



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 9 OF 2020

MOSES WAMBASI NALIANYA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence in Criminal

Case No. 1639 of 2016 at the Chief Magistrates' Court at

Bungoma by Hon. J. Kingori – CM on 17th January 2020)

JUDGMENT

1. Upon arraignment, **Moses Wambasi Nalianya**, the Appellant was charged with the offence of defilement of a child contrary to **Section 8(1)** as read with **Section 8(4)** of the Sexual offences Act No. 3 of 2016. The particulars being that between the 26th day of June 2016 and 1st day of July 2016 at [Particulars Withheld] area within Bungoma County intentionally and unlawfully caused his penis to penetrate into the vagina of **LNW** a child aged 16 years.
2. In the alternative he faced a charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act No. 3 of 2006. Particulars being that between the 26th day of June 2016 and 1st day of July 2016 at [Particulars Withheld] area within Bungoma County intentionally and unlawfully caused his penis to come into contact with the vagina of **LNW** a child aged 16 years.
3. Upon being taken through full trial, the appellant was found guilty, convicted and sentenced to serve Eight (8) years imprisonment.
4. Aggrieved, he seeks review of sentence on grounds that he is Remorseful; and that the court erred in not considering the age bracket of both the complainant and appellant. He called upon the court to consider the period of three (3) years spent in custody during trial and to be allowed to go back to school.
5. The case presented by the prosecution was that on the 26th day of June 2016, **LNW**. a child aged 16 years visited the appellant her boyfriend. They engaged in penetrative sex and she stayed with him until 27th June 2016 when her father caused them to be arrested. The complainant was examined by **PW5 Elias Adoka**, a clinical officer at Bungoma County Referral Hospital who filled a P3 form in her regard. He found her hymen missing. She had many pus cells and epithelial cells which showed erosion or friction of the vaginal wall. Therefore, he formed the opinion that she had been defiled.
6. Upon being put on his defence the appellant denied having committed the offence and gave a testimony of how he was arrested. He denied having had sex with the complainant but alleged that he had a grudge with the complainant's father.
7. The Respondent opposed the appeal. Through written submissions it was urged that the appellant got a lesser sentence than the mandatory fifteen (15) years imprisonment. That the trial court noted lack of remorse on the part of the appellant; the trial court took into consideration the age of the appellant following an age assessment conducted where the appellant was found to be Nineteen (19) years old hence an adult and the court rightly treated him as such.
8. In meting out the sentence the trial court based its decision on the decision of **Muruatetu Vs. Republic (2017) eKLR** where the question of minimum mandatory sentence was envisaged to be unconstitutional.
9. **Section 8(4)** of the Sexual Offences Act provides thus:

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.

10. In the case of *Ogola s/o Owour Vs. Reginum (1954)EACA 270* the Court of Appeal held that:

“...This court has powers to interfere with any sentence imposed by a trial court if it is evident that the trial court acted on wrong principles or over looked some material factor or the sentence is illegal or manifestly excessive or as to amount to a miscarriage of justice.”

11. In the case of *Francis Karioko & Another Vs. Republic & 5 others (2021) eKLR* the Supreme Court reviewed the Muruatetu case (Supra) and gave directions. It clarified that the principle that was set declaring the mandatory nature of the death sentence unconstitutional which was later applied to minimum mandatory sentences by the Court of Appeal (See *Christopher Ochieng Vs. Republic (2018) eKLR; Jared Koita Injiri Vs. Republic KSM CA. Criminal Application No. 93 of 2014*) was only applicable to murder cases. This means that minimum mandatory sentences provided by the Sexual Offences Act are applicable.

12. The sentence herein was meted out at the time the court was deemed to be seized of the jurisdiction to exercise discretion in the matter and as correctly pointed out the trial court considered mitigating factors, pre-sentence report and the factor of the appellant having been remorseful. The pre-sentence report was not favourable to the appellant. In the circumstances the court did not apply wrong principles.

13. From the foregoing the appeal is unmeritorious. Accordingly, it is dismissed.

14. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 29TH DAY OF OCTOBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Mr. Ayekha for ODPP

Applicant

Court Assistant – Immaculate