



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**(CORAM: CHERERE-J)**

**CRIMINAL APPEAL NO.22 OF 2019**

**MKY.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against Conviction and Sentence in SO Criminal Case No. 14 OF 2017***

***in Principal Magistrate's Court at Sirisia by Hon. L. N.Kiniale (SRM)***

***on 07<sup>th</sup> February, 2018)***

**JUDGMENT**

**The Trial**

1. **MKY (hereinafter referred to as the Appellant)** has filed this appeal against conviction and sentence on a charge of incest by male contrary to section 20(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge are that

***On 06<sup>th</sup> September, 2017 at about 01.00 in Cheptais Sub- County within Bungoma County unlawfully and intentionally caused your genital organ namely penis to penetrate the genital organ namely vagina of IC a girl aged 13 years who to your knowledge was his daughter***

2. The prosecution called 7 witnesses in support of the charges. **PW1 IC**, the complainant stated that she was 13 years and in class 6 at [particulars withheld] Primary School and that the Appellant was her father. She recalled that on the material day, she was sleeping in the same room with her brothers **BC** and **CC** when the Appellant arrived home drunk. That he demanded for food and chased their mother **GC** out of the house. That it was then that the Appellant went to the room that complainant and her brothers were sleeping and in the presence of her brothers defiled her. It was her evidence that she went to school the following day and her mom collected her and escorted her to the police station having been informed that she had been defiled.

3. **PW2 BC** and **CC** the complainant's brothers aged 9 and 11 years recalled that on the material date at night, they were sleeping in the same room when the Appellant arrived home drunk and chased their mother away after threatening to kill her. They told court that the Appellant then went into the room where they were sleeping and defiled the complainant. **PW2** told court that he was the one who reported the incident to their mother when she returned home the following day.

4. **PW4 GC**, the complainant's mother recalled that on the material date, Appellant arrived home at midnight drunk and when he quarreled and assaulted her, she ran away. That she returned home the following morning and found that complainant had gone to school and her sons **PW2** and **PW3** informed her that Appellant had defiled the complainant the previous night. She stated that she collected the complainant from school and escorted her to the police station and also to hospital.

5. **PW5 PC ELIJAH MOKAYA** the arresting officer recalled that on 06<sup>th</sup> September, 2017, he rescued the Appellant from a mob that was assaulting him for allegedly defiling his daughter and escorted him to the police station. **PW6 CPL QUINTO ONGERO** the investigating officer received complainant's report and after investigations caused the Appellant to be charged.

6. **PW5 DAVID KIMENGICH**, a clinical officer produced the complainant's P3 form **PEXH. 1** filled he filled on 09<sup>th</sup> September, 2017

and it showed that the complainant did not injuries but that her hymen was broken which was an indication that there was penetration.

### THE DEFENCE CASE

7. When the appellant was put on his defence, he denied the offence. He stated that he was framed by his wife who claimed that he was not supporting the children who were staying with their grandmother.

8. The learned trial magistrate considered the evidence and finding the charge proved sentenced appellant to 30 years' imprisonment.

### The Appeal

9. Aggrieved by the sentence, the appellant lodged the instant appeal on 11<sup>th</sup> February, 2019 and pleaded for a lesser sentence on the ground that he was sickly and that he was the bread winner for his family.

10. When the appeal came up for hearing on 06<sup>th</sup> August, 2019, Appellant submitted that he was wholly relying on the written submissions filed on 31<sup>st</sup> July, 2019. Mr. Akello, learned Counsel for the state opposed the appeal on the ground that the sentence was fair for the reason that the Appellant was liable to a life sentence but was sentenced to 30 years.

11. The Appellant was convicted of an offence under section 20(1) of the Sexual Offences Act No. 3 of 2006 which attracts a minimum sentence of 10 years. The Court of Appeal has in several cases considered the constitutionality of mandatory minimum sentences under the Act; *B W v Republic KSM CA Criminal Appeal No. 313 of 2010 [2019] eKLR*, *Christopher Ochieng v Republic KSM CA Criminal Appeal No. 202 of 2011 [2018] eKLR*. In *Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014* the court adopted what the Supreme Court held in *Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017]eKLR* that the mandatory death sentence prescribed for the offence of murder by section 204 of the *Penal Code* was unconstitutional; as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; and 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.

12. Since the mandatory minimum sentence has been declared unconstitutional, I am bound to re-examine the sentence having regard to the fact that the legislature had taken the view the offences under the Sexual Offences Act are serious offences that merit stiff sentences and there has to be a good reason to depart from the indicative sentence prescribed by the legislature. In *Dismas Wafula Kilwake v Republic [2018] eKLR*, the Court of Appeal set out the factors to be considered in sentencing under the *Act*. It observed as follows:

**[W]e 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.**

13. The Sentencing Policy Guidelines require the court, in sentencing an offender to a 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.

14. **Section 354** of the *Criminal Procedure Code (Chapter 75 of the Laws of Kenya)* provides for the powers of this court upon hearing an appeal if it considers that there is no sufficient ground for interfering, to dismiss the appeal or it may, under **subsection 3(b)**, **"in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence"**.

15. The trial court considered that the offence was committed in full view of two other minors who are the Appellant's sons and the fact of the psychological effect of the offence on the victim and the two minors and sentenced the Appellant to 30 years. The law recognizes the seriousness of the act of defilement. The Appellant is a first offender and has shown remorseful for his actions.

16. From the foregoing, I am persuaded to interfere with the sentence sentences on the Appellant. The sentence of 30 years is substituted with a sentence of 15 years. The sentence will run from the date of conviction which is **07<sup>th</sup> February, 2018**.

**DATED AND DELIVERED THIS 09<sup>th</sup> DAY August 2019**

**T. W. CHERERE**

**JUDGE**

**Read in open court in the presence of-**

Court Assistant - Brenda

Appellant - In Person

For the State - Mr. Akello