



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 11 OF 2019

BETWEEN

JUMAA TSUMA.....APPELLANT

-VS-

REPUBLIC.....RESPONDENT

(Being an appeal against sentence passed by Hon.B. Koech, SRM on 9.11.2018 in Mombasa CMC S.O. No. 65 of 2017)

JUDGMENT

Introduction

1. The Appellant herein was charged with defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act and an Alternative Charge of committing an indecent act with a child contrary to Section 2(1) as read together with Section 11 of the Sexual Offences Act.

2. The Appellant pleaded not guilty and the case proceeded to full hearing. He was convicted of the alternative count, and that the trial court sentenced him to serve thirteen (13) years imprisonment, after taking into account his mitigation and treating him as a first offender.

3. The Appellant being aggrieved by that decision lodged an Appeal to this Court against the sentence vide Amended Grounds of Appeal filed in Court on 7.10.2020, on the following grounds.

1. That the Learned trial Court magistrate erred in law and fact by sentencing me to serve 13 years for the offence of indecent Act without putting into consideration that the said sentence was harsh, above the prescribed sentence, unjust ,unfair, unconstitutional and unproportioned to the offence committed.

2. That the Learned trial Court magistrate erred in law and fact by failing to consider my mitigation.

3. That the Learned trial Court magistrate erred in law and fact by failing to consider the period spent in remand prior to conviction and sentence.

SUBMISSION

4. The Appellant filed his written submissions and relied on the same. He submitted that the sentenced meted on him was harsh, excessive, unjust, and unfair in the circumstance of the case and that the Section 11(1) of the sexual offences Act no. 3 of 2006 prescribed a mandatory minimum sentence of 10 years which deviates from the finding in Muruatetu case.

5. **Ms. Mwangeka** Learned Counsel for the D.P.P submitted that the mandatory minimum sentences in sexual offences and the Application of the *Muruatetu case* does not preclude a trial Court from imposing the mandatory minimum sentence provided for as long the circumstance of the case are taken into account. See. **Simon Kipkurui Kimori v Republic [2019] eKLR**

6. Counsel further submitted that in this case, the victim was a six-year-old child who was of tender years and instead of the Appellant offering her protection and care, he preyed on her with the intention of defiling her.

DETERMINATION

7. This Court is under a duty to consider whether the sentence imposed upon the appellant was too harsh in the circumstances as to warrant an interference with the trial court's discretion of sentencing. Unless and until the above issue is resolved by this court, there would be no basis for either upholding or setting aside the trial court's finding. See *Okeno versus Republic [1972] EA 32*.

8. Section 11(1) of the Sexual Offences Act provides that:

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

9. Section 11 provides for a mandatory minimum sentence. However, such a sentence does not meet the constitutional test in **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015**, since they do not permit the Court to consider the peculiar circumstances of the case in order to arrive at an appropriate sentence informed by those circumstances.

10. Sentencing is a discretion of the trial court. In **Bernard Kimani Gacheru –Vs- Republic (2002) eKLR**, the Court of Appeal 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, anyone of the matters already stated is shown to exist.

11. The court ought to bear in mind that one of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done and that there is no straightjacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. (See **Charles Ndirangu Kibue v Republic [2016] eKLR**).

12. Further, the court ought to bear in mind the obligation imposed on it by the Judiciary Sentencing Policy Guidelines to take into account the aggravating and mitigating circumstances and their effects on the sentence in determining the most suitable sentence. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful.

13. In the present Appeal, this court has observed that there was breach of principle and/or abuse of discretion to warrant this court's interfering with the exercise of sentencing discretion by the trial Court reason being that the trial Court did not give reason why it arrived at a sentence of 13 years instead of the minimum sentence prescribed under Section 11(1) of the Sexual Offences Act. In accordance with the Supreme Court's decision in **Muruatetu (supra)**, the Trial Magistrate ought to have taken into consideration all the relevant factors including severity of the offence, the effect the crime had on the victim and the mitigation of the Appellant that he had nine children and his parents who depended on him. Consequently, this court finds and holds that the custodial sentence meted on the Appellant in this court's view was harsh and excessive.

14. Accordingly, I hereby set aside the sentence of thirteen (13) years and in place thereof, I jail the Appellant for the minimum term of ten (10) years from the date of arrest 16.7.2017.

Right of appeal in 14 days.

Dated, signed and delivered at Mombasa this 30th day of December, 2020

HON. LADY JUSTICE A. ONG'INJO

JUDGE



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