



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 22 OF 2019

MRD.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the sentence of Hon. D. Mochache, Senior Principal Magistrate, delivered on 20th August 2018 at Shanzu Senior Principal Magistrate's Court Sexual Offences Case No. 107 of 2018).

J U D G M E N T

1. The Appellant MRD was aggrieved by the conviction and sentence in Shanzu SPM's Court Sexual Offence No. 107 of 2018 where he was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act No. 3 of 2006.
2. Particulars were that MRD on the 28th day of August 2018 in Kisauni Sub-County within Mombasa County, intentionally and unlawfully caused his penis to penetrate the vagina of MM a girl aged 15 years.
3. The Appellant was also charged with an alternative charge of indelcent act with a child contrary to Section 4(1) of the Sexual Offences Act No. 3 of 2006.
4. From the Records of the lower court, the Appellant pleaded guilty when the charge was read over to him, he pleaded guilty and in mitigation he said he didn't know what came over him as he was married to the mother of the Complainant in 1998 and that they had sired 7 children. He said he found himself overwhelmed with emotions and he defiled the complainant.
5. The grounds of appeal in the petition of appeal filed on 28th January 2019 are:-
 - i. That the learned trial Magistrate erred in law and fact by convicted him and sentencing him without considering that the sentence of 30 years imposed upon him was excessive.**
 - ii. That the learned trial Magistrate erred in law and fact by convicting and sentencing him to 30 years imprisonment without considering that the same was unlawful because the age of the Complainant was not proved beyond all reasonable doubt.**
 - iii. That the learned trial Magistrate erred in law and fact by failing to note that Section 150 of the C.P.C. was not considered for the alleged Chief who purported to have arrested and handed over the appellant to police did not testify and clear doubt of his arrest.**
 - iv. That the learned trial Magistrate erred in law & fact by failing to consider defence statement.**
6. The appeal was heard by way of written submissions and Appellant submitted that the principle in the case of *Opoya vs Uganda* (1967) E.A. 752 at page 754 gives room for the exercise of judicial discretion. It was submitted that 30 years sentence meted on him was above the minimum sentence prescribed in section 8(3) of the Sexual Offences Act.
7. The Appellant also relied in the holding in *Francis Muruatetu & Another vs Republic* [2017] eKLR as well as a myriad of other authorities to urge the court to allow his appeal.
8. The Respondent submitted that the appeal was unmerited because the appellant pleaded guilty unequivocally and that by Section 348 of

the Criminal Procedure Code and the appeal on conviction was untenable.

9. It was also submitted that the sentence was also lawful and appropriate to the offence considering the Appellant defiled his 15 years old daughter. It was argued that the requirements for an unequivocal plea as laid down in John Mwendu M. vs Republic [2013] eKLR and Adan vs Republic [1973] E.A. 445 were met and the facts revealed the offence charged. The Respondent urged the court to dismiss the appeal.

10. In his reply to Respondents submissions he pleaded with court to find that he didn't waste time for the court by pleading guilty and that the sentence of 30 years should be found to be harsh and excessive. He urged the court to consider that being 60 years he was vulnerable and thus his life was threatened by COVID-19 pandemic in prison which is crowded and in pursuit of NCAJs circular issued on 15/03/2020 he should be released like other convicts had been released.

11. This court has considered the appeal on sentence and find that the trial Magistrate exercised her discretion to pass sentence of 30 years against the Appellant who preyed on his step daughter and defiled her. He was liable to imprisonment for a term not less than 20 years imprisonment.

12. The circumstances and nature of the offence committed by the Appellant against a child he was supposed to protect called for that stiff penalty and same cannot be said to be harsh and excessive. The appellants appeal on sentence therefore fails. He should serve and complete his sentence.

13. Right of Appeal – 14 days. Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 28TH DAY OF OCTOBER 2021

HON. LADY JUSTICE A. ONG'INJO

JUDGE

In the presence of:-

Ogwel – Court Assistant

Appellant – present in person

Mr. Mulamula for Respondent

HON. LADY JUSTICE

A. ONG'INJO

JUDGE