



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HCCRA NO.6 OF 2017

LEONARD FRANCIS NJORGE.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

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**. Particulars are that on the 8th day of March 2016 in Nyandarua County, accused intentionally and unlawfully committed an act by inserting his male genital organ (penis) into a female genital organ (vagina) of XY a child aged 8 years that caused penetration.

2. The alternative charge was the offence of **committing an indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No.3 of 2006**. Particulars are that on the 8th day of March 2016 in Nyandarua County, accused intentionally and unlawfully committed an indecent act by touching the female organ (vagina) of XY a child aged 8 years.

3. The appellant denied both the main and alternative charge. After examination in chief of the first witness, the appellant declined to cross examine the complainant and opted to admit the charge. He was duly warned of the seriousness of the offence but he still indicated to the court his intention to admit the charge. The charge was read afresh to the appellant on 11th October 2016. He responded that the charge was true. Facts were read to him and he responded that the facts were correct. He was convicted on his own plea of guilty. He was given a chance to mitigate and he was sentenced to life imprisonment.

4. Being dissatisfied and aggrieved by the decision of the trial court, the Appellant filed this appeal against both conviction and sentence on the following grounds: -

i. That the trial magistrate erred in fact and law by failing to appreciate the appellant was not warned on the implications of pleading guilty to the charges and the sentence that the offence attracted.

ii. That the trial magistrate erred in fact and law by failing to consider plausible mitigation without offering any reason thereof.

iii. That the trial magistrate erred in fact and law by failing to consider that the appellant change of plea could have been orchestrated by other external factors.

5. During the appeal hearing on 11th June 2020, the appellant informed the Court that he still admits the charge. He stated that he is married with two children and has been in prison for 6 years. He said he has reformed and will not repeat such an offence again. He prayed and requested for a non-custodial sentence.

6. In response the state counsel **Ms. Rita Rotich** urged the Court to consider aggravating circumstances; that the child was a minor of tender age and was subjected to pain; that the complainant was traumatized. She submitted that the appellant took advantage of her innocence and enticed her using sweets; that the offence of defilement is rampant and the sentenced imposed was deterrent.

ANALYSIS AND DETERMINATION

7. I note that the appellant was sentenced before the decision in the case of **Francis Karioko Muruatetu Vs Republic [2017] eKLR** where the Court declared mandatory nature of sentence unconstitutional for taking away the discretion of the Court and makes mitigating factors superfluous.

8. The trial magistrate in this case imposed the mandatory sentence of life imprisonment provided in the **Sexual Offences Act**. In view of the decision, in the said **Muruatetu** case, the appellant deserves this Court's consideration of sentence imposed.

9. I have considered the accused's mitigation, the age of the child defiled; the appellant has indicated that the 6-year period he has served in prison has helped him reform and promise not to commit such an offence again. Having considered the above, I find that the appellant deserves reduction of sentence.

10. FINAL ORDER

1. The Appellant's sentence is reduced to 15 years' imprisonment.
2. Sentence to run from the date the appellant was sentenced by the trial court.

Judgment dated, signed and delivered via zoom at Nakuru This 30th day of June, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Appellant in person present

Rita for State