



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 115 OF 2009

PAUL KIBET ROTICH.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

R U L I N G

The appellant Paul Kibet Rotich was charged with **defilement contrary to Section 8(2) as read with Section 8(2) of the Sexual Offences Act.**

It was alleged that: *On the 18th August, 2008 at [particulars withheld] area in Nakuru District within Rift Valley Province, unlawfully and intentionally defiled BC a child under the age of 11 years.*

He was tried, found guilty and convicted of the offence. On 15th April 2009 he was sentenced to twenty (20) years imprisonment.

He filed this appeal against the conviction and sentence.

At the hearing of the appeal, the appellant abandoned the appeal against conviction and submitted on the sentence.

He urged this court to find that he had served 11 years, being a substantial part of the sentence, and as an exemplary prisoner. He urged this court to allow his appeal grant him a non-custodial sentence.

In response, Ms. Wambui prosecuting counsel submitted that the appellant had been held in custody prior to the sentence from **20th August 2008 to 15th April 2009**. The state conceded that this period ought to be considered as part of the sentence.

However, regarding the submission for a non-custodial sentence, she submitted that the state was opposed to a non-custodial sentence. The reasons were that, the victim was eleven (11) years old, there was a struggle, her clothes were torn and the appellant was a neighbour at the material time, and expected by society to protect the child. She urged the court to find that the custodial sentence was appropriate.

In response the appellant urged the court to allow him to leave prison so that he could use the skills obtained there as a useful member of the society.

I have carefully considered the submissions by the state and the appellant. **Section 354 of the Criminal Procedure Code at Section 354 (3).**

"The court may... if it considers that there is no sufficient ground for interfering, dismiss the appeal or may;

(a)...

(b) In an appeal against sentence increase or reduce the sentence or alter the nature of the sentence."

Hence the applicant's prayer for non-custodial sentence is not far-fetched.

However is it appropriate in this case?

I have considered the nature of the offence, the age of the complainant and the manner in which the offence was committed, and agree with

the state that a non-custodial sentence would not be appropriate.

The record shows that the appellant was given the mandatory minimum sentence of twenty (20) years imprisonment. However, taking into consideration the power of the High Court under **Section 354 (3) (b)** and the holding in **Francis Karioko Muruatetu & another v Republic [2017] eKLR** on the unconstitutionality of mandatory sentences, that sentence is now reviewable.

The appellant has served almost 12 years of the

The sentence is reviewed to 15 years imprisonment to run from 20th August 2008.

Dated, delivered and signed at Nakuru this 3rd day of August, 2020.

Mumbua T. Matheka

Judge

In the presence of: VIA ZOOM

Martin Court Assistant

For state Ms Wambui

Appellant present