



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CRIMINAL APPEAL NO. 123 OF 2020

AMOS NTHIGA RUNJI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The applicant herein, was on the 9th June, 2015 arraigned in the Senior Principal Magistrates court at Siakao in criminal case number 453/2015 and charged with the offence of defilement of a girl under the age of 11 years contrary to section 8 (1) (2) of the Sexual Offences Act No. 3 of 2006.

The particulars of the said offence were that; on the 7th June 2015, at [Particulars Withheld] village Mutuobari Location in Mbeere south Sub County within Embu County, intentionally and lawfully caused his penis to penetrate the vagina of WK a child aged 13 years.

He also faces an alternative charge of Indecent act Contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006, the particulars being that; on the 7th day of June 2015, at [Particulars Withheld] Village Mutuobari Location in Mbeere South Sub County within Embu County intentionally and unlawfully caused his penis to touch the vagina of WK a child aged 13 years.

He was found guilty of the main charge and sentenced to serve 20 years imprisonment.

On the 13th day of August, 2020, he filed the present application for revision.

In his application, he has sought for leniency and has urged the court to review his sentence for the reasons that he is a first offender and that the court has jurisdiction to review the sentence.

In his submissions filed in court, he states that the sentence imposed on him is harsh taking into account that he is a first offender. He invited the court to be guided by the decision of the supreme court in petition number 15 of 2015 (*Francis Muruatetu & Another vs. R.*) and impose a lenient sentence in conformity with the court of Appeal decision in the case of *Evans Wanjala Wanyonyi vs. R. (2019) eKLR*.

He urged the court to be guided by Articles 25 (C), 27 (1) (2) and 50 (2) (P) of the Constitution of Kenya, 2010.

On her part, counsel for the Respondent urged the court to consider the circumstances of the case and the age of the complainant who was only 13 years.

She stated that the applicant has not demonstrated to the court any impropriety on the part of the trial court and submitted that the sentence of twenty (20) years imposed on the applicant is legal and lawful.

She asked the court to consider the sentencing policy and guidelines and particularly the deterrent objective and uphold the sentence of 20 years.

The court has considered the application and the submissions of both parties.

The powers of the High Court on revision is provided for in Section 362 through to 366 of the Criminal Procedure Code.

Section 362 provides as follows;

“The High Court may call for and examine the record of any criminal proceeding before any subordinate court for purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to regularity of any proceedings of any subordinate court.”

Section 364(5) provides as follows;

“Unless an appeal lies from a finding, sentence or order and no appeal is brought no proceeding by way of revision shall be entertained at the insistence of the party who could have appealed.”

From the foregoing, it is clear that the court should not entertain an application for review in a case where the applicant had an option of appeal.

I note from the record that though the applicant filed an appeal, he withdrew the same before it could be heard.

His application is based among other reasons, on the legality of the sentence and especially in view of the supreme court petition number 15/2015 and Article 25 and 50(2) of the Constitution.

The issue of the legality of mandatory sentence was discussed by the supreme court in the case of *Muruatetu (supra)* and the same was found to be unconstitutional.

The court of appeal also in the case of *Christopher Ochieng vs. R.* held the same view and stated thus;

“In this case, the appellant was sentenced to life imprisonment on the basis of mandatory sentence stipulated by Section 8(1) of the Sexual Offences Act, and if the reasoning in the supreme Court was to be applied to this provision, it too should be considered unconstitutional on the same basis..... needless to say, pursuant to the supreme court’s decision in Francis Karioko Muruatetu & Another vs. R. (Supra) we should set aside the sentence of life imprisonment imposed and substitute it therefore with a sentence of 30 years imprisonment from the date of the sentence by the trial court”.

In the case herein, the applicant was sentenced to serve the mandatory sentence under Section 8(1) (2) of the Sexual Offences Act no. 3 of 2006.

Being guided by the above decisions, considering the applicant’s mitigation and the circumstances under which the offence was committed and also the age of the complainant, I hereby set aside the sentence of twenty years and substitute the same with a shorter sentence of 15 years from the date of sentence by the trial court.

It is so ordered.

Dated, Delivered and signed at EMBU this 23rd day of October, 2020.

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L. NJUGUNA

JUDGE

In the presence of:

..... **for the Appellant**

.....**for the Respondent**