REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 16 OF 2020

KALUME CHARO MWAKAMSHA......................APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(An appeal from the sentence of Hon. D. Odhiambo,

Resident Magistrate, delivered on 24th August 2018 at Shanzu

Senior Principal Magistrate's Court Sexual Offences Case No. 103 of 2017).

J U D G M E N T

1. The Appellant Kalume Charo Mwakamsha was accused in Shanzu SPM's Court Sexual Offence Case No. 103 of 2017 with the offence of attempted defilement contrary to Section 9(1) as read with Sexual Offences Act No. 30 of 2006.

2. The particulars are that on the 28th day of November 2017 at [Particulars withheld] area in Kisauni Sub-County within Mombasa County the Appellant intentionally and unlawfully attempted to cause his penis to penetrate the vagina of LC a girl aged 6 years.

3. In the alternative the Appellant was charged with the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

4. The Appellant was found guilty for the offence of attempted defilement and he was convicted and sentenced to serve ten years imprisonment.

5. He was aggrieved by the sentence and in his amended grounds of appeal filed on 14th July 2021 he said that the learned trial Magistrate erred in law & fact by failing to consider his mitigation; that the learned trial Magistrate erred in law & fact by failing to take into account cognizance of the current jurisprudence on criminal justice pertaining to sentencing of offences.

6. This appeal was canvassed by way of written submissions. The Appellant on his submissions stated that the trial Magistrate imposed that which is erroneously construed to be a mandatory minimum penalty for that offence. He argued that it was incorrect to constitute the penalty section of Section 9(2) to mean that no lesser punishment can be imposed.

7. He argued that recent developments in criminal justice have recognized that the mandatory nature of any penal law is

unconstitutional as it deprives the trial court of its discretion to consider the available mitigating factors.

8. The Appellant argued that the trial Magistrate did not consider provisions of Section 329 of the Criminal Procedure Code and there is no evidence his mitigation was considered in passing the sentence.

9. He said the trial that culminated into his incarceration was irregular and pre-judicial for skipping the crucial congruent process of taking, recording and considering any other evidence that may not have been captured during the taking of prosecution evidence.

10. The Appellant relied in the Supreme Court holding in Francis Karioko Muruatetu in which, it was declared that mandatory nature of any law is unconstitutional. While relying on the holding in **S. vs Malgas 2001 (2) SA 122 SCA 1235** the Appellant argued that the holding the wording of the law that the trial court invoked to sentence him cannot in any way be said to be mandatory in nature as it only talks of a liability that is upon a person under it to the prescribed punishment.

11. Appellant also relied on the holding of Sir. Clement De Lestang vs P.J. in Opaya vs Uganda [1967] E.A. 752 where it was held that the words "shall be liable to does not in the ordinary meaning require the imposition of the stated penalty but merely express the stated penalty which may be imposed at the discretion of the court. In other words they are not mandatory but provide a maximum sentence only and while the liability existed the court might not see it fit to impose it". The Appellant urged the court to make out a sentence that takes into account his mitigation.

12. The Appellant also urged the court to consider the 9 months remand period in his sentence under Section 333(2) of the Criminal Procedure Code.

13. The Respondent submissions were to the effect that Appellants mitigation was considered and the trial Magistrate exercised his discretion judiciously owing to the fact that the Complainant PW 1 was 10 years old at the time of the incident & the Appellant had taken steps in preparation to defile the minor. It was submitted that had PW 2 not interrupted the Appellant he would have defiled the minor.

14. It was submitted that the offence attract a minimum sentence of ten years and the sentence meted is proportionate and commensurate with the offence. The Respondent urged the court to dismiss the appeal.

15. I have considered the Appellants appeal on sentence passed against him. Section 9(2) of the Sexual Offences Act No. 3 of 2006 provides:-

"A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years".

16. The determining word here is "not less than". The Muruatetu case as clarified by the Supreme Court in its advisory only applied to murder cases and not any other.

17. In the circumstances this court finds that the sentence passed against Appellant was lawful and cannot be unsettled. The Appellant will only benefit from the 9 months remand period. His sentence of 10 years shall run from 30th November 2017.

18. Orders accordingly.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 13TH DAY OF JANUARY 2022

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court Assistant

Appellant – present in person

Ms. Kambaga hold brief for Mulamula for Respondent

Hon. Lady Justice A. Ong'injo

Judge

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