REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CRIMINAL DIVISION

CRIMINAL APPEAL CASE NO. 113 OF 2018

LESIIT, J

GO..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence by Hon. Ojoo (Mrs.) PM dated 15th March, 2018 in Kibera Chief Magistrate's Court,Sexual Offence Case No. 43 of 2015)

JUDGMENT

1. The Appellant **GO** was charged with one count of Defilement contrary to **section 8(1)**as read with **section 8(2)** of the **Sexual Offences Act (SOA)**. He faced an alternative count of **Indecent Act** with a child contrary **section 11(1)** of the **Sexual Offences Act**.

2. The particulars in count I are as follows:

> **"On the night of 29th day of August 2015 in Riruta within Nairobi county, unlawfully and intentionally caused his penis to penetrate the vagina of BA a child aged 5 years."**

3. The particulars in the Alternative Count are:

> **"On the night of 29th day of August 2015 in Riruta within Nairobi County, unlawfully and intentionally committed an indecent act by touching the vagina of BA child aged 5 years."**

4. The Appellant was convicted of the main count of defilement and sentenced to serve 25 years' imprisonment on March 15, 2018.

5. The Appellant then filed an appeal and annexed a mitigation of Appeal. I take that to mean a memorandum of appeal. It has five grounds as follows:

> **(1) That, I pray that the Hon. Court be pleased to include the period served in remand as part of my sentence under section 333 (2) of the CPC.**
>
> **(2) That, I pray that the Hon. Court be pleased to find that my mitigation before the trial court expressed remorse.**
>
> **(3) That, I pray that the Hon. Court be pleased to consider that the sentence though lawful has no room for rehabilitation.**
>
> **(4) That, I pray that the Hon. Court be pleased to grant me a second opportunity to act as a role model in the society.**
>
> **(5) That, I pray to be furnished with a copy of the appeal record to enable me raise more reasonable grounds and be present during the appeal hearing.**

6. When the appeal came up for hearing the appellant indicated that he was not challenging the conviction but only the sentence.

7. The facts of the prosecution case were that the victim in this case was a child of 5 years. She was orphaned and lived with her maternal

uncle. The Appellant was a distant relative of the victim's uncle, PW2 and lived with them at the time the incident occurred.

8. The Appellant has urged the court to reconsider his sentence arguing that he was only 19 years old and therefore young when he committed this offence. He urged that he was a different person now, and that staying in the correctional institution has exposed him to learning a lot including life skills. He said that he had acquired certificates in [Particulars Withheld] Training and Electrical Studies.

9. He said that if he is given a chance by this court he would settle in his home area where he will be involved in Youth Rehabilitation as his contribution to society. He will also be involved in advanced farming which was quick paying. He claimed to have sought and received forgiveness from the victim's family.

10. Mrs. Kimani, Learned Prosecution Counsel opposed the appeal against sentence on the basis the victim was a child of tender age and an orphan. Counsel urged the victim was psychologically affected. She urged that the sentence meted out on the Appellant was lenient as the offence called for a sentence of life imprisonment and urged this court to enhance the sentence. She argued that reducing the sentence will create a bad trend.

11. The court called for a Probation Officer's Report. The one filed by Mr. Kanyutu is centered on the Appellant and the uncle of the victim. The Report has contradicted facts as adduced in evidence. For instance, it contradicts the fact the victim was an orphan. It is claimed that her mother took her back to their rural home after this incident. It also claims the house where incident occurred belonged to the Appellant as opposed to PW2.

12. Mr. Kanyotu stated that the uncle of the victim who was PW2 in the case told him that the mother of the victim could not be reached because her phone was not going through. He did not say if he required to be given the number so as to personally attempt to call her. His report is lopsided and not of much help given the nature of this offence and the age of the victim.

13. I have considered the Appellant's passionate plea to be released from serving sentence. I see from the Probation Report the great support he has from his community and from PW2. I also note the Training he has gone through while serving sentence and his words that he is remorseful for the offence.

14. Defilement is a very serious offence especially where the victim is so young as in this case. The **Sexual Offences Act** provides for mandatory minimum sentences in almost all the offences. In this case, the sentence prescribed under **section8(2)** of the **SOA** is life imprisonment. However, I am guided by the case of **Dismas Wafula Kilwake v R [2018] eKLR**, the Court of Appeal sitting in Kisumu had the following to say about the mandatory minimum sentences prescribed in the **Sexual Offences Act**:

> **"In principle, we are persuaded that there is no rational reason why the reasoning of the Supreme Court in Francis Karioko Muruatetu & Another v. Republic, SC Pet. No. 16 of 2015], which holds that the mandatory death sentence is unconstitutional for depriving the courts discretion to impose an appropriate sentence depending on the circumstances of each case, should not apply to the provisions of the Sexual Offences Act, which do exactly the same thing.**
>
> **Being so persuaded, we hold that the provisions of section 8 of the sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.**
>
> **The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."**

15. The Appellant says he was himself 19 years old when he committed the offence. The Probation Officers Report seems to support the age of the Appellant as being roughly as he claims. The Appellant was a student who occasionally lived with the victim's uncle PW2. PW2 seems to have (delegated his role as) a caregiver of the victim to PW2 as he worked as a night watchman. That was quite unfortunate that the child victim had no mature person to take care of her.

16. This explains PW2's attitude towards the Appellant and the offence while he says PW2 had no blood relationship with him, he trusted him enough to leave the victim with him. PW2 failed his niece and should equally be held responsible for what befell her.

17. As for the Appellant, it is no excuse he had just emerged from teenage when he committed the offence. I have taken cue from the **Muruatetu& Anor. Vs. Republic, Supreme Court Petition No. 15 of 2015** which held mandatory nature of capital sentences are unconstitutional.

18. The reasoning in **Muruatetu** case respecting **Section 204** of the **Penal Code** has been extended further by the Court of Appeal to the mandatory death penalty in robbery with violence cases (see **William OkunguKittiny vs. Republic [2018] eKLR**. It was extended further to sentences imposed by the **Sexual Offences Act** by the Court of Appeal in the case of **Dismas Wafula Kilwake vs. Republic [2018] ekLR** where the court, inter alia, held:

"In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by Section 8 to impose the provided sentences if the circumstances do not demand it…… Among the mitigating factors are provocation, offer of restitution, the age of the offender, ….. and whether the offender is remorseful."

19. The aggravating circumstances are the youthful age of the victim and the psychological impact the offence will have on her. On the other hand, the mitigating factors include the age of the Appellant and the remorsefulness of the Appellant. I did also consider the role played by PW2 in delegating his responsibility over the victim to the Appellant therefore neglecting the victim and demanding too much of the Appellant who was equally like a child.

20. Having considered all the circumstances of the case, I will allow the Appellant's appeal against sentence, set aside the sentence of 25 years and in its place impose a sentence of 10 years from today's date. Those are my orders.

DELIVERED THROUGH TEAMS THIS 29TH DAY OF JUNE, 2020.

LESIIT, J.

JUDGE