IN THE COURT OF APPEAL AT KISUMU

(CORAM: ASIKE-MAKHANDIA, OMONDI & KIMARU JJ.A.) CRIMINAL APPEAL NO. 148 OF 2020

BETWEEN

THOMAS EBOYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Kakamega, (Njagi, J.) dated 28th November, 2019

in

HCCRA No. 78 of 2018)

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JUDGMENT OF THE COURT

1. The appellant, Thomas Eboya, was the accused person at the trial before the Hamisi Senior Principal's Magistrate's Court in Criminal Case No. 175 of 2017, where he was charged with the offence of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act, it was alleged that on the 25th February, 2017, at Shiru Sub location within Vihiga County, the appellant caused his penis to penetrate the vagina

of G.K., a girl aged 12 years.

2. The appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the victim, date and place of the alternative count were the same as those in the main charge.
3. The appellant pleaded not guilty to the charge and a trial ensued, during which five witnesses testified for the prosecution and the appellant gave an unsworn statement of defence. At the conclusion of the trial, the appellant was found guilty of the charge, convicted and sentenced to 20 years imprisonment.
4. The appellant was aggrieved by the judgment of the trial court and preferred an appeal to the High Court. On considering the appeal, the High Court (Njagi, J.) upheld both the conviction and sentence, and dismissed the appeal in its entirety.
5. The appellant was again dissatisfied with the decision of the High Court and has lodged the present appeal against the sentence only. In summary, he complains that the sentence imposed was harsh and excessive in the circumstances; contending that he is reformed, rehabilitated having undergone numerous rehabilitation programmes and he's therefore ready to reintegrate into society.
6. In rebuttal, the respondent contends that by virtue of section

361(1) of the Criminal Procedure Code, the jurisdiction of this Court on a

second appeal is restricted to matters of law only. Issues relating to findings of fact, including the severity of sentence, fall outside the purview of this Court, save where the sentence is shown to be illegal, imposed without jurisdiction, or enhanced on appeal. Accordingly, the appellant's challenge to the sentence on grounds of leniency and mitigation raises issues of fact which this Court lacks jurisdiction to entertain.

7. The respondent further contends that the sentence of twenty (20) years' imprisonment imposed by the subordinate court and upheld by the High Court was the statutory minimum prescribed by law. As reaffirmed by the Supreme Court in ***Republic vs. Joshua Gichuki Mwangi, Petition No. E018 of 2023***, the decision in ***Muruatetu & another vs. Republic; Katiba Institute & 5 Others (Amicus Curiae) (Petition 15 & 16 of 2015) [2021] KESC 31 (KLR) (6 July 2021) (Directions)*** did not invalidate mandatory or minimum sentences under the Penal Code, the Sexual Offences Act, or any other statute. The sentence was therefore lawful and not open to interference.

8. This being a second appeal, this Court is restricted under Section 361(1) (a) of the Criminal Procedure Code to considering matters of

law only as stated by this Court in ***Stephen M'Irungi & Another***

vs. Republic 1982 – 88 1KAR 360:

> ***"Where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of law or mixed finding of fact and law, and, it should not interfere with the decisions of the trial or first appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."***

9. Having carefully considered the record of appeal, the written and oral submissions made by both parties, the law, and the Court's mandate, the main issue for determination is whether there is any justification for this Court to interfere with the sentence of 20 years imprisonment imposed upon the appellant.

10. On this single question of sentence, the appellant was sentenced to 20 years imprisonment under Section 8(3) of the Sexual Offences Act, which 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."***

11. Under the Act a person found guilty of the offence of defilement of a girl between the ages of 12 and 15 years is liable to imprisonment for a term of not less than twenty years. The

victim herein was a

child aged 12 years. Guided by the provisions of Sections 8(1) and 8(3) of the Sexual Offences Act, the appellant was sentenced to 20 years imprisonment for the said offence by the trial court. The sentence of twenty (20) years that the trial magistrate imposed upon the appellant was the minimum sentence provided under section 8(3) of the Sexual Offences Act which the appellant complains about.

12. We acknowledge that sentencing is an exercise of discretion by the trial court. In ***Benard Kimani Gacheru vs. Republic (2002) eKLR*** it was thus:

> ***"It is now settled law, following several authorities by this court and by the High Court that sentence is a matter which rests in the discretion of the trial court. Similarly, sentencing depends on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless the sentence is manifestly high/excessive in the circumstances of the case or that the trial court overlooked some mutual factors or took into account some wrong material or cited upon a wrong principle. Even if the Appellate court feels that the sentence is heavy and the Appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the decision of the trial court on sentence unless anyone of the matter stated i.e. shown to exist."***

13. Further, by dint of Section 361(1) of the Criminal Procedure Code, the appellant is precluded from raising the complaint on the severity of sentence on a second appeal as severity of the

sentence

is a matter of fact. The Supreme Court in ***Republic vs. Joshua Gichuki Mwangi (supra)*** had this to say regarding the jurisdiction of this Court when dealing with sentences in a second appeal:

> ***"The Court of Appeal's jurisdiction on second appeals is limited to only matters of law and it could not interfere with the decision of the High Court on facts unless it was shown that the trial court and the first appellate court considered matters, they ought not to have considered, failed to consider matters they should have considered, or were plainly wrong in their decision when considering the evidence as a whole. In such a case, such omissions or commissions would be treated as matters of law. Consequently, the Respondent's appeal on the grounds that his sentence was harsh and excessive was not one that the Court of Appeal could lawfully determine as it fell outside the purview of the Court of Appeal's jurisdiction. We must also reaffirm that, although sentencing is an exercise of judicial discretion, it is Parliament and not the Judiciary that sets the parameters of sentencing for each crime in statute. As such, striking down a sentence provided for in Statute, must be based not only on evidence and sound legal principles but on an in-depth consideration of public interest and the principles of public law that informed the making of that specific law. A judicial decision of that nature cannot be based on private opinions, sentiments, sympathy or benevolence. It ought not to be arbitrary, whimsical or capricious. However, where a sentence is set in Statute, the Legislature has already determined the course, unless it is declared unconstitutional, based on sound principles and clear guidelines, upon which the Legislature should then act. Suffice to say, where Parliament enacts legislation, the Judicial arm***

should adjudicate disputes based on the provisions of the law. However, in the special circumstances of a declaration of unconstitutionality, the process is reversed." The sentence was, therefore, neither excessive nor illegal, nor do we find any

demonstration to show that the trial court acted on some wrong principles or overlooked some material factors as to justify this Court's interference.

14. Similarly, in ***Dismas Wafula Kilwake vs. Republic [2019] eKLR*** this Court affirmed that courts are bound to apply mandatory sentences where prescribed by statute, unless declared unconstitutional.

15. The appellant has not established any grounds upon which the Court can interfere with his sentence. The upshot is that the appeal against the sentence fails and is dismissed.

Dated and delivered at Kisumu this 13th day of March, 2026.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR