



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

CRIMINAL APPEAL NO. 105 OF 2020

PATRICK WAFULA MAPESA alias “TUYU” APPELLANT

VERSUS

REPUBLICRESPONDENT

(Appeal against the original sentence in Criminal Case No. 56

of 2020 at the Chief Magistrates Court Bungoma by

Hon. A. Odawo – SRM on 6th October 2020)

J U D G M E N T

1. **Patrick Wafula Mapesa** alias “**Tuyu**”, the appellant, was arraigned, tried and convicted for the offence of defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the Sexual Offences Act. It was alleged that he intentionally and unlawfully caused his genital organ, namely penis to penetrate the genital organ namely vagina of **FJ** a child aged twelve (12) years on the 2nd day of June, 2020.

2. Evidence adduced against the appellant was that the complainant encountered the appellant at a hotel. He promised to give her Kshs. 30/- if she went with him to his house. Upon reaching the house he ordered her to remove her clothes and threatened to slaughter her if she did not comply. She removed her clothes and lay down as instructed and he molested her. She slept at his house and in the morning she reported to a neighbour and even slept at her house. In the evening he called her to go and cook for him. When she refused he was offended. The matter was reported to the police, the appellant was arrested and subsequently charged.

3. The complainant was subjected to medical examination by **Elias Adoka**, a Clinical Officer, who found her having sustained a bruise on the lower vaginal floor and her urine had epithelial cells. There was also presence of spermatozoa and white blood cells in her genitalia. He formed the opinion that there had been penetration. The complainant was also examined by the Dentist. Her dental formula had unerupted 2nd molars both on the lower side and upper arches. The root formation of the 2nd molar was beginning to appear. It was concluded that the minor was twelve (12) years old.

4. When put on his defence the appellant denied charges and explained that he had disagreed with the Chief who vowed to make him see and consequently he was arrested.

5. The court analyzed evidence presented by the complainant that she was found inside the house of the

appellant hence he recognized her assailant and there was proof of the fact of penetration having occurred, hence the conviction. The court considered the fact of the appellant having been a first offender and sentenced him to serve ten (10) years imprisonment.

6. Aggrieved, at the outset he appealed against the entire judgment on grounds that the case was not proved as required but at the hearing of the appeal he only mitigated on sentence. He urged that: he was a first offender; remorseful; he is the sole provider of his family of six children who are perishing in bad environment and the sentence meted out was harsh and excessive.

7. The Respondent/State argues that the case was proved as required and the sentence meted out was proper in respect to the sentence provided for by the respective Statute.

8. This being a first appellate court, it is mandated, to reconsider and re-evaluate what transpired at trial so as to reach it's independent conclusion. (*Also See Okeno Vs. Republic (1972) EA32*).

9. It is trite that for an appellate court to interfere with sentence meted out by a trial court it must satisfy itself that the court misdirected itself by acting on wrong principles and if the sentence is harsh and excessive. This principle was well captured in the case of *Bernard Kimani Gacheru Vs. Republic (2002) eKLR* where it was stated thus:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with the sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist (emphasis court’s).”

10. **Section 8(3)** of the Sexual Offences Act provides that:

A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years

11. Evidence of the age of the child was proved to be twelve (12) years. The sentence was passed at a time when courts had assumed discretion following the decision of *Francis Muruatetu & Another Vs. Republic (2017) eKLR*. The position has since been clarified following directions given by the Supreme Court in the case of *Francis Muruatetu & Another Vs. Republic, Katiba Institute & 5 Others (Amicus Curiae) (2021) eKLR* that the discretion is in respect to murder cases where the death sentence was found to be unconstitutional.

12. Looking at the age of the complainant vis a vis the offender (Appellant) who mitigates that he is a father of six (6) children, his character becomes questionable. In the premises the sentence meted out was too lenient.

13. Therefore, the appeal which lacks merit 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:

Appellant

Mr. Ayekha for ODPP

Court Assistant – Immaculate