



IN THE COURT OF APPEAL

AT KISUMU

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

CRIMINAL APPEAL No. 33 OF 2015

PAUL NGEI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against the judgment of the High Court of Kenya at Kakamega, (A.C. Mrima J.) delivered on 6th November 2014

in

H C Cr. Appeal No. 95 of 2013)

JUDGMENT OF THE COURT

1. The appellant, Paul Ngei, was arraigned and charged before the Chief Magistrate's court with the offence of defilement contrary to **Section 8 (1) and (2) of the Sexual Offences Act**. The particulars were that on 29th May 2010 in Kakamega Central District within Western Province he unlawfully and intentionally inserted his genital organ namely penis into the vagina of MO a girl aged 12 years. He faced a second count of indecent act with a girl MO contrary to **Section 11 (6) of the Sexual Offences Act**.
2. Upon hearing the prosecution and defence case, since the appellant denied the offence, the trial magistrate on 9th May 2013 convicted the appellant and sentenced him to twenty (20) years imprisonment. His appeal to the High Court against conviction and sentence was dismissed. He has lodged the instant second appeal against sentence only.
3. The prosecution case was founded amongst others, on the testimony of the complainant MO as PW1. After a *voire dire* examination, PW1 a girl child of 12 years old testified as follows:

...On 29th May 2010, I had gone to collect firewood. The accused Paul Ngei who is well known to me came and held me. He pulled me into a sugarcane farm and took me to his house. I had gone to collect firewood near the stream. While inside the house, the accused undressed me. We were in the sitting room. This is the school dress I was wearing.....The accused took me to bed. He did bad things to me. He had also undressed while in the bedroom. He injected his penis in my vagina. He did that for 3 or rather 4 rounds. The accused held my mouth and I did not scream. The accused had sexual intercourse with me continuously. The accused slapped me while I was in the bedroom as he did not want me to leave his house. I had tried to go out of the house. The brother of the accused called another person. That was my mother. She arrived. The accused told me to go and hide under the bed and I did so. I got from under the bed and started putting on my clothes. My mother saw me. The accused cut my mother with a panga. Many people arrived.....
4. PW 3 Jonathan Andati testified that on 29th May 2010, he was on his way home when he met the appellant's brother, a Mr. Mwati, who told him that the appellant had locked the complainant in his (appellant's) house. PW3 called his mother and together they went to the appellant's house which had been locked from inside. That his mother screamed and the appellant emerged with a panga. That when they entered the house they found the complainant naked. The appellant hit his mother with the panga.
5. Mr. Akwabi Maloba PW5, a clinical officer testified that he works at the Provincial General Hospital in Kakamega. He tendered in evidence a P3 Form filled in relation to the complainant. The P3 form showed that the complainant had a whitish discharge and redness of the area surrounding the vagina.

6. Upon considering and evaluating the evidence tendered, the trial magistrate in sentencing the appellant to a term of 20-year imprisonment stated as follows:

I have considered the accused mitigation. The offence committed is serious and although he wants reconciliation it is late in the day and it does not apply in cases where the victim is a minor. In any event, a minimum sentence has been set down and this court does not have much in terms of discretion. After due consideration of all the circumstances of the case, the accused is sentenced to twenty (20) years in jail. (Emphasis supplied)

7. Dissatisfied with the judgment of the trial magistrate, the appellant appealed to the High Court against conviction and sentence. The learned judge dismissed the appeal stating it was devoid of merit.

8. Aggrieved, the appellant has moved to his Court in a second appeal against both conviction and sentence. At the hearing of the appeal, the appellant appeared in person while the State was represented by Mr. Kakoi, the Principal Prosecution Counsel. The appellant whereupon abandoned his appeal against conviction and pursued appeal against sentence. He urged this Court to look into the constitutionality and severity of the 20-year term of imprisonment meted upon him.

9. The State in responding to the appeal observed that the appeal is limited to sentence. That the offence as charged was proved beyond reasonable doubt. That it was proved that the appellant had defiled a girl child 12 years of age. On sentence, it was submitted that following the Supreme Court’s decision in **Francis Karioko Muruatetu & another – v- Republic SC Petition Nos. 15 & 16 of 2015**, a minimum mandatory sentence is unconstitutional. In the instant appeal, the State left the consideration of sentence to be meted upon the appellant to the discretion of this Court.

10. We have considered the oral submissions by the appellant and respondent on the issue of sentence. The record of appeal shows the appellant offered mitigation and the prosecutor requested that the appellant be treated as a first offender. It is noteworthy that the trial magistrate sentenced the appellant to a term of 20-year imprisonment on 9th May 2013. The High Court dismissed the first appeal on 6th November 2014. The decisions of the two courts below were delivered before the decision of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic**. In its decision, the Supreme Court held that a mandatory sentence is unconstitutional as it takes away judicial discretion to determine an appropriate sentence in each particular case. By parity of reasoning, we apply the dicta and *ratio decidendi* in the said decision to all mandatory sentences.

11. In this matter, we note that the trial magistrate stated that the 20-year imprisonment meted on the appellant was mandatory and the court did not have discretion. This position is no longer the law in light of the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic (supra)**.

12. 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** considered legality of minimum mandatory sentences under the Sexual Offences Act. It was held that such mandatory sentences were unconstitutional as they took away judicial discretion to determine an appropriate sentence in each individual case.

13. In the instant matter, there is on record mitigation by the appellant and we see no reason to remit the matter to the trial court for rehearing on sentencing. Guided by the Supreme Court decision in **Francis Karioko Muruatetu & another – v- Republic (supra)** and persuaded by the decisions of this Court in **Christopher Ochieng – v- R (supra)** and **Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014**, we are convinced and satisfied that the mandatory 20-year term of imprisonment meted upon the appellant cannot stand. We are inclined to intervene as we hereby do. We set aside the 20-year sentence meted upon the appellant and substitute the same with a sentence of twelve (12) years’ imprisonment with effect from 9th May 2013 when the trial court passed sentence.

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

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

DEPUTY REGISTRAR