IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, OKWENGU & SICHALE, JJ.A)

CRIMINAL APPEAL NO. 94 OF 2018

BETWEEN

MUSEE WAMBUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(*Appeal from a judgment of the High Court of Kenya at Machakos (B. Thuranira, J)*

***dated 23rd May, 2013 in* HC.CR. A. No. 220 of 2011)**

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JUDGMENT OF THE COURT

[**1**] The appellant, **Musee Wambua**, is dissatisfied with the judgment of the High Court in which the learned Judge (**Thuranira-Jaden, J.)** dismissed his appeal against conviction and sentence for the offence of defilement contrary to **section 8(1**) as read with **section 8(2)** of the **Sexual Offences Act**.

[**2**] The appellant was charged and tried before the Senior Principal Magistrates court at Kitui. It was alleged that he intentionally and unlawfully caused his penis to penetrate the vagina of ML (name withheld), a child aged seven years.

[**3**] Five witnesses testified for the prosecution during the trial. The evidence was that the complainant, who is aged seven years old, was living with her grandmother, **JMN**

(J) and **MM**(**M**), J's 13 year old daughter. On 23rd March 2011, M was washing ML when she noticed that her private parts were swollen. She asked her what had happened and ML explained that the appellant whose house was about 20 metres away, had two days earlier taken her to his house, removed her pants and put his male organs into her private parts, threatening her that he would kill her if she told anyone. M called J and informed her what had happened. J called the mother of ML and together they took her to Kitui police station where they reported the matter. They were then referred to hospital where ML was examined and treated. Janet produced a clinic card confirming that ML was seven years old at the time the offence was committed.

[**4**] **Dr. Okoko** who was then working at Kitui District Hospital examined ML and filled the P3 form noting that ML's hymen was absent, her vagina was reddish and had a discharge, which when taken for analysis revealed a few pus cells. The report of Dr. Okoko was produced in evidence by **Dr. Patrick Mutuku** of Kitui District Hospital as Dr. Okoko had been transferred to Pumwani Hospital and could not be traced by the time the report was being produced in evidence. **PC Margaret Kwamboka** who was then stationed at Kitui Police station and who was the investigating officer, testified how she looked for the appellant, arrested him and caused him to be charged.

[**5**] When put on his defence, the appellant explained that he had gone to dig a fishpond at central primary school when he was arrested on allegations of defilement. He maintained that the complaints against him were a frame up.

[**6**] In his judgment, the trial magistrate found that the prosecution had proved its case as the evidence of ML that she was defiled was corroborated by that of M and the findings of the doctor as recorded in the P3 form. The trial magistrate was satisfied that the appellant was positively identified by ML as the person who defiled her as she knew him well, being her cousin, and that ML identified the appellant by his full name. The trial magistrate believed that ML spoke the truth. He therefore rejected the appellant's defence, convicted him of the charge and sentenced him to life imprisonment.

[**7**] As already stated the appellant's appeal to the High Court was dismissed, the learned Judge finding that there was sufficient evidence in support of the appellant's conviction, and that he was properly identified. The learned Judge further dismissed the appeal against sentence, noting that the sentence provided was within the law.

[**8**] In his appeal before us, the appellant initially appealed against conviction and sentence, but later filed an amended memorandum of grounds of appeal in which he urged the Court to consider the appeal solely on the legality of sentence, and prayed that the matter be remitted back to the High Court for re-sentence and consideration. During the hearing of the appeal, the appellant reiterated his position that he was pursuing the appeal on the issue of legality of sentence only.

[**9**] In **Bernard Kimani Gacheru vs Republic [2002] eKLR** this Court stated that:

> **"…sentence is a matter that rests with 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, any one of the matters already stated is shown to exist."**

[**10**] We have considered the record of appeal and do note that the appellant stated in mitigation that he was a first offender, and an orphan living with his grandmother. The trial magistrate considered this mitigation but observed that his hands were tied by the law, and imposed the life sentence. In her judgment, the learned Judge of the High Court noted that section 8(2) of the Sexual Offences Act provides for life imprisonment, and that the hands of the trial magistrate were tied because the complainant was proved to be seven years old. It is apparent that both the trial court and the first appellate court were guided by the minimum sentence provided under section 8(2) of the Sexual Offences Act No. 3 of 2006, which they considered mandatory. That section states as follows:

> "**A person who commits an offence of defilement with a child aged 11 years or less, shall upon conviction be sentenced to imprisonment for life**."

[**11**] The issue of mandatory sentence vis-à-vis the discretion of the trial court was considered by the Supreme Court in **Francis Karioko Muruatetu & Anor vs Republic**, **[2017] eKLR** where the Court had this to say about the mandatory nature of the death sentence under section 204 of the Penal Code:

> **"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."**

[**12**] In **Evans Wanjala Wanyonyi vs Republic [2019] eKLR** this Court reduced to ten years, a sentence that had been enhanced by the High Court to the mandatory minimum sentence of 20 years. Applying the Muruatetu decision to mandatory minimum sentence under the Sexual Offences Act, the Court stated *inter alia* as follows:

> ***"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the aforestated Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***
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> *'In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. ….. Needless to say, pursuant to the Supreme Court's decision in **Francis Karioko Muruatetu & another – v- Republic** (**supra**), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.'***"**

[**13**] It is evident to us that in sentencing the appellant, the trial magistrate did not exercise his discretion nor did he take into account the mitigation of the appellant because he was of the mistaken belief that he had no discretion but had to impose the minimum sentence provided under section 8(2) of the Sexual Offences Act. Although there are cases where that minimum sentence may be deserved, the trial magistrate must be so satisfied having considered the circumstances of the particular case.

[**14**] We find that this is an appropriate case in which this Court ought to intervene as the appellant did not get a fair trial in so far as sentencing was concerned. This Court has the discretion to impose the appropriate sentence or remit the case back to the High Court for re-sentencing. As we have already substantially dealt with the appeal, and the appellant having already served over nine years imprisonment, we find it expedient to bring this matter to conclusion by imposing the appropriate sentence. Given that the appellant was a first offender, and his mitigation that he was an orphan staying with his grandmother, and not losing sight of the fact that the victim of the offence was a helpless

seven year old girl, we find that a sentence of 20 years imprisonment would meet the ends of justice.

[**15**] For above the reasons, the appellant having abandoned his appeal against conviction, we dismiss the appeal against conviction, but allow the appeal against sentence to the extent of setting aside the sentence of life imprisonment that was imposed on the appellant, and substituting thereto a sentence of 20 years imprisonment with effect from 17th November, 2011, the date when the appellant was first sentenced.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 6th day of March, 2020.

W. KARANJA

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR