REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CRIMINAL APPEAL NO. 5 OF 2017

ATHMAN OMAR.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(*Being an appeal against the judgment in the Principal Magistrate Court at Mpeketoni criminal case 96 of 2016, Hon. J. W. Onchuru (PM) dated 30th January 2017*)

JUDGMENT

1. The Appellant was charged with one count of the defilement contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on diverse dates between 21st May 2016 and 2nd July 2016 at [particulars withheld] village within Witu Division, Lamu West District of Lamu County, the Appellant intentionally and unlawfully caused his penis to penetrate the vagina of EASC, a child aged 13 years old.

3. The Appellant also faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.

4. The particulars of the offence were that on diverse date between 21st May 2016 and 2nd July 2016 at [particulars withheld] village within Witu Division, Lamu West District of Lamu County, the Appellant intentionally and unlawfully touched the vagina of EASC, a child aged 13 years old with his penis.

5. At the conclusion of the trial, the court found the Appellant guilty and sentenced him to 15 years imprisonment.

6. Aggrieved by the judgment, the Appellant filed his Petition of Appeal based on eleven grounds challenging the conviction and sentence. His grounds were that his defence and mitigation was not considered that the victim father gave false evidence that he found his daughter in the Appellant's home; that there was no eye witness; that the medical report showed that the victim had been sexually active, and; that the victim's parents and village elder ganged up against him so as to grab his land and that the sentence was manifestly harsh. The Respondent on its part issued a Notice to enhance the sentence from 15 years to 20 years in line with the Sexual Offence Act.

7. Subsequently, the Appellant filed amended Grounds of Appeal in which he abandoned his appeal against conviction and only sought a reduction of his sentence. He relied on four grounds which were to the effect that he was a first time offender, that he was

an orphan and the sole breadwinner of his siblings through peasant farming and casual jobs, and that due to his imprisonment his siblings were suffering for lack of food and school uniforms. He pleaded with the court to have mercy and reduce the sentence or to grant him a non-custodial one.

8. When the matter came up for hearing on the 24th October 2019 the Appellant relied on his grounds of appeal against the sentence.

9. Mr. Mwangi, learned counsel for the Respondent opposed the appeal in its entirety through oral submissions. It was his submission that the Appellant's defence was considered but found to be a mere denial as there was no land dispute between the Appellant and the victim's mother. He submitted that penetration had been proved through the P3 form which indicated the victim's hymen was broken. Finally, he submitted that the sentence meted out was lawful and that sexual offences were on the rise and that such a rise called for a deterrent sentence.

10. I have considered the amended grounds of appeal by the Appellant and the submissions by the Respondent. It is apparent that the Appellant amended grounds of appeal and narrowed the appeal to one against the sentence only.

11. It is a well-established principle that sentencing is at the discretion of the trial court and that an appellate court can only interfere with the sentence under very specific circumstances. this principle was emphasized by the Court of Appeal in **Benard Kimani Gacheru vs Republic [2002] eKLR** where it stated that:-

"It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, any one of the matters already stated is shown to exist."

12. In the instant case, the Appellant was sentenced to 15 years imprisonment, under section 8(3) of SOA which provides that :-

"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years."

13. The SOA is one of the few statutes that expressly provides for mandatory minimum sentences demonstrated by use of the term *"not less than"*.

14. The Court of Appeal in **Caroline Auma v. Republic Criminal Appeal no 65. Of 2014 (2014) eKLR** while discussing mandatory nature of sentences pronounced itself thus:-

"Although the word used in section 3 of the Sexual Offences Act is "liable", the provision is clear that the sentence provided is minimum by use of the words "shall not be less than", *thus giving allowance for discretion on the upper limit and not the lower limit…"*

15. The **Judiciary's Sentencing Policy Guidelines 2016** issued to guide court on imposing appropriate sentences, expressly provides that courts cannot issue a sentence lower than the mandatory minimum provided for in statute. **Paragraph 7.17** of the guidelines states that:-

Where the law provides mandatory minimum sentences,[51] then the court is bound by those provisions and must not impose a sentence lower than what is prescribed.[52] A fine shall not substitute a term of imprisonment where a minimum sentence is provided.[53]

16. Based on the above it is my finding that the learned trial magistrate erred in sentencing the Appellant to the 15 years imprisonment which was lower than the prescribed sentence of 20 years imprisonment.

17. The Respondent had issued a notice to enhance the sentence of the Appellant but seemed to abandon the same when the matter came up for hearing. Counsel submitted that the sentence meted out by the trail court was deserved to deter sexual offences which seemed to be on the rise.

18. As stated earlier, the sentence imposed by the trial court was lower than the prescribed minimum under the SOA which raises the question whether this court should enhance the sentence in exercise of its discretion provided for **Section 354 (3) (b) of the Criminal Procedure Code.**

19. Following the decision of the Supreme Court in **Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015,** the ground appears to have shifted with regard to mandatory minimum sentences in the SOA. Recent jurisprudence seem to advance the view that the mandatory nature of the minimum sentences was no longer tenable. In **Rophas Furaha Ngombo v Republic [2019] eKLR** the Court of Appeal quoted with approval its decision in **Dismas Wafula Kilwake vs. Republic, Criminal Appeal No. 129 of 2014**, where it stated thus:-

"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court, which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the sexual offences act, which do exactly the same thing."

20. Following the above authority, and considering the circumstances of the present case, I decline to enhance the sentence to the mandatory 20 years. Indeed I can do no better than to rely on the judgment of the Court of Appeal in **Evans Wanjala Wanyonyi v Republic [2019] eKLR,** where it set aside the enhanced sentence by the High Court and pronounced thus:-

"On the enhanced 20-year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. 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. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory

sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution…

In this appeal, guided by the merits of 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 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years with effect from the date of sentence by the trial court on 18th September 2015".

21. I am bound by the above decision of the Court of Appeal. I have also gone further and considered the circumstances of the present case which were of mitigating effect.

22. The age of the Appellant was not stated while that of the victim was proved to be 13 years. It came through the evidence of the prosecution witnesses that the Appellant and the victim lived in the same locality and were known to each other. It was clear from the evidence of the victim that they had eloped. She testified thus: "I know Athman Omar. I used to stay with him as husband and wife. This started between May 2016 and 2nd June 2016. During the day he would hide me in the chicken coop. He would bring food to me during the day. At night he would remove me and we would walk together at Biafra village and return to the house where we would sleep together and have sex……. Accused was arrested and charged. I went to his house voluntarily."

23. It is my considered view and indeed the law that the victim had no legal capacity to make a decision to run away from home to

live with a man and engage in sexual intercourse. Children ought not be allowed to cede away the protection granted by the law in order to engage in conduct or activity which steal their innocence, sabotage their education and predispose them to early child marriage. The justice of this case however would dictate that the Appellant who himself is a young man be spared the lengthy prison sentence. A reduction of sentence is just. I find that a 10 year sentence would suffice for him to learn and pay for his indiscretion.

24. The appellant shall serve 10 years imprisonment from date of conviction and sentence.

25. Orders accordingly.

Judgment dated delivered and signed at Malindi on this 29th day of November, 2019.

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R. LAGAT KORIR

JUDGE

In the presence of:

S. Pacho Court Assistant

Appellant present in person

Mr. Nyoro holding brief for Respondent