



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
(CORAM: CHERERE-J)
CRIMINAL APPEAL NO. 17 OF 2018

BETWEEN
DAVID ACHOWO CHIANGO.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Maseno Criminal Case Number 783 of 2015 by Hon. R.S.Kipngeno (SRM) on 22nd January, 2018)

JUDGMENT

Background

1. The Appellant herein **DAVID ACHOWO CHIANGO** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (hereinafter referred to as **the Act**) which was allegedly committed on 15th May, 2015 against **JGA** a girl aged 14 (Fourteen) years
2. In a judgment dated 22.01.18, *the* Appellant was convicted for the offence of indecent act with a child and was sentenced to 15 years' imprisonment.

Appeal

3. Aggrieved by this decision, the Appellant lodged the instant appeal on 07.03.18. In his amended grounds of appeal filed on 17.10.19, the Appellant abandoned his grounds of appeal and pleaded for lenience on the grounds that he is a first offender
4. At the hearing, the Appellant relied wholly on his written submissions filed on 17.10.19.
5. Ms. Gathu, Learned Counsel for the State opposed the appeal on the basis of written submission filed on 17.10.19 and urged the court to find that it has no merit and dismiss it.

Analysis and Determination

6. I have considered that Appellant is only appealing against sentence. Section 354 of the Criminal Procedure Code Chapter 75 Laws of Kenya (**the CPC**). Section 354 (3) (b) of **the CPC** provides that the court in an appeal against sentence may increase or reduce the sentence or alter the nature of the sentence.
7. Section (8) (4) of the Sexual Offences Act under which the Appellant was convicted provides that:

A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.

8. Appellant was sentenced to the mandatory minimum sentence for an offence of defilement contrary to section 8(1) as read with section 8(4) of **the Act**.

9. The Court of Appeal has in several cases including **BW 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** and **Jared Koita Injiri v Republic, KSM CA Criminal Appeal No. 93 of 2014 [2019] eKLR** considered the constitutionality of mandatory sentences. The court has adopted the holding of the Supreme Court held in **Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR** that mandatory sentences are unconstitutional as the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion to impose an appropriate sentence.

10. From the foregoing, I am bound to re-examine the sentence meted on the Appellant 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 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.

11. 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.

12. The Appellant who is a first offender has expressed his remorsefulness.

13. In the end, the 15 years' sentence imposed on the Appellant is substituted with a sentence of **5 years** which will run from **22nd January, 2018** when he was sentenced.

DELIVERED AND SIGNED IN KISUMU THIS 31st DAY OF October 2019

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Amondi/Okodoi

Appellant - Present in person

For the State - Mr. Muia