IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A.)

CRIMINAL APPEAL NO. 31 OF 2018

BETWEEN

JUMA BAYA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of the High Court of Kenya at Malindi (Njoki Mwangi, J.)

delivered on 20th April, 2018 *in Criminal Appeal No. 20 of 2018.*)

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JUDGMENT OF THE COURT

1. On 14th July, 2017 ***Jumaa Yaa Baya,*** herein after referred to as ***"the appellant,"*** was convicted on his own plea of guilty by the Chief Magistrates' Court at Malindi on a charge of defilement of a girl, ***SC,*** aged 15 years. The offence was committed on diverse dates between July and September 2016 at [particulars withheld] village of Watamu location within Kilifi County. On 21st July, 2017 the appellant was sentenced to serve 20 years' imprisonment.

2. Notwithstanding the fact that the conviction and sentence was based on the appellant's own plea of guilty, he preferred an appeal to the High Court stating, *inter alia*, that the learned magistrate failed to consider that the plea was not unequivocal; that he was not informed of the consequences of so pleading; and that the sentence was harsh.

3. The learned judge dismissed the appeal against both conviction and sentence, prompting an appeal to this Court. This being a second appeal, by dint of the provisions of ***section 361*** of the ***Criminal Procedure Code*** we are enjoined to consider only matters of law. See ***Karani v Republic [2010] 1 KLR 73***.

4. In his appeal before this Court, the appellant stated in his memorandum of appeal that the learned judge failed to consider that the charge was defective; that the charge was made up; and that judge did not consider his mitigation.

5. During the hearing of the appeal, the appellant, who was unrepresented, relied on his written submissions. The respondent's representative did not attend court, though served with a hearing notice on 11th November, 2019.

6. The learned judge considered the charge and the manner the plea was taken. She was satisfied that the charge was proper and the plea was taken in accordance with the principles laid down in ***Adan v Republic [1973] EA 445***. We have re-considered the charge and we see no basis of faulting the learned judge. The charge was read and explained to the appellant in the Kiswahili language. In response the appellant stated:

> ***"It is true I impregnated a school girl. I am 19 years old. I did sleep with her and she became pregnant and had a child. The child is mine. I agree. I know she is 15 years."***

7. The facts of the case revealed that between July and September 2016, the appellant and the complainant engaged in "consensual" sexual intercourse as a result of which the girl became pregnant and delivered a baby boy. Thereafter the appellant was arrested and charged as aforesaid. The appellant admitted the facts as read out. The trial court then convicted the appellant on his own plea of guilty.

8. The Prosecutor told the trial court that the appellant was a first offender. In mitigation, the appellant said that the girl's parents were aware that he was living with her; that they chased him away from the village but kept on asking him to help her.

9. In view of the foregoing, the appellant's contention that the charge was made up and unsustainable. The charge was clear, and the appellant so confirmed when he was asked by the trial court whether the facts as read out were true and correct. We therefore dismiss that ground of appeal.

10. We now turn to consider the issue of sentence. The learned judge in affirming the 20 years' imprisonment expressed herself as follows:

> ***"The sentence provided under the provisions of section 8(3) of the Sexual Offences Act is imprisonment for a term of not less than 20 years. This court therefore has no discretion to vary the sentence that was imposed against the appellant."***

11. The appellant urged this Court to reconsider the sentence in light of the Supreme Court's decision in ***Francis Karioko Muruatetu & Another v Republic [2017] eKLR*** where the Court held the mandatory nature of sentence that denies the court the opportunity to pass a lesser sentence even after considering an accused's mitigation was unconstitutional. The Court states:

> ***"[48] Section 204 of the Penal Code deprives the***
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> ***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. The Supreme Court in the ***Francis Karioko Muruatetu case***, where the appellant had been convicted of murder before the trial court, the Court held that the factors that were to be considered were as follows:-

> ***"[71] As a consequence of this decision, paragraph 6.4-6.7 of the guidelines are no longer applicable. To avoid a lacuna, the following guidelines with regard to mitigating factors are applicable in a re-hearing sentence for the conviction of a murder charge:***
>
> ***(a) age of the offender;***
>
> ***(b) being a first offender;***
>
> ***(c) whether the offender pleaded guilty;***
>
> ***(d) character and record of the offender;***
>
> ***(e) commission of the offence in response to gender-based violence;***
>
> ***(f) remorsefulness of the offender;***
>
> ***(g) the possibility of reform and social re-adaptation of the offender;***
>
> ***(h) any other factor that the Court considers relevant."***

13. By parity of reasoning, this Court, in appropriate cases of sexual violence where either the trial court or the first appellate court had not taken into consideration the accused mitigating factors, applied the principles set out by the Supreme Court in the ***Francis Karioko Muruatetu case***. In this appeal, neither the trial court nor the first appellate court considered the mitigating factors as stated by the appellant.

14. Considering the age of the appellant and the circumstances in which the offence was committed, we are inclined to interfere with the sentence. We hereby set aside the sentence of imprisonment for a term of 20 years and substitute therefor imprisonment for a term of 10 years from the date the initial sentence was passed. To that extent only we allow this appeal.

It is so ordered.

Dated and delivered at Nairobi this 22nd Day of May, 2020

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR