



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & ODEK, J.J.A)

CRIMINAL APPEAL NO. 1 OF 2016

BETWEEN

JOSEPHAT NJORE.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Kisii, (Nagillah, J.) dated 12th October, 2015

in

HCCRA NO. 62 OF 2012)

JUDGMENT OF THE COURT

At the hearing of this appeal, the appellant through **Mr. Mokua**, learned counsel, abandoned the appeal on conviction. Instead, he opted to prosecute the appeal on sentence only.

The appellant was charged before the Principal Magistrate's Court at Kilgoris with the offence of defilement of a girl contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act**. The particulars were that on 21st March, 2009 at [Particulars Withheld] Primary School in Transmara District of the Rift Valley Province the appellant intentionally and unlawfully caused his penis to penetrate the vagina of **ENT**, a girl aged 14 years. He also faced the alternative count of Indecent Act with a Child contrary to **section 11** of the Sexual Offences with particulars being that on the same day and place, the appellant unlawfully indecently assaulted ENT by touching her private parts namely the vagina.

He pleaded not guilty to the counts and his trial ensued. After considering the evidence by the prosecution as well as defence witnesses, the learned Magistrate reached the conclusion that the charge of defilement had been proved beyond reasonable doubt and proceeded to convict and sentence the appellant to 20 years imprisonment. His appeal to the High Court (**Nagillah, J.**) was unsuccessful, hence this second and perhaps last appeal, which, as already stated, is limited to sentence only.

During the hearing of the appeal, **Mr. Mokua** submitted that the appellant had so far served 10 out of 20 years imprisonment imposed on him by the trial court. Relying on the case of **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, counsel urged us to do away with minimum mandatory sentence of 20 years handed down on the appellant and replace it with the term so far served.

In response, **Mr. Muia**, learned Prosecution Counsel submitted that courts have generally been moving away from mandatory sentences since the decision in **Muruatetu case** aforesaid. However, in deserving cases, such sentences can still be imposed. Counsel further submitted that the appellant was ENT's teacher. By sexually assaulting her, he abused the trust and authority bestowed on him. Since the appellant had not exhibited any remorse, counsel urged us not to interfere with the sentence.

Having considered the record and the parties' respective submissions, the core issue for determination is whether we should interfere with the sentence that was handed down on the appellant. We note that in sentencing the appellant, the trial court observed that section 8(3) of the Sexual Offences Act, tied its hands as regards the sentence to impose as the minimum sentence prescribed for an accused who commits an offence of defilement with a child between the ages of twelve and fifteen years was twenty years imprisonment. Accordingly, the trial court imposed the said mandatory minimum sentence.

This Court in **Christopher Ochieng v Republic [2018] eKLR** considered the legality of minimum mandatory sentence under Sexual Offences Act and stated:-

“... 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 of life imprisonment imposed and substitute it therefor with sentence of 30 years imprisonment from the date of sentence by the trial court...”

Taking into account the holding in the **Muruatetu case** (supra), regarding mandatory sentences, we appreciate that a court is required to consider mitigating factors before imposing a sentence, even where the law prescribes a statutory minimum sentence. Our perusal of the record shows that though the trial court considered the mitigation proffered by the appellant, it considered itself bound by the statutory provision and was not at liberty to exercise discretion at all in sentencing the appellant. Of course that was the position in law before the Supreme Court’s decision in **Muruatetu case** aforesaid. We are satisfied that the sentence imposed on the appellant of 20 years imprisonment was the mandatory minimum sentence as provided in section 8(3) of the Sexual Offences Act. The discretion of the two courts below to mete out a sentence to the appellant that was commensurate with the circumstances of the case was accordingly curtailed by the minimum mandatory sentence. This therefore calls for our interference. We are convinced and persuaded that the mandatory 20 years’ imprisonment meted upon the appellant was not justified. We in the premises set aside the said sentence and substitute it with a sentence of 12 years imprisonment with effect from 5th March, 2012 when the trial court passed the initial sentence.

This Judgment has been delivered in accordance with rule 32(2) of the Court of Appeal Rules, Odek, JA having passed on before signing it.

Dated and delivered at Kisumu this 3rd day of April , 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL