



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 27 OF 2017

JAMIN PEPELA WEPUKHULU alias PEPEKALE.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal arising from Judgment delivered on 25/1/2017 in the PM'S Court at Sirisia in Criminal case No. 10 of 2016, R .V. Jamin Pepela Wepukhulu alias Pepekale)

J U D G M E N T

The appellant has appeal against his conviction and sentence of twenty (20) years imprisonment in respect of the offence of defilement contrary to **section 8(1) as read with section 8(3) No. 3 of 2006**.

In this court the appellant has raised 4 grounds in his petition of appeal. His grounds are as follows:-

1. That the trial magistrate erred in law and fact when he convicted and sentenced the appellant to 20 years imprisonment without warning the appellant on the seriousness and risk of entering a plea of guilty.
2. That the trial magistrate erred in law and fact without drawing his attention to the circumstances that lead to the purported defilement.
3. That the trial magistrate erred in law and fact without taking into account that the complainant was within the appellant's home.
4. The trial magistrate erred in law and fact in disregarding the appellant's mitigation by imposing 20 years imprisonment, without considering that the appellant is 60 years of age.

Ms Nyakibia for the state opposed the appeal in its entirety. She submitted that the plea of guilty by the appellant was unequivocal. She also submitted that the sentence of 20 years imprisonment was merited.

In his reply to the submissions by the state, the appellant who appeared in person pleaded to the court to assist him by setting him free to go home and provide for his children since his wife is dead. Additionally, he stated that ever since he was imprisoned he feels weak with pains in head, back and the chest. He also stated that he feels dizzy whenever he stands for a long time. Finally he stated that, he is the sole bread winner of his family and that his eye-sight is bad.

In sentencing the appellant, the trial court took into account his mitigation. The mitigation of the appellant were as follows. He was a first offender. He was a widower and had sought forgiveness. The court then sentenced him to the prescribed minimum term of imprisonment for 20 years, which was to be calculated from the time he took plea on 23rd December 2016.

It is clear from the sentencing notes, that the trial court committed two errors in sentencing the appellant. The first one is that it sentenced the appellant to the minimum mandatory sentence of 20 years imprisonment. In view of the decision of the Supreme court in **Francis Muruatetu & another –vs- R (2017) eKLR** the court was not bound to impose a minimum sentence of imprisonment. It therefore follows that the court had to assess sentence in the ordinary way. The second error committed by the court is that it did not take into account the period in which the appellant had been in custody, which was from 21/12/2016, which translates to about three years. The requirement that the custody period should be taken into account is mandatory required by **section 333(2) of the Criminal Procedure Code (Cap 75) Laws of Kenya**. It is clear therefore that the trial court did not exercise its discretion properly. As a first appeal court I am entitled to interfere with the sentence imposed. In re-assessing the sentence to be imposed I am required to take into account both the mitigation and aggravating factors.

The mitigating factors are as follows. The appellant is a first offender, is aged 60 years old and is a widower. He is also the sole bread

winner of his family of 4 children. The appellant also pleaded guilty to the offence.

The aggravating factors include the following. The victim was a child aged 15 years. The appellant used force in defiling the complainant.

After taking into account both the mitigating and aggravating factors, I find that the prescribed minimum sentence of 20 years imprisonment is manifestly excessive. I therefore reduce it to 8 years imprisonment which now the appellant has to serve.

Judgment signed, dated and delivered at Bungoma this 9th day of August, 2019 in the presence of the appellant and Ms Nyakibia for the Respondent.

J. M. Bwonwong'a.

J U D G E

9th August, 2019.