



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. E004 OF 2020

LBM.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal arising from the conviction and sentence by Hon D. Ogal (S.R.M) in original Kimilili SPMC Sexual Offence Case No. 54/2019 delivered on 3/12/2020]

JUDGEMENT

The appellant was charged in the subordinate Court with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offence Act, 2006. The particulars being; on diverse dates between 12/1/2019 and 17/4/2019 at [Particulars Withheld] area Kimilili Sub County within Bungoma County unlawfully and intentionally caused his penis to penetrate the vagina of NM, a child aged 12 years.

He faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act, 2006. The particulars being that on diverse dates between 12/1/2019 and 17/4/2019 at [Particulars Withheld] area Kimilili Sub County within Bungoma County unlawfully and intentionally caused his penis to come into contact with the vagina of NM, a child aged 12 years.

The appellant denied the charges whereupon the respondent called 5 witnesses who testified in support of its case. Upon close of the prosecution's case, the court found the appellant had a case to answer and subsequently placed on his defence. He gave a sworn statement and called 2 other witnesses.

Subsequently the court found the appellant guilty, he was convicted and sentenced to serve 10 years in prison. He was dissatisfied with the conviction and sentence thus the appeal which is premised on the following grounds;

- 1. That the appellant is remorseful for the offence committed**
- 2. That the sentence of 10 years is harsh and excessive in the circumstances.**
- 3. That trial magistrate did not consider both the complainant and appellant's age bracket.**
- 4. That prosecution's evidence was speculative and contradictory.**
- 5. That the medical report was fabricated.**

Directions were given for the appeal to be disposed of by way of written submissions. Both parties filed. Upon perusal of the said submissions, the court notes that the appellant has submitted only on re-sentencing. He has abandoned the initial grounds. As such, the court will determine whether the sentence meted out on the appellant is harsh and ought to be reviewed.

In his submissions, the appellant beseeches this court to consider the time spent in pre-sentence remand, that he is a father and a reformed person.

The court takes cognizance of the fact that a sentence is imposed by law and the court is mandated to impose the sentence as provided subject of course to the mitigation offered and the discretion bestowed on the court.

The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act. The

latter provides for a prison term of not less than 20 years while the trial court handed down a prison term of 10 years. This was extremely lenient considering the fact that the complainant was a step-daughter whom he was duty bound to protect from harm which he himself committed.

The appellate court is empowered to interfere with the trial court's sentence under exceptional circumstances for instance when it is found that trial court overlooked material factors. In the case of **Wanjema v Republic [1971] EA 494** it was stated that:

“An appellate court should not interfere with the discretion which a trial court extended as to sentence unless it is evident that it overlooked some material factors, too into account some immaterial factors, acted on the wrong principle or the sentence is manifestly excessive in the circumstances of the case.”

In the instant case, the appellant has not alleged that the trial court considered irrelevant factors. As a matter of fact, the trial court called for and considered the probation officer's report.

The court finds that indeed this is one of the cases where a deterrent sentence is appropriate. The relation subsisting at the time of the heinous act was that of step father-step-daughter. The appellant had a duty to protect and guide the complainant who was then of tender years. She looked up to him for protection and care.

The objectives of sentencing in page 15 of the sentencing policy guidelines include retribution and denunciation. Retribution is meant to punish the offender for his criminal conduct in a just manner and denunciation is communication of the community's condemnation of the criminal conduct.

The court notes that the appellant in mitigation stated that he has children who depended on him. This court however must stamp its feet and condemn such criminal conduct by meting out the appropriate sentence.

I have considered the grounds of appeal and the submissions. I find no merit in this appeal which is hereby dismissed.

It is so ordered.

DATED at **BUNGOMA** this 26th day of January 2022.

S.N RIECHI

JUDGE