REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CRIMINAL APPEAL NO. 62 OF 2014

(An appeal from the Orders of the Ag. Principal Magistrate, Runyenjes in SPMCR. Case No. 444 of 2014 dated 14/10/2014)

FRANCIS MUGENDI MWANIKI................................. APPELLANT

VERSUS

PROSECUTION……..RESPONDENT

J U D G M E N T

This is an appeal against the judgment of Runyenjes Ag. Principal Magistrate in Cr. Case No. 444 of 2014 delivered on 14/10/2014. The appellant was charged and convicted of the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. He was sentenced to serve 20 years imprisonment.

The appellant filed a petition challenging the judgment of the trial magistrate regarding both the conviction and sentence. He later filed amended grounds and submissions in which he abandoned the appeal against conviction. He put forth the following grounds:-

1. *That he is satisfied with the conviction and is only seeking the mercy of the court to reduce the sentence imposed.*
2. *That he is a pauper and a first offender.*
3. *That he is remorseful and depends on casual labour to earn his living.*
4. *That the court reduces his sentence and that he undertakes toll be a law abiding citizen.*

Ms. Nandwa for the respondent submitted that the case against the appellant was proved beyond reasonable doubt and that PW2 gave evidence implicating the appellant. In his defence the appellant did not say that he was framed. The court found the evidence of PW1 credible. It was submitted that the prosecution proved that the appellant was the perpetrator of the offence. The age of the complainant was proved by production of a birth certificate. The counsel urged the court to dismiss the appeal.

The duty of the first appellate court was explained in the case of ***OKENO VS REPUBLIC [1972] EA 32*** where it was held as follows:-

> *"An appellant on first appeal is entitled to expect the e4vidence as a whole to to be submitted to a fresh and* exhaustive *examination [Pandya Vs. Republic (1957) EA 336] and to 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 the lower court's findings and conclusions; 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)".

The appellant in his amended grounds of appeal only wishes that the sentence imposed should be reduced. He does not appeal against the conviction. The issue of consideration is whether the court should reduce the sentence of twenty years imprisonment.

The principles upon which a court can interfere with sentence imposed by the trial court were discussed in the case of ***ROBERT MUTUNGI MUUMBI VS REPUBLIC [2015] eKLR*** where the court of appeal cited with approval the case of ***BERNARD KIMANI GACHERU VS REPUBLIC, CR APP. NO. 188 OF 2000 (NAKURU)*** where it was held :-

"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 stated is shown to exist."

The court requires to consider whether the sentence is manifestly excessive, whether the trial court overlooked some material factor or took into account some wrong material and acted on the wrong principles. The fact that the sentence is excessive is not sufficient on its own as a basis for reducing sentence.

In the present case PW5 produced a birth notification indicating that the complainant was born on 3/6/2000. The offence was committed between January 2013 and 12th August 2014. The complainant was therefore 12 years and a few months old when the offence was 1st committed in January 2013.

Section 8(3) of the Sexual Offence Act provides:-

"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. "

The sentence of twenty years imprisonment is the minimum provided for under the law leaving the trial court with no discretion. This observation was made by the magistrate at the time of passing sentence.

In view of the foregoing, the sentence meted out by the trial magistrate is within the law and there is no indication that it is manifestly excessive or the trial court overlooked some material factors or took into account some wrong material or acted on the wrong principles.

I find the appeal not merited and dismiss it accordingly. The conviction and sentence are hereby upheld.

DELIVERED, DATED AND SIGNED AT EMBU THIS 9TH DAY OF NOVEMBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Appellant present

Ms. Nandwa for the respondent