



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NO. 152 OF 2015**

**TOBIAS KIPCHUMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being appeal from the judgment dated 5th June, 2015 by the Hon F. Muguongo (RM)*

*in Criminal Case No. 271 of 2018 at Nakuru Chief Magistrate's Court)*

**JUDGMENT**

1. The Appellant herein was charged in **Nakuru Chief Magistrate's Court Criminal Case No. 271 of 2018** with a single count of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act. It was alleged that on 22nd December, 2013 at [Particulars Withheld] Estate within Nakuru county, the Appellant unlawfully and intentionally committed defilement by inserting his male genital organ namely the penis into the female genital organ namely vagina of a child namely ERK, aged 11 years old which caused penetration.
2. The Appellant also faced an alternative count of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars of place, time and victim are the same as those in the main charge.
3. The Appellant pleaded not guilty and a fully-fledged trial ensued. At the conclusion of the trial, the Learned Trial Magistrate convicted the Appellant and then sentenced him to life imprisonment.
4. The Appellant was dissatisfied with both the conviction and sentence. He filed his appeal listing four grounds of appeal. The appeal was duly listed for hearing. However, on the day of the hearing, the Appellant withdrew the appeal against conviction and told the Court that he only wished to have the Court review his sentence. After confirming that the decision was made knowingly and after due consideration, the Court marked the appeal against conviction as withdrawn and proceeded to consider the appeal against sentence.
5. As part of the hearing process, the Court requested for a Social Inquiry Report. The Report confirmed much of what the Appellant told the Court in mitigation. The Appellant is 26 years old at present. That means that he was only 19 years old when he committed the offence in December, 2013. The Appellant is an orphan having lost his parents at a young age. He has a sister whose whereabouts he is not sure of presently. He is a first offender.
6. The Appellant admits that he committed the offence and expressed remorse for it. He said that he was youthful and did not realize what a big mistake it was to lure a child of 11 years old to have sex with him. He admitted that he was not of the right frame of mind to have engaged in the action. I formed the opinion that his remorse was sincere.
7. The Appellant asked the Court to give him another chance in life given his extreme youthfulness when he committed the offence. He said that he has had a chance to reflect on his actions in the last eight years that he has been in custody and that he has fully reformed. He asked the Court to consider sentencing him to the time served plus a probationary period.
8. Mr. Jamsumbah, the Prosecutor, did not oppose the Appellant's plea to the Court. He conceded that the Appellant was extremely useful and that he was not represented at the trial.
9. Our emergent jurisprudence has departed from the position that the minimum sentences provided for in the Sexual Offences Act are categorical and immutable prescriptions from which a sentencing Court cannot depart regardless of the circumstances of the individual case before it. This was perhaps most clearly held in ***Dismas Wafula Kilwake v R [2018] eKLR***, the Court of Appeal sitting in Kisumu had the

following to say about the mandatory minimum sentences prescribed in the Sexual Offences Act:

In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court [in ***Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015***], 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.

Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. 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.

10. This progressive decisional law now requires Courts to pay attention to individual aspects of the case while sentencing even for convictions under the Sexual Offences Act which have prescribed minimum sentences. Where there are compelling reasons to depart from the prescribed minimum, which is treated as indicative of the sentence to be imposed, the Court can impose a different sentence.

11. In the present case, there are clear compelling reasons to depart from the prescribed minimum sentence. It is that the Appellant was extremely youthful – barely an adult – when he committed the offence. Indeed, if he had committed the offence a few months earlier, he would have been a minor. A life sentence for this young man in the circumstances is cruel and unusual punishment. This is especially so considering that the offence was not committed in any particularly violent, prurient or depraved manner. The Appellant was, also, a first offender. In addition, he has shown sincere remorse for his crime. Finally, the Social Inquiry Report filed in Court is quite favourable for the Appellant.

12. All factors considered, I am of the view that a life imprisonment sentence in the circumstances of this case is excessive. I would, instead, revise it downwards to imprisonment for the period (of eight years) already served plus a probationary period of three (3) years.

13. The upshot is that the appeal against conviction is marked as withdrawn. I allow the appeal as regards sentence alone.

The sentence of life imprisonment is hereby set aside. In its place, I substitute therefor a sentence equal to the time served. In addition, the Appellant shall also serve probation sentence for three (3) years. He shall be released from prison forthwith to begin his probationary period.

14. Orders accordingly.

**DATED AT NAKURU THIS 22<sup>ND</sup> APRIL, 2021**

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**JOEL NGUGI**

**JUDGE**

**NOTE:** This judgment was delivered by video-conference pursuant to various Practice Directives by the Honourable Chief Justice authorizing the appropriate use of technology to conduct proceedings and deliver judgments in response to the COVID-19 Pandemic.