



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 30 OF 2018**

**BETWEEN:**

**MICHAEL KHAMISI ITAMBO. ....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Being an Appeal from the Judgment of Hon. N. N. Njagi Senior Principal Magistrate at SPM's Court Wundanyi CR. Case No 10 of 2018 delivered on 21<sup>st</sup> June 2018)**

**JUDGMENT**

1. The Court has before it an appeal brought by a petition of appeal filed on 17<sup>th</sup> July 2018. The Petition states:

*I the under mention do most humbly beg leave to mitigate for an offence of defilement passed upon me by the chief/principal/senior resident/ 1<sup>st</sup>, class/ and 2<sup>nd</sup> class Magistrate SPM's WUNDANYI*

*In criminal Case no. 10/018 judgement dated 21-6-2018*

*I plead not guilty.*

*(Here state grounds of appeal and separate sheet if necessary)*

*I am a poor man and have no money for appeal.*

*Signed on left thumb impression.....L.T.P.*

**MITIGATION GROUNDS OF APPEAL**

*1. I am the bread winner in our family of six children*

*2. I lost my parents through a road accident*

*3. I am a high blood pressure patient*

*4. That the learned trial magistrate disregarded my defence*

*5. Criminal case no 10/018 at Wundanyi and sentence to serve 15 years I believe my appeal will be answered*

2. The Court directed the Parties to file written submissions, which they have done. The arguments put forward by the Appellant are "following inter-alia

*1. That I am a first offender hence I pray for leniency*

*2. That the learned trial Magistrate failed in total when she failed to note that I pleaded guilty at trial*

3. That the learned trial Magistrate did not consider my alibi defence and my mitigation during the time of conviction and sentence as a first offender

4. That the learned trial magistrate erred in both law and fact by upholding my conviction and by failing to consider that I was not presented by an advocate hence that was my first to be in court contrary to section (2) h of the Constitution

REASONS WHEREOF: I pray this appeal of mitigation be allowed, Quash the conviction and sentence set aside.

3. The Written Submissions filed on behalf of the Respondent (State) are “as follows:-

*The Appellant was charged of the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual offences Act in the Senior Principal Magistrate Court at Wundanyi in criminal case no 10 of 2018. The appellant pleaded guilty in the first instance and was consequently sentenced to serve 15 years imprisonment.*

*The Appellant lodged the appeal herein against the sentence and filed his submissions on 25/3/2019. It is on the basis of the appellant submissions that we submit before this Honourable court.*

*Under section 348 of the Criminal Procedure Code it provides:-*

**“ No appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a subordinate court except as to the extent or legality of sentence.”**

*Section 8(4) provides as follows:-*

*“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.”*

*In Shadrack Kipchoge Kogo vs Republic the court of appeal stated:-*

*“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or a wrong principle was applied or short of those the sentence was so harsh and excessive that an error in principle must be inferred.”*

*During mitigation it was noted that the appellant is a first offender, he pleaded guilty in the first instance and he was still a young man. Notably the wording of section 8(4) of the Sexual Offences Act is couched in mandatory terms whereas no error was committed by the trial magistrate as he awarded the minimum sentence.*

*But the current change in jurisprudence we note that courts have sought a departure from the mandatory nature of sentencing. During mitigation the appellant informed court that to his knowledge the victim was 19 years of age. Though the matter did not go full trial it is clear from the facts given that the sexual act did not occur once. The appellant confirmed that he had been in a sexual relationship with the victim.*

*Section 8(5) of the sexual offences act provides a defence to a charge of defilement where the appellant is led to believe by the victim that she is of age.*

*Notably this is an issue that was not addressed since the matter did not go for full trial. In Eliud Waweru Wambui v Republic (2019)Eklr.....”.*

4. The Appellant seems to be pleading against Conviction and Sentence. The Appellant pleaded guilty at trial and therefore his appeal against conviction would inevitably be dismissed. However, in his “Memorandum of Appeal” filed on 25<sup>th</sup> March 2019 he states that he is appealing against sentence only. During the trial the Appellant relies on the following:

- a. He is a first offender and he pleads for leniency;
- b. He pleaded guilty
- c. He claims he had an alibi which the Learned Trial Magistrate did not consider
- d. He did not have an Advocate

He repeats that his Appeal is against sentence **and** conviction

5. The facts on which the plea of guilty was entered are recorded as: “on diverse dates between 15/10/2017 and 16/5/2018, at Msanganyoki village, the accused was in a sexual relationship with a minor complainant. He intentionally and unlawfully used his penis to penetrate the vagina of the minor complainant. This was done on several occasions on those dates that are mentioned. On 17/5/18, the case was reported to police by the members of the public complainant. The complainant was escorted to Mwatate sub county hospital. The complainant minor

was examined and found to be pregnant. The P3 form was completed at Mwatate sub county hospital. The P3 form of the minor complainant be marked as exhibit 1. The treatment notes be exhibited as exhibit 2. The birth certificate was given to the investigator. The minor was born on 17/1/2001. It is tendered as exhibit 2. The police completed the investigations and the accused was charged with the offence before the court.”. The Record of Proceedings shows that the Accused responded by saying “I admit the facts. They are all correct.”.

6. The Court then on 21<sup>st</sup> June 2018 heard the plea in mitigation. It was recorded that the Accused was a first offender. The Appellant said, “I have 2 children from the first wife. I am divorced. I am 30 years old. The girl told me she is 19 years old.”. The Accused having voluntarily pleaded guilty thus tries to present a defence after the event. The Learned trial magistrate noted that the Accused I a married man. The offence he committed is a serious one. He went out of his way to befriend a school child. The Appellant was sentenced to serve 15 years imprisonment. Although the Trial Court applied the minimum sentence, which was expressed in mandatory terms, this Court is thus alerted to the possibility that the Court simply applied a sentence without fairly exercising its discretion. However, the Learned Trial Magistrate gave his reasons and therefore he demonstrates that he thought about the matter.

7. The Court’s attention is directed by the Respondent to the Court of Appeal decision in *Eliud Waweru Wambui v Republic [2019] eKLR*. There the Court of Appeal propounds on English Law as it now stands and laments that the same principles are not parachuted into Kenyan Law. In addition the Court said; “The same goes for a great many other jurisdictions. A candid national conversation on this sensitive yet important issue implicating the challenges of maturing, morality, autonomy, protection of children and the need for proportionality is long overdue. Our prisons are teeming with young men serving lengthy sentences for having had sexual intercourse with adolescent girls whose consent has been held to be immaterial because they were under 18 years. The wisdom and justice of this unfolding tragedy calls for serious interrogation.”.

8. This Court respectfully, concurs that any national dialogue that ensures that the law keeps pace with societal development and prevents injustice must be a priority. However, such dialogue must be balanced and weighed against the socio-economic stringencies of society. Such dialogue must also include considerations on the long term effects of a change in the law, in particular the prevalence of and impact on child and maternal death during childhood pregnancies. The effect on the mother being able to access education and health facilities and the true nature of the so called “relationship”. Is it truly consensual or exploitative?

9. In the circumstances of this case, the Appellant already had a wife and two Children. He states he was in a relationship with a Child. He does not say where and how he met the Child? Is he a person who is in a relationship of trust? Did the relationship remove the Child from the care of her parents? Did he ensure that she had medical advice on the choice whether she wanted to become pregnant or not. If she is old enough to have intercourse, then she must be deemed to be old enough to make a decision on those choices. Who is looking after the baby now? Does the Appellant pay for child support and maintenance? There is no information before the Court. The principal reason is that the Child who purportedly presented as 19 years old in 2017 did not come to Court to plead for leniency. That state of affairs is very telling. This Court also takes into consideration the circumstances of this County and the fact that teenage pregnancy is often followed by the infanticide of the unwanted child. Further, if the age of consent were lowered, the age difference between the Appellant and their victims – here at least 14 years must be taken into account. In the circumstances, the Appeal against sentence is dismissed.

10. However, in light of the fact the Trial Court did not hear any evidence on the circumstances of the case or of the proponents. The Appellant will be deemed to be applying for a review against sentence. It is further ordered that:

- a. The Court Registry is directed to open a new file for a review against sentence, with a new file number;
- b. The National Probation Service is directed to appoint a suitable officer to prepare a Report on this case. Such report must include the full background details on the circumstances of the Complainant at the time of the offence and since.

Order accordingly,

**FARAH S. M. AMIN**

**JUDGE**

**DELIVERED, SIGNED AND DATED at Voi on this the 20<sup>th</sup> day of December 2019**

In the Presence of:

Court Assistant: Josephat Mavu

Prosecution: Ms Mukangu

Offender: Present in Person.