



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

REVISION NO. 162 OF 2021

(From the Original Conviction and Sentence in CMC Sexual Offence Case No. E019 of 2020

of the Principal Magistrate's Court at Shanzu: Y. A. Shikanda - PM)

DIRECTOR PUBLIC PROSECUTIONS.....APPLICANT

VERSUS

JOSEPH KEA NZAO *alias* JOSE.....RESPONDENT

JUDGMENT ON CRIMINAL REVISION

1. The accused person herein **Joseph Kea Nzao Alias Jose** was convicted for the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act. The particulars were that on the 10/10/2020 at Kashani area in Kisauni Sub-County within Mombasa County, the accused intentionally and unlawfully touched the anus of IKM a boy aged 9 years, using his fingers. The accused pleaded not guilty, but was found guilty by the trial court and duly convicted.
2. However, upon conviction, the trial magistrate sentenced the accused to five (5) years, in disregard of the minimum sentence provided for the offence under the Sexual Offences Act.
3. The trial magistrate referred to the now infamous case of **Francis Kariokor Muruatetu & Another v The DPP [2017] eKLR** in support of a lesser sentence than that provided under the Act.
4. However, the learned trial magistrate also disregarded the directions issued on 6/7/2021 by the Supreme Court to the effect that the said Muruatetu case was only applicable to convicts for murder cases and not those for sexual offences or robbery with violence.
5. It is this apparent disregard of the Muruatetu guidelines that has caused the need for this revision. Section 11(1) of Sexual Offences Act states that:

“Any person who commits an indecent act with a child is guilty of offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.”

6. The learned trial magistrate was therefore required, upon convicting the accused, to sentence him to not less than 10 years. Instead, the learned trial magistrate sentenced the accused person to five (5) years. Clearly this was an illegal sentence and therefore this Court has the jurisdiction to revise the same.
7. Accordingly therefore, I hereby set aside the sentence of five (5) years meted by the learned trial magistrate on 9/8/2021. Instead thereof I sentence the accused to serve the mandatory sentence of ten (10) years as is provided by the law. This sentence shall run from 28/10/2020 when the accused was remanded.

Right of appeal in 14 days.

DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF SEPTEMBER, 2021.

E. K. O. OGOLA

JUDGE

JUDGMENT DELIVERED VIA MS TEAMS IN THE PRESENCE OF:

ACCUSED IN PERSON

MS. ANYUMBA FOR STATE

MS. PERIS COURT ASSISTANT