



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CRIMINAL APPEAL 144 OF 2014

FREDRICK NZIOKI WAMBUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An Appeal arising out of the sentence of D.G. Karani PM in Sexual Offences Act [Case No. 15 of 2013](#) delivered on 15th July 2013 in the Principal Magistrate's Court at Kithimani)

JUDGMENT

The Appellant was charged the offence of defilement contrary to section 8(1)(4) of the Sexual Offences Act, Act No. 3 of 2006, and the particulars were that between the 3rd day of June 2013 and 13th day of August 2013 in Yatta District within the Machakos County, he unlawfully and intentionally committed an act of penetration with his genital organ namely penis, to the genital organ namely vagina of KM, a child aged 17 years.

The Appellant was also charged with an alternative offence of committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, Act No. 3 of 2006. The particulars of the alternative offence are that between the 3rd day of June 2013 and 13th day of August 2013 in Yatta District within the Machakos County, he intentionally committed an act with KM by touching and rubbing his penis on her vagina.

The Appellant was first arraigned in the trial court on 14th August 2013 and he pleaded not guilty to the charge against him. He was tried and convicted of the offence of defilement contrary to section 8(4) of the Sexual Offences Act, and subsequently sentenced to 15 years imprisonment. The Appellant being aggrieved by the judgment of the trial magistrate appealed his sentence. He relied on his memorandum of appeal filed in Court on 11th August 2014.

The Appellant, who was unrepresented, seeks to have is sentence reversed and altered, and he asked the court to give him a non-custodial sentence or a reduced sentence to enable him to tend to his family. He also urged that the sentence was too harsh and excessive as he was a first offender, and stated that he was remorseful and repentant, and that he would undergo rehabilitation.

Ms. Saoli, the learned counsel for the State opposed the appeal, and noted that the Sexual Offences Act provides for a minimum sentence for the offence of defilement, and the sentence imposed by the trial court was legal in law and cannot be reduced. Further, that the trial court had been lenient, as the prosecution had sought the maximum sentence.

I have considered the Appellant's mitigation and the arguments by the State, and find that the issues for

determination by the court are whether the sentence meted out to the Appellant is illegal or unlawful, harsh or excessive as provided for under the Sexual Offences Act or in any other statute, and whether the said sentence is amenable to reduction. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court were settled in the case of **Ogolla s/o Owuor, (1954) EACA 270** wherein the Court of Appeal stated as follows:

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors". To this, we would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263)."

See also the case of **Shadrack Kipkoech Kogo –v- R, Eldoret Criminal Appeal No.253 of 2003** where the Court of Appeal stated thus:-

“sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306)”

Likewise, in the case of **Kenneth Kimani Kamunyu -vs- R. (2006) eKLR** it was stated that an appellate Court can only interfere with the sentence if it is illegal or unlawful.

In the instant appeal, the Appellant was charged with, and convicted of the offence of defilement under section 8(4) of the Sexual Offences Act, which 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.”

It is to be noted from the said provisions that the offence the Appellant was convicted of attracts a minimum sentence of imprisonment of fifteen years with no option of a fine.

While sentencing is in the discretion of the court, where a minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See in this regard the decision in **David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008 at Eldoret, in which the Court of Appeal** held, with respect to the minimum sentences provided under the Sexual Offences Act, that:-

“Those are minimum sentences and parliament appears to give no discretion to the court’s to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the act which is prevention and protection from harm, from unlawful sexual act.”

In the present appeal notwithstanding that the Appellant is remorseful, I am, in the circumstances, unable to vary or review the minimum penalty provided by the law. In addition with respect to non -custodial sentences, the powers given to this Court to substitute custodial sentences with community service under section 3(1) of the Community Services Orders Act (Chapter 93 of the Laws of Kenya), can only be exercised where a person is convicted with an offence punishable with imprisonment for a term not exceeding three years, or where the sentence not served does not exceed 3 years imprisonment.

In the present appeal, the Appellant was convicted and sentenced on 15th July 2014 and has therefore served 1 year of his sentence, with a remainder of 14 years. He therefore does not qualify for consideration of a non-custodial sentence under the Community Service Orders Act.

I accordingly uphold the conviction of, and sentence of fifteen years imprisonment from the date of conviction imposed upon the Appellant for the offence of defilement contrary to section 8(4) of the Sexual Offences Act.

Orders accordingly.

DATED AT MACHAKOS THIS 21ST DAY OF JULY 2015.

P. NYAMWEYA

JUDGE