



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CORAM. D. S. MAJANJA J.

CRIMINAL APPEAL NO. 80 OF 2019

BETWEEN

JAMES NJOROGE NJERI.....APPELLANT

AND

REPUBLIC..... RESPONDENT

(Being an appeal against the original conviction and sentence dated 24th January 2019 in Criminal Sexual Offence Case No. 5 of 2016 at the Magistrate's Court at Gatundu before Hon E. N. Nyongesa, SRM)

JUDGMENT

1. The appellant, **JAMES NJOROGE NJERI**, was charged and convicted of the offence of defilement contrary to **section 8(1) and (4)** of the **Sexual Offences Act** ("the *Act*"). It was alleged that on diverse dates between 10th October 2015 and January 2016 in Gatundu South of Kiambu county, the appellant intentionally and unlawfully caused his penis to penetrate the vagina of MWN, a child aged 16 years. The appellant was convicted and sentenced to 15 years' imprisonment.

2. At the hearing of this appeal, the appellant did not contest the conviction but requested the court to review the sentence. In his unsworn defence, he stated that he had been staying with complainant, PW 1, as his wife.

3. Before the trial court, PW 1 testified that she stayed with the appellant for 2 months between October and December 2015 after she had disagreed with her mother. She was returned home by the appellant's mother. She discovered she was pregnant and gave birth to a girl. She told the court that she had known the appellant for a period of 2 years. PW 2's mother, told the court that PW 1 had disappeared. The appellant's mother brought PW 1 back to her home and told PW 2 that the appellant had married PW 1. When PW 2 interrogated her daughter, she told her that she had been married to the appellant and that she left school after she had issues with the teacher.

4. At the time of conviction, the mandatory minimum sentence under **section 8(4)** of the *Act* for causing an act of penetration of a child aged 16 years was 15 years' imprisonment. Following the decision of the Supreme Court in *Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR*, the Court of Appeal in *Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR* held that mandatory minimum sentences were not tenable under the Constitution and the court has discretion to impose an appropriate sentence based on circumstances of the case.

5. I have considered the evidence and the respective ages of PW 1 who was aged 16 years old and the appellant 22 years and the fact that they had a prior relationship. They also have a child together. In order to protect children from sexual predation and exploitation and the law provides for heavy penalties. In this instances and circumstances, I find the term of 15 years' imprisonment harsh and excessive. I find that the time the appellant has spent in custody is sufficient punishment.

6. I allow the appeal on sentence and substitute the sentence of 15 years' imprisonment with **time served**. The appellant is now set free unless otherwise held under a separate warrant.

SIGNED AT NAIROBI

D.S. MAJANJA

JUDGE

DATED and DELIVERED at KIAMBU this 29th day of JANUARY 2020.

J. N. ONYIEGO

JUDGE

Appellant in person.

Mr Kasyoka, instructed by the Office of the Director of Public Prosecutions for the respondent.