IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CRIMINAL APPEAL No. 50 OF 2015

AMJ...APPELLANT

VERSUS

REPUBLIC...RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Homa Bay, (Majanja J.) delivered on 6th March 2015

in

H C Cr. Appeal No. 47 of 2014)

****

JUDGMENT OF THE COURT

1. The appellant, AMJ, was arraigned before the magistrate's court and charged with the three counts namely: defilement contrary to **Section 8 (1)** and **(3)** of the **Sexual Offences Act**; deliberate transmission of HIV disease contrary to **Section 26 (1)** of the **Sexual Offences Act** and committing an indecent act with a child contrary to **Section 11 (1)** of the **Sexual Offences Act.**

2. The particulars in Count I were that on the 21st day of October 2013 at in Suba district within Homa Bay County, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of LAO a girl child of 14 years of age. The particulars in Count II were that on the same day 21st October 2013 while having actual knowledge that he was infected with HIV he knowingly caused penetration of his genital organ into the vagina of LAO. The particulars in Count III were that on the same date within the same county and sub location, the appellant intentionally and unlawfully caused his hands to touch the vagina and breast of LAO.

3. The prosecution called a total of 8 witnesses who testified to the guilt of the appellant. PW1 LAO, as the complainant, testified as follows;

> *I recall 20.10.2013 at about 2.00pm I was playing at a nearby bar together with A, E and Others. We were playing **"Orusiko"** (where two people stand at two points and aim the others in the middle). The accused came to where we were playing and called me. He told me he wanted to send me. He was calling me from his house which was next to where I was playing. I knew him before this day. He stays at the market centre and as we stay at the village. He is called as AMJ. That is the only name I know. AMJ is the one seated in the opposite dock.*
>
> *On arrival at where he was standing he held me by hand and pulled me into the rooms. There are many rooms in that bar. He is not working at the bar. There were no other persons. I was alone with him. The room was a store where the engine boats are kept. There was nothing on the floor. It was only cemented. He put me on the floor, he removed my biker and my inner pant, he removed his belt and unzipped his long trouser and started to have sex with me. I did not raise the alarm because he held my mouth. He was saying that if I will raise any alarm he could beat me. He had sex till he stopped alone. I did not talk to him. The clothes which he removed from me he placed on the floor. So I took them and wore them. I from there proceeded home. I did not find anybody at home. My mother whom we stay with had gone for another meeting. She came back at about 8.00pm. She found me at home. It is when I told her what had happened, from which we proceeded to the Assistant chief the same night…...*

4. The complainant's mother, PW2 NAO, produced a clinic card that indicated the complainant was born on 27th March 1997. This confirms that the complainant was 14 years of age at the time the crime was committed. Further evidence was adduced by PW7 Stephen Kerario, a clinical officer at Ndhiwa District Hospital who produced a medical report whose findings indicate that the complainant had bruises, reddening and swelling on her vaginal walls which indicated that penetration had taken place.

5. Further, PW8 Denis Okoyo Onyonyi, a nursing officer at Kiwa Dispensary testified that the appellant was HIV positive because he had been visiting the dispensary. He used to see the appellant visit the dispensary. Nevertheless, he never carried out any medical test on the appellant. PW8 further testified that he gave the complainant post exposure pills on the 21st October 2013 and found her to be HIV negative upon testing her 8 days later.

6. The trial magistrate evaluated the evidence tendered and was convinced of the appellant's guilt. The appellant was convicted and sentenced to 20 years' imprisonment for the first count and 15 years' imprisonment for the second count - the sentences to run concurrently. The trial magistrate found that Count III was a duplicity of Count I and found it unnecessary to analyze the charge and evidence in respect thereof.

7. Aggrieved, the appellant lodged a first appeal to the High Court. Upon re-evaluating the evidence, the learned judge partially allowed the appeal by quashing the conviction and sentence of Count II and upholding conviction and sentence in Count I. The judge expressed as follows:

> *Proof of age of a child is a question of fact and as regards the offence of defilement it is necessary on two grounds (sic). First, to establish the offence of defilement which is committed if the victim is below the age of 18 years and second, to establish the penalty applicable. In this instance, there is no doubt that PW1 was a child and she testified that she was in Standard 4 at the material time and when cross-examined about her age she stated that she was 14 years old. PW2, her mother testified that she was born on 27th March 1997 and produced a clinic card to confirm PW1's age. In my view, the age of the child was sufficiently proved and as such the penalty imposed for the offence of defilement, being the minimum prescribed by the law, cannot be faulted. (Emphasis supplied)*
>
> *As regards the offence of deliberate transmission of HIV disease, the appellant contends in his submissions that the offence was not proved as he was not examined to ascertain that he was HIV positive. The basis for the finding that the appellant was HIV positive was that PW8 testified that he worked there and that the appellant came for treatment for HIV. I have examined the record and it does not show any document that confirms that the appellant was HIV positive. He was not tested and as such I find that the offence was not proved beyond reasonable doubt.*

8. Discontented with the partial success of his appeal, the appellant has lodged the instant second appeal to this Court. The grounds of appeal are that the learned judge erred by upholding the conviction on Count I without evidence proving the offence was committed; that there was no document proving the age of the complainant; that there was conflicting evidence given in court; that the prosecution failed to call important witnesses; that penetration was not proved and that the judge erred in not giving due credence to the variance between the particulars on the charge sheet and the evidence adduced by the prosecution.

9. At the hearing of this appeal, the appellant appeared in person while the State was represented by the Senior Prosecution Counsel, Mr. Kakoi. Both parties filed written submissions.

APPELLANT'S SUBMISSIONS

10. The appellant relied on his written submissions and made oral highlights whereupon he abandoned all grounds of appeal and stated that his appeal be restricted to sentence only. He urged us to examine the constitutionality of the minimum mandatory sentence meted upon him by the trial court and affirmed by the High Court.

RESPONDENT'S SUBMISSIONS

11. Mr. Kakoi opposed the appeal and termed it unmeritorious. He urged this Court not to interfere with the sentence. However, he cautiously submitted that if this Court were inclined to interfere with the sentence, then an imprisonment for a term of ten (10) years would be appropriate.

ANALYSIS and DETERMINATION

12. We have considered the record of appeal as well as submissions made by the appellant and the respondent on the issue of sentence. This is a second appeal. In ***M'Riungu v. Republic*** ***[1983] KLR 455***, this Court expressed:

> *"[W]here a right of appeal is confined to question of law, an appellate court has loyalty to accept the findings of fact of the lower court(s) and resist the temptation to treat findings of fact as holdings of fact and law and it should not interfere with the decision of the trial court or the first appellate court unless it is apparent that on evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding that the decision is bad in law".*

13. In the instant appeal, this Court has been called upon to interfere with the sentence meted on the appellant by the trial court and as affirmed by the High Court. In **Adan Muraguri Mungara - v - Republic, Cr. No. 347 of 2007 (Nyeri),** this Court set out the circumstances under which it will disturb the concurrent findings of fact by the trial court in the following terms:

> *"As this court has stated many times before, it has a duty to pay homage to concurrent findings of fact made by the two courts below unless such findings are based on no evidence at all or on a perversion of the evidence, or unless on the totality of the evidence, no reasonable tribunal properly directing itself would arrive at such findings. That would mean that the decision is bad in law, thus entitling this Court to interfere." See* ***Aggrey Mbai Injaga v Republic [2014] eKLR****.*

14. We are cognizant that the appellant is not appealing against conviction. His appeal is on the sentence meted out against him. On record

there was enough proof to show that the complainant was 14 years of age at the time the offence took place. The appellant was sentenced to 20 years' imprisonment in Count I as that is minimum sentence provided for in **Section 8(3)** of the **Sexual Offences.** We also take note that the High Court's judgement which affirmed the sentence on 6th March 2015 was delivered before the decision of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015** which held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case.

15. It is important to note that as per the provision of **Article 163 (7)** of the Constitution all courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. Therefore, this Court is bound by the doctrine of stare decisis to apply the principles laid down by the Supreme Court in the case of **Francis Karioko Muruatetu & another – v- Republic (supra)**. We are further persuaded by the various decisions of this Court in **Christopher Ochieng – v- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011** and in **Jared Koita Injiri – v- R, Kisumu Criminal Appeal No. 93 of 2014** to the effect that mandatory minimum sentences similarly take away the judicial discretion to impose a sentence commensurate with the circumstances of a particular case.

16. The record shows the trial court considered its hands tied by the minimum mandatory sentence. The High Court affirmed the same expressing that it was the minimum prescribed by law. The two courts below thus did not exercise any discretion in meting out the 20-year term of imprisonment upon the appellant. Accordingly, we hereby interfere with and set aside the 20-year sentence. We substitute it with a sentence of 15 years' imprisonment with effect from 23rd April 2014 when the trial court passed sentence.

Dated and Delivered at Kisumu this 31st day of July, 2019.

ASIKE MAKHANDIA

…………………………..

JUDGE OF APPEAL

P. O. KIAGE

…………………………..

JUDGE OF APPEAL

OTIENO-ODEK

……………………….

JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR