



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MALINDI**

**CRIMINAL APPEAL NO. E024 OF 2020**

**RAJAB KANYANJE CHARO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the sentence of the Principle Magistrate's Court at Kaloleni by Hon MW NJUGUNA (RM) delivered on 3<sup>rd</sup> October 2019 in Criminal Case No. 43 of 2018)*

**CORAM: Hon. Justice Reuben Nyakundi**

**Rajab Kanyanje Charo in person**

**Mr. Mwangi for the DPP**

**J U D G E M E N T**

The appellant, **Rajab Kanyanje Charo**, was arraigned in court on the 12<sup>th</sup> November 2018 and charged with the offence of defilement of a girl contrary to Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of March 2018 and 23<sup>rd</sup> October 2018 at [Particulars Withheld] village, Kaloleni sub-county in Kilifi county within the Coast region, he intentionally and unlawfully committed an act which caused his male genital organ namely penis to penetrate the female genital organ namely vagina of **RRT** a child aged 17 years.

In the alternative charge, the accused was alleged to have committed an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of March 2018 and 23<sup>rd</sup> October 2018 at [Particulars Withheld] village, Kaloleni sub-county in Kilifi county within the Coast region, he intentionally and unlawfully committed an act which caused his male genital organ namely penis to touch the female genital organ namely vagina of **RRT** a child aged 17 years.

The accused denied the charges and the matter was set down for trial where the prosecution presented five witnesses in aid of its case. The appellant was subsequently found to have a case to answer and put on his defence whereupon he gave unsworn testimony but did not call any additional witnesses.

Hon. MW Njuguna in a decision delivered on 3<sup>rd</sup> October 2019, found that the offences of defilement contrary to Section 8 (1) as read with 8 (4) and an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006 had been proven beyond reasonable doubt and convicted the appellant accordingly. When it came to sentencing, the trial court noted that not only was the offence rampant in the area, but also that the appellant had committed the offence against a minor who was both mentally and physically challenged. While acknowledging the progressive jurisprudence on mandatory minimum sentences, the trial court found that each case ought to be considered according to its special circumstances. In consideration of the fact that the victim minor was both mentally and physically challenged, the trial court imposed the mandatory minimum sentence of 15 years imprisonment for the charge of defilement.

Aggrieved by the sentence imposed by the trial court, the appellant urges in his petition of appeal that upon perusal of the proceedings, he had elected to pursue an appeal on the sentence only. He argued that in sentencing him to 15 years imprisonment, the learned trial magistrate had failed to acknowledge that the mandatory sentencing laws had been declared unconstitutional; that the trial court erred in both law and fact in imposing on him a sentence without considering his mitigating factors; and that the sentence of 15 years imprisonment was harsh and excessive in the circumstances of the case.

**Submissions on Appeal, Analysis and Determination**

This is an appeal on sentence only as is clear from the appellant's Petition of Appeal and submissions. The appellant urges that since

mandatory minimum sentences were declared unconstitutional the trial court ought to have considered his mitigating factors including the fact that he was a first offender, an orphan and the sole breadwinner for his grandmother. He further urges that the sentence meted by the trial court was excessive and that this court ought to consider these factors in reviewing his sentence. The Appellant further urges that pursuant to Section 333 (2) of the Criminal Procedure Code ought to come into play to consider the time spent incarcerated between 24<sup>th</sup> October 2018 and 3<sup>rd</sup> October 2019.

It is canon that sentencing is at the discretion of the trial court and an appellate court can only interfere with the sentence under very specific circumstances as was emphasized by the Court of Appeal in **Ahamad Abolfathi Mohammed & another v Republic [2018] eKLR**. Not unless the sentence meted out by the trial court was excessive, outside the law or inappropriate in the circumstances, an appellate court will hesitate to interfere with the discretion of the trial court.

Section 8 (1) as read with 8 (4) of the Sexual Offences Act No. 3 of 2006 provides:

***“8. (1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.***

***(3) 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 learned trial magistrate, in consideration of the evidence at hand found that the prosecution had proven the case against the Appellant beyond reasonable doubt. The Appellant was thus sentenced to the minimum mandatory sentence of 15 years. This was a lawful sentence. The argument by the Appellant on the mandatory nature of his sentence was no doubt premised on the Supreme Court decision in **Francis Karioko Muruatetu & another v R [2017] eKLR**.

However, the Supreme Court clarified its decision in **Francis Karioko Muruatetu & another v R; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR**. In its clarification, the apex court made it clear that its judgment in **Muruatetu [2017] supra** was only in relation to the offence of murder. The relevant excerpt of the decision reads thus:

***‘We therefore reiterate that, this Court’s decision in Muruatetu, did not invalidate mandatory sentences or minimum sentences in the Penal Code, the Sexual Offences Act or any other statute’***

It is necessary to protect the victims and those vulnerable in the society from perpetrators of heinous sexual offences whose impact is often not only physical but also emotional and psychological. To this end, stiff penalties that would act as a deterrence to other would be perpetrators are necessary. **Gikonyo J in R v Jeremiah Koilel [2021] eKLR** stated:

***“[6] Sexual Offences Act is a special Act enacted to deal with the menace of sexual offences including defilement. Doubtless, the nature of sexual offences depicts moral debauchery; a cruel attack on a person’s dignity and person; and, an indelible corrosive hurt of the victim’s life. This reality makes sexual offences serious offences, hence, need for protection of victims of sexual offences.”***

In the instant case, the appellant defiled a child who is both mentally and physically challenged on numerous occasions. The sentence of 15 years imprisonment meted by the trial court was commensurate with the offence committed. It was neither harsh nor excessive and this ground must fail. However, the sentence shall run from the date of his arrest in accordance to Section 333(2) of the Criminal Procedure Code.

The appeal thus fails and is dismissed forthwith.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18<sup>TH</sup> DAY OF OCTOBER 2021**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of:**

1. Mr. Mwangi for DPP

2. Appellant in person