



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL 121 OF 2017

BETWEEN

VN.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(An appeal against the original conviction and sentence in the Chief Magistrate's Court at Kibera Sexual Offence Case no.1 of 2015 delivered by Hon. J Gandani, CM., on 31st July 2017).

JUDGMENT

1. The Appellant was charged with defilement contrary to **Section 8 (1) (3) of the sexual offences Act**. The particulars of the offence were that on diverse dates between September, 2014 and February, 2015 within Nairobi County, unlawfully and intentionally caused his penis to penetrate the vagina of N.A.V. a child aged 15 years. He was further charged with being unlawfully present in Kenya contrary to **Section 52 (2) of the Kenya Citizenship and Immigration Act No. 2 of 2011**. The particulars of the offence were that on the 3rd day of March, 2015 within Nairobi County, was found being unlawfully present in Kenya in that he did not have valid permits or passes authorizing him to remain in Kenya in contravention to the said Act. The court found him guilty for both counts. In count 1 he was sentenced to serve twenty (20) years imprisonment and in count II to one month imprisonment. The sentences were ordered to run concurrently.
2. In a Petition of Appeal titled '**Mitigation Appeal**' filed on 18th September, 2017 he has only appealed against the sentence. He pleaded remorse citing that he was the bread winner of his family and that he was sick and the prison conditions were worsening his illness.
3. The appeal was canvassed before me on 3rd March, 2020. The Appellant relied on written submissions of even date which he condensed in brief oral submissions. He pleaded for leniency stating that he did not know that what he was doing was wrong. He submitted that he understood defilement constituted an act of sexual intercourse by force, but in this case he did not force the complainant into the act. He added that he never intended to damage the life of the complainant, but rather settle with her in a family relationship He stated that he did not know the age of the minor as she had told him she was 21 years old. Furthermore, he added, he was still in good relationship with her family. He urged the court to reduce the sentence more so, following the window opened by the Supreme Court decision in the case of **Francis Kariokor Muruatetu & Another v Republic (2017) e KLR** which declared minimum mandatory sentences unconstitutional.
4. Ms. Kibathi for the Respondent submitted that the sentence was proper as provide by law and urged the court not to vary it. It was her submission that despite the Appellant's plea to be allowed to be part of the life of the child there was a wide age gap between the two parties to excuse his conduct. Furthermore, the minor and the Appellant were cousins hence, the Appellant knew that the complainant was a minor aged 15 years.
5. Under Section 8(4) of the Sexual Offences Act "**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.**" In is paramount in determining the appropriate sentence to pass to have regard to the background of the case.
6. The family of the complainant allowed the Appellant, a relative to visit them in their home in Kabiria. It was then that he would sneak into the bedroom of the complainant and defile her. **PW1, N.A.V.** (complainant) discovered in October 2014 that she was pregnant. She approached the Appellant to inform him of the developments. The Appellant offered to have them elope and he facilitated this. They went to a lodging facility and later went to Mukuru kwa Njenga where they sought for a house.
7. It was there that the complainant's uncle, **PW4, E.S.** found them after receiving a tip off. He took the Appellant and the complainant to Satellite Police Station. They were thereafter sent to a hospital where the complainant received treatment. When the ultrasound was done she

was found to be 20 weeks pregnant. After the child was born DNA samples were taken for analysis and they matched against those of the Appellant. It was the finding of government chemist **PW6 Lawrence Kinyua Muthuri** that the child was sired by the Appellant. Further, the age of the minor was established by the production of a birth certificate by **PW7, Evelyne Mwikali**, the investigation officer. It was established that the complainant was fifteen (15) years old at the time of the ordeal. In his defence, the Appellant testified that the complainant deceived him that she was 21 years old. He admitted that he did impregnate her while under this deception.

8. The Appellant was a lot older than the minor with an age difference of 16 years being that he was 31years old. He had been accommodated by the family of the minor since he was a relative at the time that he defiled the minor. He thus knew that the girl was a minor. He opted to elope with her as a cover up for the mistakes he had committed and also in the hope that if he took in the girl as a wife, no complaint would lodged by the family. He took advantage of the trust that the family had placed in him. All these are aggravating factors that inform me that a stringent sentence is deserved. Nevertheless, he struck me as a remorseful person, which factor mitigates for a lesser sentence than the minimum provided under the law.

9. Accordingly, taking into account all the factors, I hereby set aside the 20 years imprisonment in count I and substitute therefor, with a sentence of 15 years imprisonment. I shall not disturb the sentence in count II. The sentences shall run concurrently.

10. The Appellant has been in custody since 6th March, 2015 and was convicted on 31st July, 2017. He was therefore in custody for 2 years 4 months and 25 days, which period shall be considered to constitute part of the sentence. It is so ordered.

Dated and Delivered at Nairobi This 29th Day of April, 2020.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant in person.*
2. *Miss Nyauncho for the Respondent.*