



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 193 OF 2019**

**JW.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal arising from the conviction and sentence by Hon. G. P. Omondi***

***(SRM) in original Bungoma Sexual Offences Case No. 78 of 2018 dated 9<sup>th</sup> November 2019)***

**JUDGMENT**

1. The Appellant was charged with the offence of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, 2006. The particulars were that on the 8<sup>th</sup> of July 2016 at [particulars withheld] Village within Bungoma County, he intentionally and unlawfully caused his penis to penetrate the vagina of NSD (*Name redacted to protect the identity of the minor*), a child aged 9 years.
2. He faced an alternative charge of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006. The particulars were that on 8<sup>th</sup> of July 2016 at [particulars withheld] Village within Bungoma County, he intentionally and unlawfully caused his penis to touch the vagina of NSD (*Name redacted to protect the identity of the minor*), a child aged 9 years
3. A summary of prosecution's case is that on 8<sup>th</sup> July 2016 at around 8:00a.m NSD was dressing in her bedroom preparing to go to school when the appellant, who is her stepfather and lived with her, caught her in a state of undress. The appellant had a vest and no underpants. In the words of NSD, the appellant then "took his thing for urinating and put it in my place for urinating" while they were both standing. The appellant penetrated his penis into NSD's vagina for approximately 5 minutes while she screamed in pain. When he had finished he threatened to kill NSD if she told anybody what had happened. NSD then went to school looking sick on the day in question.
4. Two days later NSD divulged to her elder brother what had befallen her and he in turn informed their mother PW2. The matter was also reported to PW3, the village elder. Together PW3 and PW4 made the arrest of the appellant on 23<sup>rd</sup> July 2016 and took him to Nzoia police station.
5. NSD was taken to Bungoma District Hospital where upon examination it was concluded that she had been defiled. The appellant was subsequently charged as read above.
6. In his unsworn testimony in his defence, and without calling any witnesses, the appellant told the court that he had carried out his duties as a security guard on the date in question until 10:00a.m. That he went home to have lunch with PW1. He denied the offence.
7. At the close of the trial, the appellant was found guilty and convicted on the main charge. He was sentenced to a term of ten (10) years imprisonment.
8. Dissatisfied with the sentence the Appellant filed an appeal on the grounds that he was a first offender and that he was remorseful. He stated that the sentence was harsh and excessive: that the prosecution witnesses fabricated evidence against him: that the evidence adduced by the prosecution witnesses was too weak to warrant a conviction and that the appellant and the family of NSD were on good terms.
9. The parties filed their respective submissions to the appeal which have been duly considered. In summary the prosecution submitted that it was commendable that the appellant was remorseful. However they submitted that the trial court had imposed a lenient sentence considering that the Sexual Offences Act imposed life imprisonment upon conviction where the complainant is 9 years old. Lastly the prosecution submitted that the evidence adduced proved the three(3) essential ingredients to convict a person for a charge of defilement namely, that there was penetration, that the complainant was a minor and that the penetration was caused by the appellant. The prosecution urged the court to dismiss the appeal and uphold the judgement, conviction and sentence.

10. The appellant filed his submissions appealing for review of the sentence imposed by the court. He prayed that his sentence be ordered to commence on the date of his arrest. He quoted the case of **Robert Achada Okello v. Republic (2018)** in which the court held:

*“Under the proviso of Section 333(2) of the Criminal Procedure Code, the court is entitled to take into account the period the petitioner has spent in court in determining the sentence.”*

He further relied on the cases of **Josiah Mutua Mutunga & Anor v. R (2018)**, which also dealt with the consideration of time served by an appellant in custody while imposing a sentence. He was satisfied with the sentence of 10 years imprisonment; save for the court to consider when it should start running.

11. The only issue that arises for determination therefore is whether the sentence of 10 years imprisonment imposed by the trial court upon the appellant is harsh and excessive as to warrant interference by this court. Further, whether the court should consider the period the appellant had spent in custody in determining the sentence.

12. It is trite law that sentencing is a discretionary exercise. However before a sentence is imposed the court is bound to consider the law creating the offence for which sentence is imposed, as well as the sentence and/or sanction prescribed under the law. The court will also consider the mitigation tendered by the appellant, his age, the general circumstances of the accused and the circumstances in which the offence was committed.

13. The Appellant was charged with the offence of defilement contrary to **section 8(1) & (2)** of the **Act** which provides *inter-alia*:

**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.**

14. It was not disputed that the NSD was a child below 11 years of age. The prosecution proved beyond reasonable doubt that the appellant penetrated NSD as evinced by NSD’s testimony, the medical records and evidence presented before the trial court. The proper sentence would have been life imprisonment in line with section 8(2) of the Sexual Offences Act.

15. The appellant however presented mitigating factors including stating that he was remorseful, that he had been forgiven by PW1 and that he had good ties with the family and the community. He further argued that the time served in custody totalling 3 years and 3 months ought to have been considered during his sentencing.

16. The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to consider the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. See **Republic v. Thomas Gilbert Cholmondeley [2009] eKLR**; and **Charles Khisa Wanjala v Republic [2010] eKLR**.

17. This was considered in the case of **Samuel Kereyo v Republic [2021] eKLR** where the court gave full effect to section 333(2) of the Criminal Procedure Code as follows.:

*“Daringly, therefore, I must admit that a sentence that does not give effect to section 333(2) of the CPC leaves the period spent in custody unaccounted for in law; hence, a deprivation of freedom arbitrarily or without a just cause contrary to Article 29(a) of the Constitution which provides that:*

*Every person has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause.”*

18. In considering whether or not to interfere with the sentence imposed by the trial court, I have borrowed from the decision of J. Ngugi, J in **Benson Ochieng & Another vs. Republic [2018] eKLR** in which the judge categorized the set of factors to be considered in sentencing.

*“Re-phrasing the Sentencing Guidelines, there are four sets of factors a Court looks at in determining the appropriate custodial sentence after determining the correct entry point (which, as stated above, I have determined to be fifteen years imprisonment). These are the following:*

*a. Circumstances Surrounding the Commission of the Offence: The factors here include:*

- i. Was the Offender armed? The more dangerous the weapon, the higher the culpability and hence the higher the sentence.*
- ii. Was the offender armed with a gun?*
- iii. Was the gun an assault weapon such as AK47?*
- iv. Did the offender use excessive, flagrant or gratuitous force?*
- v. Was the offender part of an organized gang?*
- vi. Were there multiple victims?*

vii. Did the offender repeatedly assault or attack the same victim?

b. Circumstances Surrounding the Offender: The factors here include the following:

i. The criminal history of the offender: being a first offender is a mitigating factor;

ii. The remorse of the Applicant as expressed at the time of conviction;

iii. The remorse of the Applicant presently;

iv. Demonstrable evidence that the Applicant has reformed while in prison;

v. Demonstrable capacity for rehabilitation;

vi. Potential for re-integration with the community;

vii. The personal situation of the Offender including the Applicant's family situation; health; disability; or mental illness or impaired function of the mind.

c. Circumstances Surrounding the Victim: The factors to be considered here include:

i. The impact of the offence on the victims (if known or knowable);

ii. Whether the victim got injured, and if so the extent of the injury;

iii. Whether there were serious psychological effects on the victim;

iv. The views of the victim(s) regarding the appropriate sentence;

v. Whether the victim was a member of a vulnerable group such as children; women; Persons with disabilities; or the elderly;

vi. Whether the victim was targeted because of the special public service they offer or their position in the public service; and

vii. Whether there has been commitment on the part of the offender (Applicant) to repair the harm as evidenced through reconciliation, restitution or genuine attempts to reach out to the victims of the crime."

19. The trial court imposed a sentence of 10 years on the appellant despite a life sentence being provided in the Sexual Offences Act. This was due to the court giving consideration to the appellant's mitigating factors during sentencing. Considering the applicable laws, this court agrees with the Respondent that the sentence imposed was lenient having in mind the age of the minor. The court will however not enhance the sentence against the appellant since he was not warned of such an eventuality at the commencement of the hearing of his appeal, if his appeal did not succeed. The appeal fails and is therefore dismissed.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN VIRTUAL COURT THIS 24<sup>TH</sup> DAY OF NOVEMBER 2021.**

.....

**L.A. ACHODE**

**HIGH COURT JUDGE**

**In the presence of .....Appellant in person**

**In the presence of.....State Counsel**