



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO (P), NAMBUYE & OKWENGU, JJA)

CRIMINAL APPEAL NO. 41 OF 2016

BETWEEN

KENNEDY MUTINDA MUTUA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos (L.N. Mutende, J) dated 19th February, 2010

in

HC.CR. A. No. 19 of 2012)

JUDGMENT OF THE COURT

[1] **Kennedy Mutinda Mutua** the appellant was charged before the Senior Resident Magistrate Court at Kithimani, with the offence of defilement said to be contrary to **section 8(1)(2)** of the Sexual Offences Act. He pleaded guilty to the charge and was sentenced to life imprisonment.

[2] The appellant appealed to the High Court against his conviction and sentence, contending that there was a mistrial as the record does not show how the charge was read and explained to him, that is the language used or the explanation given, and that the appellant's plea was therefore equivocal. The State opposed the appeal maintaining that the facts were clearly read to the appellant; that he admitted the facts and pleaded guilty to the charge; and that the language used was clearly recorded as Kikamba.

[3] The High Court (**Mutende J**), dismissed the appeal holding that the appellant appreciated the nature of the offence as the facts which he admitted clearly revealed the particulars of the charge, and that his mitigation confirms that he admitted the charge. She therefore dismissed the appeal against conviction finding that the plea of guilty was unequivocal and that the sentence was the mandatory sentence prescribed by law.

[4] The appellant is now before us in this second appeal in which he appears in person. He has relied on his written submissions in which he reiterates that his plea was not unequivocal; that his fundamental right as enshrined under Article 25 of the Constitution was violated; that neither the complainant nor her mother who were vital witnesses were called to testify; and that although the sentence provided is a mandatory sentence, the court should have considered alternative dispute resolution mechanism, as the complainant's mother had indicated a wish to forgive the appellant. [5] **Ms Wangele** Senior Principal Prosecution Counsel, who appeared for the State submitted that the appellant was convicted on his own plea of guilty, that the plea was unequivocal and therefore neither the evidence of the mother nor the evidence of the minor was necessary. In regard to the sentence, counsel submitted that the sentence meted out was lawful and that under section 361 of the Criminal Procedure Code, the Court has no jurisdiction to interfere with the sentence. Counsel therefore urged the Court to dismiss the appeal.

[6] We have considered this appeal and the submissions that were made. As regards the appellant's conviction, it is apparent that the appellant was first produced in court on 19th February, 2010. The court record indicates that there was interpretation of English, Kiswahili and Kikamba and that the charge and the elements thereof, were explained to the appellant in Kikamba. We note that although the particulars of the charge were properly drawn, the section under which the appellant was charged was not clear as he was charged under section 8(1)(2). We have no doubt from the facts of this case that this was a mistake, and that the intended provision was section 8(1) as read with section 8(2) of the Sexual Offences Act.

[7] Notwithstanding the insignificant error in the charge, the appellant admitted that the charge was true. The facts were equally explained to the appellant and he responded that the facts were correct. In mitigation, the appellant stated that it was the first time he had had sex with the complainant.

[8] It is evident to us that the appellant clearly understood the charge and not only admitted the charge, but also confirmed that the facts as given, were correct. What the appellant said in mitigation clearly confirmed his plea of guilty. In addition, the appellant reiterated his admission and remorse in paragraph 1 in what he filed before us as mitigating supplementary grounds of appeal that:

“Although I pleaded guilty to the charge and convicted (sic) on my own plea of guilt, I am very much remorseful and pleaded with the complainant’s mother who passed my remorsefulness to the officer in charge, OCS Ndonyo-Sabuk Police Station who in turn expressed the same to the trial magistrate during trial, a fact on record.”

[9] We find no substance in the appellant’s claim that his plea was equivocal. He understood what he was pleading guilty to. The error in the stated provision of the Sexual Offences Act was a minor error that did not cause any prejudice to the appellant. This is because section 8(1) defines the charge of defilement, whilst section 8(2) provides the punishment for the offence of defilement of a child under 11 years. In any case, the error in the charge is curable under section 382 of the Criminal Procedure Code. The learned Judge properly addressed and analyzed the appellant’s guilty plea, quoting appropriate authority. The plea having been an unequivocal plea, the issue of witnesses testifying does not arise as the appellant was convicted on his own plea of guilty.

[10] In considering the appeal against sentence, we are mindful of section 348 of the Criminal Procedure Code, which provides that:

“No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of the sentence.”

[11] Section 8(2) of the Sexual Offences Act provides that ‘any person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life’. The trial magistrate noted the appellant’s mitigation but appeared not to have exercised any discretion in sentencing, as he stated that he sentenced the appellant in accordance with the Sexual Offences Act, having noted the age of the complainant. This means that the trial magistrate felt constrained to apply the sentence provided in the Act. Likewise, the learned Judge held that the sentence was a mandatory prescribed minimum sentence and that the court could not interfere with the sentence.

[11] In **Bernard Kimani Gacheru vs Republic [2002] eKLR** this Court reiterated 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.”

[12] Recent jurisprudence guided by the Supreme Court has reiterated the importance of the trial court’s discretion in sentencing even where mandatory or minimum sentence has been provided. In **Francis Karioko Muruatetu & Anor vs Republic, [2017] eKLR**, (Muruatetu decision) the Supreme Court disapproved the mandatory nature of the death sentence under section 204 of the Penal Code as inimical to the discretion of the trial court in sentencing, and declared such mandatory sentences as contrary to fair trial as enshrined in the Constitution. In **Dismus Wafula Kilwake vs Republic [2018] eKLR** this Court applying the Muruatetu decision held that the provisions of Section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the Court in sentencing. In **Evans Wanjala Wanyonyi vs Republic [2019] eKLR**, this Court applying the reasoning in the Muruatetu decision reduced to 10 years a minimum sentence of 20 years that had been imposed by the trial magistrate under section 8(3) of the Sexual Offences Act.

[13] In this case, the appellant who was treated as a first offender, pleaded guilty and expressed his remorsefulness. Had the trial magistrate considered these factors and exercised his discretion properly in sentencing, we are sure that he would not have imposed life sentence on the appellant. For this reason, we are satisfied that the trial magistrate failed to take into account the mitigation of the appellant and the circumstances of the case. The learned Judge failed to note that the trial magistrate did not properly exercise his discretion in sentencing, as he failed to take relevant factors into account. For this reason, we are justified in interfering with the sentence in order to do what the learned Judge ought to have done.

[14] The upshot of the above, is that we dismiss the appeal against conviction, but allow the appeal against sentence and set aside the sentence of life imprisonment that was imposed on the appellant, and substitute thereto a sentence of 30 years to run from 19th February 2010, the date on which the appellant was convicted.

Those shall be the orders of the Court.

Dated and delivered at Nairobi this 24th day of April, 2020.

W. OUKO, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPTY REGISTRAR