REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NANYUKI

CRIMINAL APPEAL NO 33 OF 2020

BONIFACE MUTHAURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Sentence in Nanyuki CM Sexual Offence Case No 28 of 2016 – L Mutai, CM)

J U D G M E N T

1. The Appellant herein, **BONIFACE MUTHAURA**, was convicted after trial of ***defilement*** contrary to **section 8(1) & (4)** of the ***Sexual Offences Act, 2006*** (the Act). It was alleged in the particulars of the offence that between August 2015 and July 2016 at Mia Moja area in Laikipia County, he intentionally and unlawfully caused his penis to penetrate the vagina of one FWM, a child aged 17 years.

2. On 31/01/2017 the Appellant was sentenced to serve fifteen (15) years imprisonment. He has appealed only against that sentence.

3. I have considered the Appellant's submissions as well as those of the learned counsel for the Respondent. I have also read through the record of the trial court.

4. Section 8(4) of the Act provides –

> ***"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."***

The use of the term *"liable to"* means that the trial court has the discretion to award a non-custodial sentence if appropriate. However, once it decides that the convict deserves a custodial sentence, then it must sentence him to the minimum prescribed, that is 15 years. Compare this, for instance, with the wording of section 8(2) of the Act, which provides –

> ***"A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life."***

The use of the term ***"shall…be sentenced to"*** here makes it clear that for defilement of extremely young children the sentence is mandatory imprisonment for life.

5. It is not clear if the trial court was aware of its sentencing discretion noted above under section 8(4) (and also section 8(3)) of the Act. Had it been so aware, then perhaps it would have considered another kind of punishment for the Appellant other than imprisonment, given the circumstances of this case.

6. Those circumstances were as follows. The complainant was aged 17 years at the time of the defilement, while the Appellant was aged 20 years. It was not a one-off defilement; in fact the Appellant and the complainant were living together as husband and wife after she skipped school. Her grandmother (PW2) with whom she had been living, tried to get her to leave the Appellant's house, but she did not succeed. That was when she reported the matter to the police.

7. There was also evidence from the complainant herself that she had told the Appellant that she was 20 years old (though the trial court chose not to believe this part of the complainant's testimony).

8. In his own testimony given under oath the Appellant stated it was the complainant who requested for his love, came to live in his house,

would not keep away even after her grandmother came for her several times, and that she ultimately asked him to marry her, though he told her he would have to inform the parents first. All this was during a whole year as they lived together as husband and wife.

9. These were indeed very special circumstances. The complainant was just outside adulthood, while the Appellant himself was just two years into adulthood. She had told him she was 20 years old, though he knew she was in school. At 17 years of age she was obviously too old for primary school, and it appeared she no longer wanted to continue with school. What she wanted was to get married to the Appellant.

10. To send the Appellant to jail for 15 years in these circumstances was in my considered view to do a grave injustice to him; I am persuaded that if the trial court had been aware of its sentencing discretion under section 8(4) of the Act, it would have considered a non-custodial sentence.

11. In the event therefore, I will allow the Appellant's appeal against sentence. I will set aside the sentence of fifteen (15) years imprisonment and substitute therefor an unconditional discharge. It is so ordered. It is unfortunate that he has already served nearly five years of his sentence. That cannot be undone.

DATED AND SIGNED AT NANYUKI THIS 22ND DAY OF SEPTEMBER 2021

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 23RD DAY OF SEPTEMBER 2021