



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL APPEAL NO. 36 OF 2018

JAMES WAWERU MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the decision of V. Ochanda, Resident Magistrate,

in S.O. No. 5 of 2016 at Murang'a dated 25th June 2018]

JUDGMENT

1. The appellant was convicted for *defilement* contrary to section 8 (1) of the **Sexual Offences Act**. He was imprisoned for *life*.
2. The particulars were that on 23rd January 2016 within Murang'a County, he intentionally caused his penis to penetrate the vagina of VWW [*particulars withheld*] a child aged *eleven* years.
3. The original petition attacked the conviction and sentence. However, the amended grounds of appeal relate only to the sentence. When the appellant appeared before me, he unequivocally *abandoned* the appeal on *conviction*.
4. The appellant relied entirely on his typed but undated submissions. He argued that the learned trial magistrate erred by failing to consider that he was a first offender and deserved the least severe sentence. He submitted that the punishment was draconian and infringed on his rights guaranteed by Articles 27 and 50 of the **Constitution**.
5. Lastly, he said that he has reformed in prison and wishes to be re-integrated with the society. The appellant pleaded for *mercy*. He said he is *remorseful* for his actions. In a synopsis, the entire appeal is a fresh clamour for leniency.
6. The appeal is opposed by the Republic. On 1st February 2022, I heard brief arguments from learned counsel for the Republic, *Ms. A. Otieno*. The case for the State is that the appellant received the *minimum* sentence. I was thus implored to dismiss the appeal.
7. This is a first appeal to the High Court. I have re-evaluated the evidence and drawn independent conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] E. A. 32.
8. According to the birth certificate, the complainant was born on 28th August 2005. From her evidence through an intermediary, I am satisfied that she *knew* the appellant; and, that she positively identified him as the person who pulled her into his mud house and defiled her.
9. PW2 responded to the screams from the complainant. When she examined the child, she saw sperms outside her vagina. Medical evidence from PW4 confirmed there was penetration. A high vaginal swab revealed the presence of spermatozoa and pus cells. I thus find that the conviction was *safe*. Furthermore, the appellant no longer challenges his conviction.
10. I will now turn to the sentence. Section 354 (3) of **Criminal Procedure Code** empowers this court to *review* the sentence.
11. The *mandatory* sentence provided in this case is life imprisonment. The Court of Appeal has given fresh guidance on *minimum sentences* under the **Sexual Offences Act**. In *Jared Koita Injiri v Republic* [2019] Kisumu Criminal Appeal 93 of 2014 [2019] eKLR. The court held:

*In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by **section 8 (1)** of the **Sexual Offences Act**, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis.*

The appellant was provided an opportunity to mitigate in the trial court where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy.

*Needless to say, pursuant to the Supreme Court decision in **Francis Karioko Muruatetu & Another vs Republic (supra)**, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court. [Underlining added]*

12. I accordingly *set aside* the life sentence. I have considered that the appellant is elderly and a first offender. The appellant shall now serve a term of *10 years' imprisonment*. For the avoidance of doubt, the new sentence shall run from 25th June 2018, the date of the original conviction.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 24TH DAY OF FEBRUARY 2022.

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

The appellant (in person).

Ms. A.P. Gakumu for the Republic instructed by the Office of the Director of Public Prosecutions.

Ms. Susan Waiganjo, Court Assistant.