speak.

I know my role as a Judge. And so did the trail magistrate; to implement the law as passed by the Legislature. The strong and emphatic words of the Court of Appeal regarding the mandatory death sentence for certain offences in **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR** say it all. Drawing inspiration from the famous American case of **Marbury v. Madison 5 U.S. 137, 1 Cranch 137 (1803)** where Justice Marshall stated that:

> "It is emphatically the province and duty of the judicial department to say what the law is."
>
> And, the words of Stamp LJ in **Blackburn vs Attorney General [1971] EWCA Civ 7** where he stated that:
>
> "Parliament enacts laws; and it is the duty of this Court in proper cases to interpret those laws when made; …."

The Court rendered itself thus;

As judges, our mandate is fidelity to the Constitution and to the law. we cannot interpret the Constitution and other statutes whimsically where no discretion or window has been provided. The right to life under Article 26 of the Constitution of Kenya, 2010 has been fashioned in a specific manner to provide, or include, specific circumstances where life is limited, that is, to the extent is provided by law.

> In our view, to say that there are other alternative sentences to the mandatory imposition or application of the death sentence is a pedantic and preposterous interpretation of the spirit and the letter of the Penal Code and the Constitution of Kenya, 2010. If the people of Kenya intended in their wisdom, and their collective will to outlaw the death sentence, then nothing could have been easier to do….
>
> The best the Court can do is exercise judicial authority conferred upon it in accordance with Article 159 of the Constitution, and interpret and apply the law in the manner envisaged… As judges, we must be satisfied with the privilege and honour bestowed upon us by the people of Kenya.
>
> It is not the role of judges to engage in wandering and wilderness interpretation of what the law ought to be. To do so would be going outside the province of Article 159 and 259 of the Constitution of Kenya, 2010.

Hence neither the trial magistrate nor myself can pronounce a sentence less than 10 years' imprisonment in the circumstances of this case. However, and with a lot of respect, as a Judge, I live within the same society as everyone else, and my experience especially in the Children's Court is that as a society we think that harsh laws and long imprisonment sentences will take care of the sex and sexuality issues. The law is definitely not the panacea. There ought to be in place a variety of "sex offender treatment methods" that go together with or in the alternative to lengthy periods in prison depending on the circumstances of each case. I think I have a responsibility to point out where there are gaps in the law.

Be that as it may, the trial court appears not to have been aware of the **SENTENCING POLICY GUIDELINES and** the provisions of section 333(2) of the Criminal Procedure Code. The Guidelines state at page 20 that

> 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.

A perusal section 333 of the CPC reveals that it states;

> (1) A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
>
> 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. (emphasis mine)**

This proviso is couched in mandatory terms.

Section 354 of the Criminal Procedure Code provides for the powers of the court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may—

> (3) (a)……...

(i) …… …………………………………or

(ii)……………... ………………………. or

(iii) ……………………………………….

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

In this case the appellant took plea on the 8th of December 2014. He was sentenced on the 14th April 2016. He spent one year and about 5months in remand custody as he was not able to raise the bond terms. The trial court was obligated by the law to take into consideration the period spent in custody when pronouncing the mandatory sentence of 10years. That is the law.

This is again re- stated in the Guidelines that;

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.

The trial court hence erred in not taking into consideration the period the appellant had spent in remand custody. I there allow the appeal and order that the sentence imposed of 10 years to run from the date the appellant was remanded in custody i.e. Eight Day December 2014.

It is so ordered.

Right of Appeal Explained.

DATED SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF JUNE 2017

TERESIA MATHEKA

JUDGE

In the presence of

The appellant

Ms. Jebet for the State

Court Assistant……………. Harriet