



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO 193 OF 2012

REPUBLIC.....RESPONDENT

=VERSUS=

DONALD AMBANI AMWAYA.....APPELLANT

(An Appeal arising from the original conviction and sentence in Criminal Case. No 5228 of 2012

in the Chief Magistrates Court at Eldoret – Hon. F.N Kyambia (PM)

JUDGEMENT

1. The appellant **Donald Ambani Amwaya** was charged in the lower court with the principal count of defilement of a girl contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act** with an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the same Act (herein after referred to as the Act).

2. The particulars of the charges in the principal count alleged that on the 2nd and 4th days of December, 2012 in Eldoret West District within Rift Valley Province, the appellant intentionally and unlawfully caused his genital organ(penis) to penetrate the genital organ (vagina) of **R S**, a child aged 12 years.

In the alternative count, it was alleged that on the same dates and place, the appellant intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of R S.

3. On 11th December, 2012, the appellant pleaded guilty to the principal count and was convicted on his own plea of guilty. He was subsequently sentenced to twenty (20) years imprisonment with hard labour. The appellant was dissatisfied with the conviction and sentence hence this appeal.

4. In his petition of appeal filed on 24th December, 2012, the appellant indicated that he was appealing against both his conviction and sentence but the grounds upon which the appeal was premised which were titled “mitigation” show clearly that the appellant intended the appeal to be against his sentence only.

5. This intention was made more express and clear on 25th November, 2014 when the appeal was scheduled for hearing. In his oral submissions in support of his appeal, the appellant informed the court that he was maintaining his plea of guilty and that he was satisfied with his conviction. He stated that he was only pursuing his appeal against sentence and was abandoning his appeal against conviction.

He urged the court to review his sentence on grounds that he was 67 years old and that owing to his age he deserved forgiveness; that he had now reformed and should not continue suffering in prison.

6. The appeal was opposed by the state. **Mr. Mulati** learned prosecuting counsel submitted that the appellant was sentenced to the minimum sentence allowed by the law and that therefore the sentence was lawful save for the direction that the sentence should include hard labour. The state conceded that the component of hard labour was illegal and urged the court alter the sentence under **Section 354** of the **Criminal Procedure Code** to remove that aspect only but to uphold the rest of the sentence.

7. Since the appellant expressly abandoned his appeal against conviction, the only task left for this court is to determine his appeal against sentence.

The record of proceedings in the lower court confirms that the appellant was sentenced to twenty years imprisonment with hard labour on 11th December, 2012. As stated earlier, the appellant was convicted for the offence of defilement contrary to **Section 8(1)** as read **with Section 8(3)** of the **Sexual Offences Act**. **Section 8(1)** defines the offence of defilement while **Section 8(3)** prescribes a minimum penalty of twenty years imprisonment for a person convicted of the offence where the victim is between 12 and 15 years of age.

8. In this case, the undisputed age of the victim was said to be 12 years. **Section 8(3)** of the Act does not however state that the minimum sentence of 20 years imprisonment should be served with hard labour.

I therefore concur with **Mr. Mulati** that the imposition of a sentence of 20 years imprisonment on the appellant in the circumstances of this case was lawful but the inclusion of the component of hard labour to go with it was illegal as it was not anchored on any law.

This court in its appellate jurisdiction is empowered by **Section 354(3) (a) (iii)** of the **Criminal Procedure Code** to correct such an illegality in order to align the sentence to the law. I therefore alter the sentence imposed on the appellant by the learned trial magistrate by removing the component of hard labour illegally attached to the sentence.

The appellant's appeal against sentence therefore partially succeeds to the extent specified above. As the rest of the sentence is lawful, this court has no reason to interfere with it. The sentence of twenty years imprisonment is consequently upheld. Orders accordingly.

C.W GITHUA

JUDGE

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10th DAY OF DECEMBER 2014.

In the presence of:

The Appellant

.....for the state

Paul Ekitela Court Clerk