



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAROK

CRIMINAL APPEAL 92 OF 2017

(CORAM: F.M. GIKONYO J.)

(From the conviction and sentence by Hon. H. Ng'ang'a SRM in Narok SOA Case No. 16 of 2017 on 28.6.2017)

SAMUEL KEREYO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

JUDGMENT

BACKGROUND

1. The Appellant was convicted for defilement contrary to Section 8(1) as read with Section 8 (3) of the Sexual Offences Act No.3 of 2006. The particulars of the offence were that on 23/12/2016, [Particulars Withheld] village of Olokurto division in Narok North sub county within the Republic of Kenya unlawfully and intentionally caused his penis to penetrate the vagina of SK a child aged 16 years old. He was charged in the alternative with the offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006.the particulars being that on the day and place particularized in the main charge, unlawfully and intentionally committed an indecent act by rubbing his penis at the vagina of S.K. a child aged 16 years old. The appellant was found guilty and sentenced to serve 15 years' imprisonment.

2. The appellant being aggrieved by the said decision and has lodged this appeal in which he raised the ground; that the learned trial magistrate erred in law in convicting and sentencing him to 15 years yet failed to take into consideration all the mitigating factors he raised which makes the sentence manifestly harsh and excessive in the circumstances and occasioned a failure of justice.

3. Based on **Joseph Kaberia Kahinga & 11 Others vs. Attorney General [2016] eKLR**, the appellant submitted that the trial court should have taken into account the mitigation and proportionate sentence. That the learned trial magistrate failed to take into account issues as youth/immaturity, old age and serious illness. That the court failed to consider that the appellant pleaded not guilty. Is an orphan, was a sole bread winner of the family, young, first offender and that he has young family to take care of falls within the mitigating factors.

4. On the part of the Respondent, **Ms Koina**, learned prosecution counsel submitted that the appellant was accorded an opportunity to tender his mitigation and the trial court took account of the same before sentencing him. She cited the case of **Samson Mumbaa Murigi V Republic [2020] eKLR**.

5. That the appellant knew that the complainant was a school going child, he gave her a mobile phone for ease of his access to her to lure her into sexual abuse. The complainant's parents warning to the appellant fell on deaf ears. The complainant even wanted to elope with the appellant and abandon her studies.

6. The learned prosecution counsel submitted that the sentence meted by the trial court was proportionate to the offence committed and that the trial court took account of aggravating circumstances. She urged the court not to interfere with the sentence meted. She also urged the court to take into account the sentencing objectives in the ***muruatetu*** case.

ANAYSIS AND DETERMINATION

Appeal on sentence

7. I have considered the submissions made by the parties, the record as well as the applicable law in this appeal. The appeal is on sentence. The court will therefore be concerned with the legality or propriety or appropriateness of the sentence. It will also consider relevant factors *inter alia*, the penalty clause, mitigating and or aggravating factors, and the objects of punishments.

Minimum sentence

8. In this case the appellant was charged under section 8(1) as read with section 8(4) of the Sexual Offences Act. The said provision states:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

9. The principle laid down in the decisional law by the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER VS. REPUBLIC [2017] eKLR**, is that, provisions of law which exclude or fetter discretion of court in sentencing is inconsistent with the Constitution. This principle has been applied by courts in Sexual Offences Act. See **CHRISTOPHER OCHIENG V REPUBLIC KSM CA CRIMINAL APPEAL NO. 202 OF 2011 [2018] eKLR**, and **JARED KOITA INJIRI V REPUBLIC, KSM CA CRIMINAL APPEAL NO. 93 OF 2014**.

10. Although the mandatory minimum sentences under the SOA are indicative of the seriousness of the offence and signify the legislative intent to protect the rights of the child, they have the potentiality of fettering or taking away the discretion of the court to mete out appropriate sentence. On that basis, I set aside the sentence of 15 years imposed herein.

11. What is the appropriate sentence in the circumstances of this case?

12. The court should pass sentence upon consideration of the individual circumstances of the case.

13. I have considered the fact that the victim who was defiled was a child aged 16 years. From the evidence on record, the Appellant gave the minor girl a phone so that he could easily reach her. It was claimed that the phone was used for communication between the appellant and the minor. The minor's parents confiscated the phone upon discovering it. The complainant despite warning from the parents of the girl continued to pursue her. The appellant knew that the complainant was a child and was still in school when he defiled her.

14. In aggravation the applicant used an unfair advantage to secure and satisfy his depraved sexual desires on the minor. The Court considers the offence to be quite egregious, and it was committed against a child who was in school. It bears repeating that the penalties enacted in the SOA reflect a deliberate intention by the legislature; (1) to protect the rights of the child; and (2) to signify the seriousness of the offence of defilement.

15. The court should also consider mitigating factors. The appellant is a first time offender, orphan, sole bread winner to his siblings. He was barely 20 years when he committed the offence. He pleaded for leniency and non-custodial sentence.

16. It is my considered view that, in this case, as much as deterrence is important, so also is rehabilitation of this young person so that he may be re-integrated into society with the aim of making him eke a productive life for himself. I find a sentence of 10 years to be appropriate. Accordingly, I sentence the appellant to 10 years' imprisonment.

Of section 333(2) of CPC

17. I should also consider Section 333(2) of the Criminal Procedure Code. Decisional law as well as literal writings emphasized that courts must give full effect to section 333(2) of the Criminal Procedure Code. See the Court of Appeal in **Ahamad Abolfathi Mohammed & Another vs. Republic [2018] eKLR**. (see also **Bethwel Wilson Kibor vs. Republic [2009] eKLR**).

18. Section 333(2) of the CPC creates an obligation on the court to take account of time spent in custody in sentencing; and its purport is to prevent subjecting a person to a more severe sentence than prescribed in law. Accordingly, the section pertains to fair trial and justice. Failure to give full effect to the section is a violation of the right to; (i) a less severe sentence enshrined in Article 50 (2)(q); and (ii) protection and benefit of law guaranteed under Article 27(1) & (2) of the Constitution. Article 27(1) & (2) of the Constitution provides that:

(1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms. [Underlining mine]

19. The spell cast by the Constitution upon courts is to be prepared to take on a different view of the situation in section 333(2) of the CPC, and exhibit sheer courage on the part of the judges to break free from the bindings of earlier restricted judicial approaches and allow provisions of existing law which tend to confer, protect or promote rights and fundamental freedom to take fight under section 7 of the Sixth Schedule of the Constitution, to gain conformity to the Constitution; and under article 259 and 20 of the Constitution; to developing the law to give effect to a right or fundamental freedom. This is the constitutional command upon the courts. See article 20(3) & (4) of the Constitution that: -

(3) In applying a provision of the Bill of Rights, a court shall—

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(b) the spirit, purport and objects of the Bill of Rights.

20. Daringly, therefore, I must admit that, a sentence that does not give effect to section 333(2) of the CPC leaves the period spent in custody unaccounted for in law; hence, a deprivation of freedom arbitrarily or without a just cause contrary to Article 29(a) of the Constitution which provides that:

Every person has the right to freedom and security of the person, which includes the right not to be—

(a) deprived of freedom arbitrarily or without just cause;

21. I do not wish to defend a less austere version of this model of the Constitution, by weakening the notion of redress for denial or violation of right or fundamental freedom. Accordingly, I will give full effect to section 333(2) of the CPC.

22. Although on 7th June 2017, the appellant was granted bond of Kshs. 300,000 with one surety of similar amount, there is nothing on record to show that he was released from custody. It is therefore safe to state that the Appellant was in custody during trial. Therefore, the sentence shall commence from the date of arraignment in court that is; **24th March 2017**. It is so ordered. Right of appeal explained.

DATED, SIGNED AND DELIVERED ON THIS 26TH DAY OF MAY, 2021 AT NAROK THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

F. M. GIKONYO

JUDGE

In the presence of:

- 1. The Appellant**
- 2. Ms. Torosi for the Republic**
- 3. Mr. Kasaso CA**

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F. M. GIKONYO

JUDGE