**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL APPEAL NO. 143 OF 2018**

**RAM.....APPELLANT**

**VERSUS**

**REPUBLIC..... RESPONDENT**

*(from the original Judgment and conviction by H. Wandere, PM, in Kakamega CMC Sexual Offence Case No. 69 of 2017 delivered on 19/9/2018)*

**JUDGEMENT**

1. The appellant was convicted of the offence of defilement contrary to Section 8 (1) as read with Section 8 (2) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve life sentence. She was aggrieved by the sentence and filed the instant appeal. The grounds of appeal are that:-

(1) The appellant is a single mother of a 17 year old child.

(2) The appellant is a widow who is the sole breadwinner of her family.

(3) She is remorseful for committing the offence.

2. The appellant pleaded with the court to substitute the sentence with a non-custodial sentence.

3. The state opposed the appeal but did not make any submissions in the case. They relied on the evidence in record.

4. The appellant made written submissions in the appeal in which she raised other matters that were not part of the appeal. The court is not obliged to consider such submissions that were not part of the appeal and will confine itself to the grounds raised in the appeal. The grounds of appeal relate to the sentence imposed on the appellant.

5. The particulars of the charge against the appellant were that on the 2nd September, 2017 in Kakamega South Sub-county within Kakamega County intentionally and unlawfully caused her vagina to be penetrated by the penis of CM (herein referred to as the complainant) a child aged 11 years.

6. The evidence for the prosecution was that the appellant is an aunt to the complainant. That on the material day the complainant and his friends were looking for "mapera" in a river close to their home when the appellant came along. She called the complainant to go to where she was. The complainant went to her. On getting to her the appellant held him and dropped him to the ground. She removed his clothes and defiled him. The complainant's colleagues went to the place and pulled away the appellant from the complainant. They ran away with the complainant. After some days the complainant started to experience rashes on his private parts. His teachers checked on him and found him with swellings on his private parts. He was taken to hospital and was diagnosed with a sexually transmitted disease. He revealed that the appellant had defiled him. The appellant was arrested and charged with the offence.

7. The charge against the appellant was under Section 8 (2) of the Sexual Offences Act that provides the sentence for the offence under Section 8 (1) to be a mandatory life imprisonment. The trial court imposed the mandatory life imprisonment on the appellant.

8. The appellant had mitigated at the lower court that she was HIV positive. She pleaded for leniency.

9. Sentencing is a discretion of the trial court. In **Bernard Kimani Gacheru –Vs- Republic (2002) eKLR**, the Court of Appeal stated that:-

***It is now settled law, following several authorities by this court and by the High Court, that sentence is a matter that rests in the***

***discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor or took into account some wrong material, or acted on a wrong principle. Even if, the appellate court feels that the sentence is heavy and that the appellate court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.***

10. In **Denis Kinyua Njeru –Vs- Republic (2017) eKLR** the Court of Appeal expressed the view that the sentences provided under section 8 of the Sexual Offences are "*straight jacket*" penalties that left no room for the exercise of discretion by a sentencing court. However, recently in **Evans Wanjala Wanyonyi –Vs- Republic [2019] eKLR**, the court held that:-

***"On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R (supra) stated:***

***In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was 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 – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.***

***25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years."***

11. The meaning of the latter decision of the Court of Appeal is that the sentence provided by Section 8 (2) of the Sexual Offences Act is a discretionary maximum sentence. The court therefore has a discretion in an appropriate case to impose a lesser sentence than the maximum life imprisonment.

12. The appellant defiled a child aged 11 years who was her relative. The appellant was HIV positive at the time that she defiled the child. She thereby exposed the child to possible infection with HIV. A life sentence may not be an appropriate sentence in this case. All the same I am of the considered view that the appellant still deserves a heavy sentence. In the premises the sentence of life imprisonment is set aside and substituted with one of thirty five years imprisonment.

**Delivered, dated and signed in open court at Kakamega this 29th day of July, 2019.**

**J. NJAGI**

**JUDGE**

In the presence of:

Miss Omondi for state

Appellant - present

Court Assistant - George

14 days right of appeal