



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
(CORAM: K. GIKONYO J)

CRIMINAL APPEAL NO 106 OF 2010

HARUN MUTWIRI.....APPELLANT

Versus

REPUBLIC.....RESPONDENT

*(Arising from the original conviction and sentence by S. MWENDWA, RM and J. NYAGA, Ag SPM,
respectively in MAUA CMCCRC NO 3615 OF 2007)*

JUDGMENT

INTRODUCTION

Background Information

[1] The Appellant was charge with defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act. It was alleged that on 5th day of November, 2007 at [particulars withheld], Igembe Division, Eastern Province had unlawful and intentional penetration of M K, a girl under the age of 11 years. He was tried and convicted for the main count of defilement by S. M, RM, and subsequently sentenced to 20 years imprisonment by J. NYAGA, Ag SPM.

[2] He was aggrieved by the conviction and sentence and filed this appeal.

An About-turn

[3] The Appellant was notified that the prosecution will be applying for enhancement of sentence. That prompted him to make an almost about-turn on the appeal; he informed the court that he did not wish to argue the appeal. Instead, he would ask for the sentence to be reduced. He submitted that he has been in jail for a long time now. He promised to become a good citizen, for he has reformed.

The state asked for enhancement of sentence

[4] On the other hand, Mr Motende for the State asked for the enhancement of sentence form 20 years imprisonment to life imprisonment as provided by the law. He said that section 8(2) of the Sexual Offences Act prescribes life imprisonment for any person who has been found guilty of defilement of a child aged five years. The complainant was aged five years. The sentence of 20 years imprisonment imposed by the J. NYAGA, Ag SPM was illegal sentence and should be substituted for life imprisonment. He asked the court to stick to the law and impose the appropriate sentence as provided in law.

COURT'S RENDITION

[5] The law is well settled that where a mandatory sentence is prescribed in law, the court cannot impose a sentence other than the prescribed penalty. Let me borrow from the latest case of **JOSEPH MWAURA NJUGUNA [2013] eKLR**. Although the case dealt with death penalty the principle enunciated therein applies; that where the statute has prescribed a mandatory penalty, the court does not have discretion to impose a sentence other than the one prescribed. The underpinning of that principle is separation of power which I can subtly construe as follows: Parliament makes the law; courts interpret the laws. But see the case of **BLACKBURN v ATTORNEY GENERAL [1971] EWCA Civ. 7**.

[6] The relevant law is section 8(2) of the Sexual Offences Act which provides:

8(2) - A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.

The word used is "Shall" and there is not any ambiguity which will need the craft of interpretation other than giving effect to the plain meaning to the section. When courts are faced with such situations where an enhancement of sentence is being sought, there is a temptation to think that the accused may suffer prejudice. That intuitive reaction may be influenced by the staple protections which are offered by the Constitution to the accused person. But for clarity, that is not it; and let me state that Article 50(2) (p) of the Constitution does not apply here, for it relates to a situation where the law on the prescribed sentence for the offence has subsequently changed; the accused in that case is entitled to the least of the sentences prescribed. I am saying all these things to fortify the position of the law that section 8(2) of the Sexual Offences Act prescribes a mandatory sentence of life imprisonment upon any person found guilty of defilement of a child aged eleven years or less. The court would then not have any discretion to impose any other sentence apart from the one prescribed. The complainant herein was aged 5 years at the time of the defilement, and, therefore, the appropriate sentence is life imprisonment. I substitute the sentence of 20 years imprisonment for life imprisonment. The Appellant is hereby sentenced to life imprisonment.

Dated, signed and delivered at Meru this 28th day of November, 2013

F. GIKONYO

JUDGE