



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CRIMINAL APPEAL NO. 29 OF 2020**

**JOHN CHIDIA LWAINA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from the sentence of the Honourable Resident Magistrate Hon. S. Telewa delivered on 30<sup>th</sup> of December 2016 in Eldoret CM's Court Criminal Case No. 130 of 2015.)*

**JUDGMENT**

1. The appellant was charged with **defilement of a child with mental disability contrary to Section 7 of the Sexual Offences Act No. 3 of 2006**. An alternative charge of committing an indecent act with a child with mental disability contrary to **Section 11 (1) of the Sexual Offences Act No. 3 of 2006**. The particulars of the main charge were that on the 26<sup>th</sup> day of December 2014 at [Particulars withheld] Village of Simat Location of Warene Sub-County within Uasin Gishu County unlawfully and intentionally caused his genital organ (penis) to penetrate the genital organ (vagina) of **EJ** a child with mental disability aged 11 years; and particulars of the alternative charge were that on the 26<sup>th</sup> day of December 2014 at [Particulars withheld] Village of Simat Location of Warene Sub-County within Uasin Gishu County unlawfully and intentionally caused his genital organ (penis) to come into contact with the genital organ (vagina) of **EJ** a child with mental disability aged 11 years.

2. The Appellant denied both the main and alternative charge. The case proceeded for hearing with prosecution calling 7 witnesses in support of their case while the appellant opted to give sworn defence and called one witness. The Court found the appellant guilty and convicted him for the main charge and sentenced him to 10 years imprisonment.

3. The appellant being aggrieved and dissatisfied with the conviction and sentence, acting in person, filed a Petitions of Appeal challenging the conviction and sentence on the following grounds:-

- i. The learned trial magistrate erred in law and fact by failing to find out that this case was tumped with;*
- ii. That the trial court erred in law and facts as it ignored the provision of Section 31 and 32 of the Sexual Offences Act;*
- iii. That the trial court erred in law and in facts in finding that the prosecution proved their case beyond any reasonable doubt;*
- iv. That the trial magistrate erred in law and in facts in failing to hold that the provisions of Section 124 of the Evidence Act were not complied with;*
- v. That the trial magistrate erred in law and in facts in failing to hold that the medical evidence adduced in court did not link the appellant to the offence;*
- vi. That the trial magistrate erred in law and in facts in failing to find that the witnesses evidences on record was uncorroborated;*
- vii. That the trial magistrate erred in law and in fact in failing to hold that the recognition and identification of the appellant was obvious;*
- viii. That the trial magistrate erred in law and in fact by failing to consider the appellant's defence in determination of it judgement;*
- ix. That the trial court erred in lae and in facts by ignoring to invoke the provisions of Section 333(2) of the Criminal Procedure*

4. The state opposed the appeal on both conviction and sentence. The appellant filed in his written submissions while the state counsel did submissions in Court on 9<sup>th</sup> September 2020.

#### **APPELLANT'S CASE**

5. The appellant adopted his grounds of appeal and submission filed during the hearing on 9<sup>th</sup> September 2020. He informed the Court that he is not challenging conviction and he wished to proceed on sentence only. He stated that he has already served two-thirds of the sentence having been in prison for 6 years out of the 10 years he was sentenced.

6. He had 4 children and a wife who depended on him and that they have suffered in his absence. He submitted that during his incarnation in prison, he has learnt new experiences/skills and has completely reformed; socially, spiritually and psychologically, he is remorseful and repent for his action; that he is a servant of God by being a pastor and once released into the society he will serve as a role model, a teacher and a mentor to others.

7. The appellant attached to his submissions recommendation letter from prison and certificates of the skills he acquired while in prison. The certificates showed that he has acquired skills through the rehabilitation programmes offered in prison; he obtained grade 2 artisan certificate specialist in upholstery of construction of sofa sets course. He said the training skills he obtained will help him start his own workshop in case he is set free to join the society. He submits he is a first offender and is remorseful.

8. He urged the Court to rely on the **Francis Muruatetu's** case and **Chomdley's** case where **Muga Apondi J**, Jailed an accused for 8 months where a life was lost. He prays that the Court to consider the period he stayed in custody during trial and reduce his sentence.

#### **RESPONDENT'S CASE**

9. The state counsel, **Brenda** on behalf of the prosecution submitted, the appellant was charged with defilement of a child with mental disability and under the provision, minimum sentence is 10 years; she submitted that the sentence is reasonable in view of the fact that he was not charged under **Section 8(1) of the Sexual Offences Act**. The child was aged 11 years. She submitted that **Muruatetu's** case, provides that the Court should consider mitigation factors in resentencing. That it provides that one of the mitigating factor is commission of an offence in regard to gender based violence. She prayed that the Court do consider that the offence was committed in Uasin Gishu County which has prevalence of such offences and the sentence was reasonable and should not be interfered with.

#### **ANALYSIS AND DETERMINATION**

10. The appellant's appeal is premised on the Supreme Court's decision in the **Francis Karioko Muruatetu & Another v Republic [2017] eKLR**, where the Supreme Court outlawed mandatory death penalty for murder as unconstitutional and struck down **Section 204 of the Penal Code** to the extent that it prescribed mandatory death sentence upon conviction for murder. The reasoning in **Muruatetu's Case** was also extended to sentences imposed by the **Sexual Offences Act** and possibly all other statutes prescribing minimum sentences.

11. In the case of **Dismas Wafula Kilwake v R [2018] eKLR**, the Court of Appeal 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 court's 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.”**

12. From the foregoing Courts are required to consider individual circumstances of each case where the accused person is charged under the **Sexual Offences Act** which have prescribed minimum sentences. Where there are compelling reasons to depart from the minimum sentence prescribe, the Court can impose a different sentence.

13. In view of the appellant, I have considered circumstances of this case as shown by record. I have considered mitigation raised by the

appellant. I have also considered the fact that the appellant took imprisonment positively and took advantage of opportunities available in prison to reform and gain skills which will help him impact on the society positively. I have considered his age. In my view, the appellant will be more beneficial to his family and society while out of prison. I note that the appellant has already served 6 years imprisonment. He has served two-thirds of the sentence. From his submissions and certificates availed to court, there is no doubt that he has reformed. I am of the view that the period he has served in prison is sufficient. I therefore reduce the appellant's sentence to sentence already served.

**14. FINAL ORDERS**

1. Appeal on sentence is hereby allowed
2. Sentence reduced to sentence already served.

**Judgment dated and signed at Nakuru this 28th day of October, 2020**

**RACHEL NGETICH**

**JUDGE**

**Judgment dated, signed and delivered at Eldoret this 29th day of October, 2020**

**HELLEN OMONDI**

**JUDGE**

**In the presence of:**

Komen - Court Assistant

M/s Okoth for State

Appellant in person