



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO P., M'INOTI & MURGOR, J.J.A.)

CRIMINAL APPEAL NO. 100 OF 2016

BETWEEN

KAMUSYI NGULU.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Machakos (Jaden, J.) dated 12th June 2014

in

H.C.C.R.A. No. 92 of 2013)

JUDGMENT OF THE COURT

This is another of the appeals that were heard remotely through Skype technology in the wake of the Covid-19 pandemic.

The appellant, Kamusyi Ngulu, presented a notice of intention to act in person and participated in the proceedings from Kamiti Maximum Prison, whilst Mr. Hassan Abdi, learned counsel for the Director of Public Prosecutions, joined the video link from Nairobi. We thank both parties for supporting the deployment of technology to ensure that in this era of the said pandemic, the administration of justice does not grind to a halt.

The appellant was charged before the **Senior Resident Magistrates' Court** at **Mutomo** with the offence of defilement contrary to **section 8(1)** as read with **section 8(2)** of the **Sexual Offences Act**. He also faced, as an alternative to that count, a charge of engaging in an indecent act with a child contrary to **section 11(1)** of the same Act. Lastly, the appellant was charged in count II the offence of assault causing actual bodily harm contrary to **section 251** of the **Penal Code**.

The particulars in count I were that on 14th February 2013 in **Mutomo Location, Kitui County**, he defiled **NM (the complainant)**, a child aged 11 years. The particulars of the alternative charge were that on the same day and at the same place, he intentionally touched the complainant's vagina. As for count II, the particulars stated that on the same day and at the same place as in count I, the appellant unlawfully assaulted the complainant and occasioned her actual bodily harm. The trial court convicted him on the two counts and sentenced him to life imprisonment for the first count and three years imprisonment for the second, but ordered the sentences to run concurrently.

The appellant was aggrieved and appealed against both the conviction and sentence to the High Court at Machakos. By the judgment, the subject of this appeal, the court (Jaden, J.) dismissed the appeal and affirmed the sentence. The appellant was still aggrieved and filed this appeal, which is restricted to appeal against sentence only.

The evidence upon which the appellant was convicted, adduced by five prosecution witnesses, was that on the material day, the complainant, a class four pupil, was sleeping at her home, having missed school because she was ill. At about 1.00 pm the appellant arrived at the complainant's home and accused her of stealing his Kshs 350. He took her to his home where he assaulted and inflicted injuries on her. Thereafter he ordered her to follow him to her grandmother to report the alleged theft. On the way to the grandmother's home, the appellant led the complainant through some bushes where he knocked her down, tore her pants and dress, and defiled her, claiming that she was paying his stolen money.

After the appellant was done and had left, the complainant, who was bleeding profusely, went to her grandmother's home but found that she

was at the market. When the grandmother returned at about 7.00 pm, the complainant reported what had hap-

pened to her. She was still bleeding too much that the grand-mother had to use a container throughout the night to collect the oozing blood. The matter was reported to the complainant's school the next morning and subsequently to the police. The complaint was attended to and treated at **Mutomo Dispensary**.

The appellant fled to **Kibwezi** from where he was arrested a week after the date of the offence, and charged with the offence. The medical evidence adduced by the prosecution was that on examination the complainant was sickly with a tender lower abdomen whose injuries were inflicted by a blunt weapon. Her hymen was missing and she had tear wounds on the lower *libia minora* and on the clitoris. She had vaginal bleeding and pus cells. The clinical officer concluded that there was penetration and classified her injuries as harm. The complainant's blood-soaked clothes, as well as her school registration card bearing her date of birth, were produced in court as exhibits.

When he was put on his defence, the appellant gave an un-sworn statement in which he denied having committed the offence. He stated that he had been in Kibwezi since 5th January 2012 from where he was arrested by the police on 23rd February 2013 and charged with an offence he knew nothing about.

As we stated earlier, the appellant's appeal is against sentence only. He submitted that his sentence of life imprisonment was a mandatory sentence and that the Supreme Court had declared mandatory sentences unconstitutional in **Francis Kariokor Muruatetu & Another v. Republic [2017] eKLR**. He added that he was a first offender and was remorseful which did not warrant a sentence of life imprisonment. It was the appellant's view that since the *Muruatetu* decision, this Court has jurisdiction to substitute the mandatory sentences provided in the Sexual Offences Act with appropriate sentences. He cited as an example the judgment of this Court in **Evans Wanjala Wanyonyi v. Republic [2019] eKLR**.

On his part, Mr Hassan for the respondent opposed the appeal, submitting that sentence meted out to the appellant was lawful. Counsel further submitted that the decision in *Muruatetu* had no application to the mandatory sentences prescribed by the Sexual Offences Act and that it applied only in cases of capital offences. In his view, what the Supreme Court declared unconstitutional were only mandatory death sentences.

Section 8(1) as read with **section 8(2)** of the Sexual Offences Act under which the appellant was charged provides that a person who defiles a child aged eleven years or less shall, upon conviction, be sentenced to imprisonment for life. It was on the basis of those provisions that the appellant was sentenced to life imprisonment.

By dint of **section 361(1) (a)** of the **Criminal Procedure Code**, severity of sentence is a matter of fact which this Court cannot delve into in a second appeal. In this appeal however, as we understand it, the appellant is not merely challenging the severity of the sentence, he is positing that to the extent that the sentence imposed upon him was a mandatory sentence, it is an unlawful sentence because the court was denied the opportunity to consider his case on the basis of its facts. We are satisfied that we have jurisdiction to consider the question of legality of sentence in this appeal.

This Court has held in numerous appeals that a proper reading of the Supreme Court's judgment in **Francis Kariokor Muruatetu & Another v. Republic** (supra) leads to the conclusion that mandatory sentences are unconstitutional because they constitute a legislative invasion of sentencing, which is a function of the Judiciary. In addition to the case of **Evans Wanjala Wanyonyi v. Republic** (supra) cited by the appellant, we may refer to others like **Hellen Onyango Oloo & 2 Others v Republic [2018] eKLR**, **Christopher Ochieng v. Republic [2018] eKLR**, **Jared Koita Injiri v. Republic [2019] eKLR**, **Ezekiel Wakhwa Nandwa & Another v. Republic [2019] eKLR**, **BW v Republic [2019] eKLR** and **David Wafula Kilwake & Another v. Republic [2018] eKLR** where this Court has applied the reasoning in *Muruatetu* on mandatory sentences. The mere fact that the Supreme Court was dealing with the mandatory nature of sentences in the context of a capital offence does not change the rationale of its decision, which finds expression in paragraph 48 of that judgment as follows:

“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

an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.” (Emphasis added).

Accordingly we do not agree with the respondent's argument that mandatory sentences are lawful in all other offences except in capital offences. Having said that however, we must hasten to add that this Court will uphold a sentence prescribed by the Sexual Offences Act if upon proper exercise of sentencing discretion and consideration of the facts of each case, such sentence is deserved or merited. This Court expressed the proposition as follows in **Dismas Wafula Kilwake & Another v Republic (supra)**:

“[W]e hold 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. Those provisions are indicative of the seriousness with which the Legislature and the Society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it.”

Taking the foregoing into account, and bearing in mind the circumstances of this appeal, in particular the inhuman and callous manner in which the appellant defiled the young complainant, his disregard of the fact that she was already ill, the money motive that spurred the defilement, and the nature and seriousness of injuries that the appellant inflicted on the complainant, not merely on her private parts, but also on the rest of her body, we are satisfied that there is no basis for interfering with the sentence imposed by the trial court and upheld by

the first appellate court. A court properly exercising its discretion in the circumstances of this appeal, could impose the sentence that was meted out to the appellant.

The upshot is that we do not find any merit in this appeal, and the same is hereby dismissed. It is so ordered.

Dated and delivered at NAIROBI this 24th day of July, 2020

W. OUKO, P.

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

I certify that this is a true

copy of the original

Signed

DEPUTY REGISTRAR