REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CRIMINAL REVISION NO. 119 OF 2010

JAIRUS OMOLO RIAGA ……...……APPLICANT
VERSUS
REPUBLIC …….RESPONDENT
R U L I N G

The Accused, Kennedy Konde Munga, was on 2/8/2010 charged with the offence of defilement of a child contrary to Section 8(1) as read with Section 8 (4) of the Sexual Offence Act, No. 30 of 2006.

After trial, he was found guilty of the offence by the Senior Resident Magistrate Ms S.R. Wewa on 29.11.2010. On the 6th December 2010 the court after taking into account his mitigation and the Probation Report placed him on 3 years Probation.

Being aggrieved, the Father of the child who sought the assistance of CLEAR-KENYA a Legal Aid Organization who made an application for revision of the sentence. They complained of selective justice and bias.

This court under the provisions of section 362 Criminal Procedure Code called for the record of the trial court and under Section 365 (2) ordered that the Accused appear in court for him to be heard personally or by an advocate on his own defence.

On 24.01.2010 the matter was placed for mention before me. Mr. Atancha Advocate was present for the Accused while Mr. Onserio represented the Republic. As the Accused had not been produced the matter was placed for hearing today.

At today's hearing the counsel for the Accused did not attend and only sent a court clerk to state that he had gone to Kaloleni for another case.

The Accused speaking in Kiswahili asked for adjournment so that his advocate could be present.

I declined to allow adjournment as the Advocate decided to give priority to another matter in Kaloleni before the subordinate court. This court gave the Accused an opportunity to be represented. In any case, in the circumstances of this case, the Accused was able to speak on his own behalf. I also took into account that if it was a question of sentence, then there could be no prejudice as even this court would not have a discretion where minimum sentence was involved.

Upon perusal of the Sexual Offences Act Section 8(4) the minimum sentence for the offence of defilement of a girl between the ages of 16 – 18 years is imprisonment for a term of not less than 15 years. It is implied therefore that the maximum sentence is life imprisonment.

The trial magistrate placed the accused on probation for 3 years i.e. he gave a non-custodial sentence.

This was clearly against the law, illegal and null and void ab initio. The trial court had no power, authority or jurisdiction to grant a non-custodial sentence and the minimum custodial sentence permitted by law was 15 years.

The shocking, aspect in this case is that in the Probation Report, the Probation Officer upon investigation and inquiry did not recommend the Accused to be placed on probation. She stated:-

"……<u>RECOMMENDATIONS</u>

Your Honour, Kennedy Konde is not a first offender, during the interview he was not remorseful for his actions and is not ready to accept his mistakes. I therefore do not recommend him to be put on probation."

In view of the Probation Officer's recommendation, one wonders how the court could disregard the same and place the Accused on Probation without giving reasons or justification even assuming the sentence allowed non-custodial sentence.

This aspect of the decision is highly questionable and cries out for an explanation to all involved, including the complainant, her family, the Police, the Probation Department and the public at large. It is this kind of decisions that place the Judiciary's performance, dignity and Integrity into question in the eyes of the public.

The worst was that sentence Probation was not even available to the Trial Court and the presiding Magistrate Ms. S.R. Wewa.

The maximum sentence is life imprisonment and the minimum 15 years! This means that even after mitigation and giving the Accused all indulgence and benefit of the mitigation and any favourable probation report, the minimum sentence was 15 years, nothing less!

The trial court in an act of unconstitutional arrogance, illegality and unlawfulness, proceeding to mete out a sentence which it had no jurisdiction to give. The court had no discretion in the minimum sentence. The court would only exercise discretion as to any higher sentence beyond 15 years and take into account any mitigation etc.

In this case, there was little mitigation and in fact it was found he had a previous conviction. The sentence should if anything been above 15 years.

In view of the foregoing, I do find that the court failed to pass a sentence which it was required to pass under the Sexual offences Act under Section 8 (1) and 8 (4). In the circumstances, the Accused was not entitled to be heard personally or by an advocate but this court went ahead to hear him so that his family and relatives and the complainant and her family understood what was going on.

I do hereby set aside and quash the sentence of 3 years probation and substitute with a sentence of imprisonment for a term of fifteen (15) years. I have taken into account his mitigation before me to give him the minimum sentence for the offence.

The sentence by the trial court amounted to a miscarriage of justice, reckless and blatant violation of the law as to sentencing. The Honourable Magistrate is deemed to know the law and knew what she was doing. It was a sentence pregnant with questions as to proprietary and competence.

I do hereby order that a copy of this Ruling be forwarded to the Registrar of the High Court and to the Judicial Service Commission to consider if there is any action or consequence that flows from this for the maintenance and enhancement of the standards of the administration of justice in our courts.

I thank the Attorney General's office through Mr. Onserio for their input and contributions to correct

this serious situation.

The Accused having been sentenced today shall have a Right of Appeal within 14 days to the High court in the usual manner.

Orders accordingly.

Dated and delivered at Mombasa this 25th day of January 2011.

M. K. IBRAHIM
J U D G E