REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CRIMINAL REVISION NO 51 OF 2015

DIRECTOR OF PUBLIC PROSECUTION.....APPLICANT

VERSUS

JOSEPH WAIHENYA GITAU.....RESPONDENT

J U D G M E N T

1. The Respondent in this revision, **Joseph Waihenya Gitau**, was the accused in **Gatundu CM Criminal Case No. 247** of **2011.** It would appear that he was tried for and convicted of ***defilement of a child*** contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act, 2006*****.** On 13/11/2015 he was sentenced to three (3) years of probation.

2. The ***Director of Public Prosecutions*** (the Applicant) has sought revision of that sentence under **section 362** of the ***Criminal Procedure Code, Cap. 75*** in respect to its legality or propriety. Revision is sought upon the following grounds –

(i) That the sentence is improper, irregular and unlawful in that the laws provides for a mandatory sentence of imprisonment for a term of not less than twenty (20) years.

(ii) That the trial court disregarded the report of the Probation Officer which showed that the convict was not remorseful, and that therefore "a harsh sentence (was) needed…so that the same can serve as a deterrence to others".

(iii) That the sentence was illegal and improper "to the extent that it violated provisions of the ***Victim Protection Act, 2014*** particularly sections 9(2) (a) and 12 thereof as read with section 329 and 329C of the ***Criminal procedure Code***".

3. When the request for revision was mentioned before the court on 08/03/2016 the learned Prosecution Counsel, Mr. Njeru, invited the court to deal with the matter without the necessity of hearing any party. The Convict was then not in court as he had not been served with due notice. It is also to be noted that an order in revision that is prejudicial to an accused person (which term must include a convicted person) cannot be made unless he has had an opportunity of being heard either personally or by an advocate in his own defence, though this injunction will not apply to an order made where a subordinate court has failed to pass a sentence which it was required to pass under the written law creating the offence concerned. See **section 364(2**) of the Criminal Procedure Code.

4. It is to be noted also that the ***Director of Public Prosecutions*** does not have a right of appeal against a sentence imposed upon an accused person. See **section 348A** of the Criminal Procedure Code which provides –

"348A. Where an accused has been acquitted on a trial held by a subordinate court, or where an order refusing to admit a complaint or formal charge, or an order dismissing a charge, has been made by a subordinate court, the Attorney-General may appeal to the High Court from the acquittal or order on a matter of law".

5. So, the ***Director of Public Prosecutions*** can apply for revision of a sentence, and section 354(5) will not apply to him. That subsection provides –

"364.(5) When an appeal lies from a finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed".

I must therefore examine the three grounds put forward by the ***Director of Public Prosecutions*** for seeking this revision.

Was the Sentence of Probation imposed illegal?

6. The Respondent herein was convicted of ***defilement*** contrary to **section 8(1)** and **(3)** of the ***Sexual Offences Act*****.** That **subsection (3)**

provides –

> **"8. (3) Any person who commits an offence of defilement with a child between the age of twelve and fifteen years <u>is liable upon conviction to imprisonment for a term of not less than twenty years."</u> (Emphasis supplied).**

Contrast this with subsection (2) of the same section which provides –

> **"8. (2) A person who commits an offence of defilement with a child aged eleven years or less <u>shall upon conviction be sentenced to imprisonment for life.</u>" (Emphasis supplied).**

7. It is clear that the sentence of life imprisonment under subsection (2) is mandatory. But the sentences of imprisonment under subsections (3) and (4) of section 8 are not mandatory (hence the use of the term "**is liable**" and not "**shall be sentenced to**."

See the definition of liable in Oxford Advanced Learner's Dictionary"–

> **"1 – (for something) responsive by law: You will be liable for any damage caused**
>
> **2 – (to something) likely to get or have something: subject to something: a road liable to subsidence. Offenders are liable to fines of up to £500.**
>
> **3 – (to something) likely to do something: We are all liable to make mistakes when we are tired."**

8. This means that a trial court had a discretion under subsections (3) and (4) of section 8 to impose a custodial sentence or some other form of punishment. But once the court decides that the accused deserves a custodial sentence (and this is the mandatory bit!) it must impose the minimum term of imprisonment provided.

9. The sentence of probation for 3 years imposed upon the Respondent is thus not illegal; the trial court must have decided that he did not deserve a custodial sentence. And there could be all sorts of reasons why a custodial sentence may not be appropriate – for instance, where a child has been born and will need the love and care of both parents, etc.

<u>Did the Trial Court Disregard the Probation Report?</u>

10. The ***Director of Public Prosecutions*** has merely stated that the Probation Report "**indicated that the convict was not remorseful**." The probation report is not before this court, and I have no way of knowing if the report did not recommend probation. In any event, it is the trial court's discretion, not that of the Probation Officer, whether or not to place an offender on probation. The concerned statute, the **Probation of Offenders Act, Cap 64**, in fact, does not seem to require a probation report before placing an offender on probation, but the court, in its discretion, may call for it.

<u>Were any Provisions of the Victim Protection Act Violated?</u>

11. The ***Director of Public Prospections*** has cited **sections 9(2) (a)** and 12 of the ***Victim Protection Act, 2014*** as read with **section 329 and 329C** of the Criminal Procedure Code.

12. Section 9(2) of the Victim Protection Act Provides as follows –

> **"9. (2) Where the personal interest of a victim have been affected, the court shall –**
>
> > **(a) Permit the victim's views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the court ….."**

And **section 12** of the Act provides –

> **"12. (1) A victim of a criminal offence may make a victim impact statement to the court sentencing the person convicted of the offence, in accordance with section 329C of the Criminal Procedure Code and that statement may be considered by the court in determining the sentence of the offender.**
>
> **(2) If a victim exercises a wish to make a victim impact statement, a prosecuting agency shall refer the victim to an appropriate victims' services agency for assistance in preparing the victim impact statement.**
>
> **(3) A victim has a right to present a victim impact statement in all cases where the court is to consider victim protection and welfare.**
>
> **(4) The statement referred to under subsection (1) shall include information on the impact of the offence on the victim's life and any concerns the victim may have about their safety".**

13. Section 329 of the Criminal Procedure Code provides –

> **"329. The court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed".**

And section 329A of the Code gives various definitions of "**victim**", "**personal harm**", etc.

14. In the present case the child that was defiled by the Convict was indeed a primary victim as the offence was committed against her. She was said to be 13 years old when the offence was committed. At the time he was sentenced the victim was about 18 years old.

15. There is nothing on the record of the trial court to show that the victim expressed any wish to make a victim impact statement, and was refused opportunity to do so. At 18 years of age or thereabouts, she was certainly old enough to make such a request to court. She did not.

16. The trial court therefore did not breach any provisions of the Victim Protection Act as alleged.

17. In the result I find nothing in the lower court record that is amenable to exercise of the powers of criminal revision of this court. The request for revision is therefore refused. It is so ordered.

DATED AT MURANG'A THIS 30TH DAY OF APRIL 2018

H P G WAWERU

JUDGE

DELIVERED AT MURANGA THIS 30TH DAY OF APRIL 2018