IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, ASIKE-MAKHANDIA & J.

MOHAMMED. JJ.A)

CRIMINAL APPEAL NO. 67 OF 2019

BETWEEN

DENNIS KIMEU..................................APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal from the Judgment of the High Court of Kenya at Machakos, (Kemei, J.) dated 24th July 2017

in

HCCR.A. NO. 44 OF 2015)

****

JUDGMENT OF THE COURT

Background

1. The appellant, **Dennis Kimeu**, was charged before the Principal Magistrate's Court at Mavoko with the offence of defilement contrary to **Section 8 (1) as read with Section 8 (3) of the Sexual Offences Act**. The particulars of the offence were that on 15th August, 2011 in Athi River District within Machakos County he intentionally and unlawfully caused his male genital organ (penis) to penetrate the female genital organ (vagina) of a child aged fifteen and a half (15 1/2) years old. In the alternative, the appellant was charged with the offence of committing an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**.

2. The appellant was also charged with a second count of assault causing actual bodily harm contrary to **Section 250 as read with Section 251 of the Penal code**. The appellant pleaded guilty to the char latter charge and was subsequently sentenced to a fine of Kshs. 5,000/- or three (3) months imprisonment in default.

3. The appellant pleaded not guilty to the first count and the matter proceeded to trial. The prosecution called four (4) witnesses including the minor complainant. The evidence was that towards the end of 2010, **MM** met the appellant at his workplace, a food kiosk adjacent to her home.

4. On 15th August, 2011 at about 12.00 noon **MM** went to visit the appellant at his single room. He started caressing her, undressed her and then defiled her. She claimed that he thereafter apologized to her for using force. She dressed and left. She testified that she did not tell anyone about the incident as she feared the consequences. Thereafter, **MM** continued talking to the appellant whenever they met.

5. Subsequently, **MM** joined [Particulars Withheld] Secondary School in 2011 and while at school she felt unwell and went to see the school doctor who informed her that she had anaemia and sent her home for treatment. She informed her mother that she suspected that she was pregnant. Her mother took her to Machakos Level 5 hospital where she was examined and it was confirmed that she was 2 months pregnant.

6. When **MM** was about 8 months pregnant, the appellant called her and asked her to go with him to Machakos town. It was her account that when they arrived at Machakos, the appellant forcefully took her to his relatives in Makueni. Thereafter, she delivered a baby girl and named her **EK**.

7. On 1st December, 2013, while **MM** was on her way home from church, she met the appellant. He insisted on continuing their relationship but she refused. She took shelter at a posho mill and the appellant followed her there and hit her head with a glass water jar.

8. **MM** reported the matter to the police and went for treatment at Athi River Health Center. **Robert Kilonzo**, a medical officer based at the hospital produced a P3 form on behalf of his colleague, **Winfred Musembi**, who had examined **MM**. The findings were that her hymen was torn.

9. **PC Kenneth Meta** the investigating officer who was based at Athi River Police Station testified that he was assigned the case; that he filled the P3 form and recorded witness statements; that he took **MM** and her daughter to Kenyatta Hospital for DNA testing; and that while he was on leave, **PC Letoya Kaparo** took the samples to Government Chemist for testing.

10. **Ann Wangeci Nderitu**, a Government analyst, produced the DNA test report dated 11th August, 2014. The findings were that there was a probability of 99.9% that the appellant was the father of the complainant's child.

11. In his defence, the appellant gave sworn evidence that he and the complainant were lovers; that he was then aged 22 years while the complainant was aged about 16 years old; that he sired a child with the complainant; that he later went to visit the complainant and his child and found that she was in a relationship with another man; and that he got annoyed and assaulted her. He admitted committing the offence of defilement and sought forgiveness and wished to be reunited with his family.

12. The appellant called his mother, **Jane Mueni Musyoka**, as a witness. It was her account that the appellant had impregnated the complainant who was a school girl at the time. She further testified that she had held a discussion with the complainant's parents through which it was resolved that the complainant should proceed with her schooling.

13. The trial magistrate found that the prosecution had proved the case against the appellant beyond reasonable doubt. Therefore, he convicted the appellant for the offence of defilement under **Section 8 (1)** as read with **Section 8 (3) of the Sexual Offences Act** and sentenced him to 20 years imprisonment.

14. Aggrieved, the appellant appealed to the High Court on both conviction and sentence on the grounds that the learned trial magistrate erred by not finding that the statutory defence under ***Section 8(5) of the Sexual Offences Act*** absolved him. He also faulted the learned trial magistrate for passing the mandatory sentence of 20 years imprisonment without fully considering the mitigating factors including the appellant's state of mind regarding the complainant's age.

15. The learned Judge dismissed the appeal on both conviction and sentence. He found that the appellant could not benefit from the defence provided under **Section 8 (5) of the Sexual Offences Act** as he was not made to believe that the complainant was over 18 years and he never took steps to establish her age. Regarding sentence, the learned Judge found that the sentence imposed of 20 years imprisonment was neither illegal nor inappropriate. He reasoned that the complainant was still within the age of 15 years which was within the bracket contemplated by **Section 8 (3) of the Sexual Offences Act**. He further reasoned that the trial court did receive a pre-sentence report which it considered and thereafter indicated that its hands were tied by the law which provided a minimum sentence of twenty (20) years for the offence.

16. Undeterred, the appellant filed this second appeal against the sentence imposed by the trial court and confirmed by the High Court. The appellant filed a 'Mitigation Appeal' urging the Court *inter alia* to invoke the provisions of **Section 333(2)** of the Criminal Procedure Code and consider: the period he has spent in remand prison; that he is the bread winner of his young family; that the complainant has completed her education and is ready to reunite with him; that the complainant is now an adult and they can legally get married and raise a family; and that he is remorseful for the offence he committed and will be a law abiding citizen. The appellant prayed for leniency and a non-custodial sentence.

<u>Submissions</u>

17. At the hearing of the appeal, the appellant acted in person and confirmed that his appeal was against sentence. The appellant urged this Court to reduce his sentence to enable him reunite with his family. He also urged us to consider the time that he has already served in prison custody; and that the complainant and their child, now 8 years old and in class 3, visit him in prison.

18. **Mr. Hassan**, learned counsel for the State, opposed the appeal against sentence and contended that the sentence imposed by the trial court was the minimum sentence for the offence; that the sentence imposed on the appellant was proper in the circumstances as the complainant was between 15 and 16 years at the time of the commission of the offence; that unless the sentence is found to be manifestly harsh and excessive the court should be slow in interfering; and that the case of ***Francis Karioko Muruatetu v Republic (2017) eKLR*** does not apply in the circumstances of this case.

<u>Determination</u>

19. This being a second appeal, the jurisdiction of this Court is limited to consideration of matters of law only. ***Section 361 of the Criminal Procedure Code*** provides that:-

> ***"361. (1) A party to an appeal from a subordinate court may, subject to subsection (8), appeal against a decision of the High Court in its appellate jurisdiction on a matter of law, and the Court of Appeal shall not hear an appeal under this section –***
>
> > ***(a) on a matter of fact, and severity of sentence is a matter of fact; or***
> >
> > ***(b) against sentence, except where a sentence has been enhanced by the High Court, unless the subordinate court had no***

power under section 7 to pass that sentence."

20. This Court in the case of ***Chemagong v Republic [1984] KLR 213*** on page 219 stated as follows:-

> "***A second appeal must be confined to points of law and this Court will not interfere with concurrent findings of facts arrived at in the two courts below unless based on no evidence. The test to be applied on second appeal is whether there was any evidence on which the trial court could find as it did. (Reuben Karari s/o Karanja vs. Republic 17 EACA146)" See also Karingo v R. [1982] KLR 213.***

21. With the above in mind, we have considered the appeal, the submissions, the authorities cited and the law. This is an appeal against sentence. The appellant contends that the sentence of 20 years imprisonment that was meted on him was manifestly harsh and excessive in the circumstances of this case. It is clear that the sentence imposed was the prescribed sentence for the offence of defilement under **Section 8 (3) of the Sexual Offences Act**. The record shows that the trial court took into consideration the social inquiry report, the nature of the offence and its circumstances. The trial court noted that the appellant would need counselling while in custody, but stated that its hands were tied by the law which provides for a minimum sentence for the offence. The High Court upheld the conviction and sentence.

22. The Supreme Court of Kenya in the case of ***Francis Karioko Muruatetu*** *(supra)* found that:-

> "***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 the accused persons under Article 25 of the Constitution; an absolute right."***

23. This Court in **Dismas Wafula Kilwake v R [2018] eKLR** stated as follows:

> "***Since the enactment of the Sexual Offences Act, the above provisions have been interpreted and applied by all the levels of the courts as imposing mandatory minimum sentences. The effect is that irrespective of the circumstances under which the offence is committee and irrespective of any mitigating circumstances, the Act purports to tie the hands of the courts, so that in all cases they must pass the same sentence predetermined by the legislature, based only on the age of the victim.***
>
> ***We have no doubt in our minds that the legislature has the power and legitimate interest to signal the seriousness of an offence by prescribing stiff penalties. The issue however, that is raised in this ground of appeal is whether the legislature can legitimately tie the hands of the judiciary by prescribing rigid and mandatory sentences in all cases without any regard to peculiarities of each individual case."***

24. Further, **Section 33 of the Sexual Offences Act** provides as follows:

> "***Evidence of surrounding circumstances and impact of sexual offence evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove-***
>
> **a) Whether a sexual offence is likely to have been committed-**
>
> **(i) Towards or in connection with the person concerned;**
>
> **(ii) under coercive circumstances referred to in section 43; and**
>
> **b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.**

25. Subsequently, this Court in the case of ***Christopher Ochieng v Republic [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011*** set aside the sentence for life imprisonment mandatorily imposed on the appellant under the Sexual Offences Act and substituted it with a sentence of 30 years imprisonment from the date of sentence by the trial court. See also ***Jared Koita Injiri v Republic [2019] eKLR Criminal Appeal No. 93 of 2014.***

26. Further, in ***Erick Iddi Shatala v Republic [2020] eKLR Criminal Appeal No. 51 of 2016*** this Court reduced the 20 year sentence meted on the appellant and substituted it with a 10 year sentence.

27. The Supreme Court in the **Muruatetu case (supra)**, also outlined some mitigating factors to be considered in sentencing 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."

28. Applying the foregoing to the instant matter, we note that the appellant was 22 years old at the time of the commission of the offence and that he expressed remorse. We also note that the appellant took responsibility as the father of the complainant's child and that the complainant and their child visit him in prison regularly.

29. All things considered, we find that the sentence of 20 years imprisonment that was meted on the appellant was harsh and excessive in the circumstances and should be interfered with.

30. In the circumstances, we allow the appeal on sentence to the extent that the sentence of 20 years imprisonment is set aside and substituted with a sentence of time already served. Accordingly, the appellant shall be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nairobi this 9th day of October, 2020.

W. KARANJA

……………………..………

JUDGE OF APPEAL

ASIKE-MAKHANDIA

…………………………………

JUDGE OF APPEAL

J. MOHAMMED

…………………..…………

JUDGE OF APPEAL

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

Signed

<u>DEPUTY REGISTRAR</u>