IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU M'INOTI & SICHALE, JJ.A.)

CRIMINAL APPEAL NO. 31 OF 2013

BETWEEN

GIDRAF KIOI JOHN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Nakuru (Emukule, J.)

dated 21st June 2013 in H.C.CR.A. No. 227 of 2012)

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JUDGMENT OF THE COURT

At the hearing of this appeal, ***the appellant, Gidraf Kioi John*** informed the Court that he was abandoning his appeal against conviction, to pursue only the appeal against sentence.

Accordingly, this judgment is restricted to the appeal against sen-tence.

Before we consider the appellant's arguments on sentence, it is apposite to set out briefly the background to the appeal. The appellant was charged before, and convicted by the ***Chief Mag-istrates Court*** at ***Nakuru*** for the offence of defilement contrary to ***section 8 (1)*** as read with ***8(3)*** of the ***Sexual Offences Act***. The victim of the offence, ***LWE***, was a girl aged 12 years. Upon conviction, the appellant was sentenced to twenty years impris-onment. The High Court in Nakuru, where the appellant filed his first appeal, found the same to have no merit and upheld his conviction and sentence, leading to the present appeal.

The evidence adduced by the prosecution against the appel-lant was that he had employed LWE, an orphan, as his house-help at Miti Kubwa in Nakuru County. On 29th October 2009, after LWE had finished washing clothes, she returned the buckets into the house where the appellant was. The appellant closed the door, put on loud music, forced LWE to strip naked, and defiled her.

A lady neighbour who saw LWE crying shortly thereafter in-quired from her what was wrong and LWE informed her that the appellant had defiled her. LWE was taken to the police and sub-sequently to Bahati District Hospital where ***Grace Gulani (PW1),*** a clinical officer examined her. PW1 estimated LWE to be 12 years old and noted that her hymen was torn and bleeding. A high vaginal swab confirmed the presence of spermatozoa. The injuries were a few hours old and in PW1's opinion were inflicted by a penis. A subsequent age assessment report indicate that LWE was approximately 15 years old.

The appellant was arrested and charged with defilement. In his unsworn defence, he denied having committed the offence. He stated that he had disagreed with a neighbour who threatened him and used LWE to frame him up. On 26th October 2010 LWE went to him in the house and asked to show him something. She showed him her pants which were bloodstained and told him that she was hurt while playing. The appellant did not see LWE again until the next day when she arrived in the company of the police and he was arrested and charged with an offence which he had not committed.

In the appeal against sentence, the appellant submitted that he had reformed and that his sentence of 20 years imprisonment was excessive and should be reduced. He added that he had learned skills in prison which he would like to put to good use for his benefit and that of the society. He urged us to reduce the sentence to 15 years imprisonment.

Mr. Chigiti, Assistant Director of Public Prosecutions, op-posed the appeal on behalf of the respondent, contending that severity of sentence is a question of fact and cannot be raised in a second appeal. In his view the appellant had not placed before the Court any justification for interference with the sentence im-posed by the trial court and upheld by the first appellate court. He added that the appellant was sentenced to 20 years imprisonment as required by ***section 8(3)*** of the Sexual Offences Act and that the sentence was lawful.

Counsel further submitted that since the decision of the Supreme Court in ***Francis Kariokor Muruatetu & Another v. Republic [2017] eKLR*** this Court had interfered with mandatory sentences on grounds of legality. He cited as an example the judgment in ***Jackson Wanyoike Njuguna & Another v. Repub-lic [2019] eKLR*** where the Court reduced a sentence of death to

15 years imprisonment. However, he urged, taking into account all the circumstances of this appeal, it was not a proper case for interference with the sentence.

We have carefully considered the appellant's and the respondent's submissions on the appeal against sentence, as well as the law. It is trite that in a second appeal, only matters of law may be raised and ***section 361*** of the ***Criminal Procedure Code*** expressly provides that severity of sentence is a matter of fact. The only way that the appellant may raise the question of sentence is if the sentence was unlawful. (See ***Njoroge v. Republic [1982] eKLR*** and ***Vincent Jared Ogutu v. Republic [2019] eKLR***).

The judgment of the Supreme Court in ***Francis Kariokor Muruatetu & Another v. Republic*** (supra) held that sentencing is in the discretion of the court. The Court expressed itself as follows in that regard:

> ***"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 circum-stances 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).

That holding however does not allow the second appellate court to overturn all sentences merely because they are minimum sentences. This Court has stated that each case must depend on its circumstances. Thus for example, in ***Dismas Wafula Kil-wake v. Republic [2018] eKLR***, the Court reasoned thus:

> ***…****[W]e hold that the provisions of section 8 of the sexual Of-fences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are in-dicative 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 sentenc-ing, 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." [Emphasis added]*

The appellant took advantage of an orphan in his employment, who as of the date of the offence, was a child of tender years as defined in law. (See ***Samuel Wahini Ngugi v. Republic [2012] eKLR)***. We are satisfied that in the circumstances of this appeal, there is no reason for interfering with the sentence im-posed by the trial court. We find that the appeal against sentence has no merit and is hereby dismissed. It is so ordered.

Dated and delivered at NAIROBI this 6th day of November, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR