



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CRIMINAL REVISION NO. 33 OF 2019**

**AND**

**CRIMINAL APPEAL NO. 46 OF 2020**

**(Arising from the conviction and sentence in Kakamega**

**CMCCRC No. 84 of 2018, by Hon. EK Malesi Senior**

**Resident Magistrate (SRM), on 13<sup>th</sup> November 2020)**

**DIRECTOR OF PUBLIC PROSECUTIONS.....APPLICANT/RESPONDENT**

**VERSUS**

**FRANCIS ACHUTA AMKAYA.....RESPONDENT/APPELLANT**

**JUDGMENT**

1. These proceedings were sparked off by the conviction of Francis Achuta Amkaya, who I shall refer to hereafter as the respondent, of defilement, contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006, and sentenced to five years' imprisonment. The victim was a six-year-old child.
2. The State, who I shall refer hereto as the applicant, was aggrieved by the sentence imposed, and wrote to court a letter dated 18<sup>th</sup> December 2019, seeking revision of sentence, under sections 362, 364 and 365 of the Criminal Procedure Code, Cap 75, Laws of Kenya. It complained that the sentence imposed was both lenient and illegal, given that what was prescribed by law was life imprisonment. It was pointed out that the victim was six years old, and the perpetrator fifty-eight years of age. Consequently, the file in Kakamega HC Criminal Revision No. 33 of 2019 was opened.
3. When the revision cause came up for directions, on 13<sup>th</sup> October 2020, the Advocate for the respondent, Dr. Malala, informed the court that he had instructions from the respondent, to file appeal against the entire proceedings. He sought that he be allowed to file appeal, so that the same could be disposed of concurrently with the revision proceedings. The State was not opposed to that proposition, and the order was granted, hence the appeal in Kakamega HCCRA No. 46 of 2020.
4. It would appear that the two cannot be handled simultaneously as Dr. Malala had intended, for the respondent never filed his record of appeal as required by the law governing criminal appeals. Secondly, although directions were given on 3<sup>rd</sup> May 2021, in the presence of Ms. Mburu for the respondent, for filing of written submissions, none were filed. I would have no basis for determining the appeal. One way out of it would be to dismiss it altogether. However, that may be too drastic. I shall separate it from the revision proceedings, and proceed to determine the revision.
5. In the letter of 18<sup>th</sup> December 2019, the State was fairly comprehensive, in terms of identifying the grounds upon which revision is sought and the issues that the court ought to take into account.
6. Under section 8(2), where the victim of defilement is aged under eleven, the Sexual Offences Act has imposed a mandatory sentence of imprisonment for life. The victim herein was just six years old. She fell within the age bracket in section 8(2), and the trial court was bound to impose that mandatory sentence.
7. I have looked at the trial record, and I have noted that the trial court did not indicate the reason why it imposed a sentence of five years' imprisonment, yet there was no discretion under section 8(2). Of course, the sentence was imposed after the decision in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), where the Supreme Court appeared to renounce mandatory sentences and to pronounce that trial courts, where there were mandatory and minimum

sentences, had discretion to consider other sentences. The trial court did not refer to *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), but it would appear that that decision influenced the sentence it imposed.

8. However, even then, the sentence imposed was extremely lenient. Firstly, the victim was just six years old. She must have suffered excruciating pain in the process. Secondly, she must have suffered trauma, which is likely to be lifelong. The offender was aged fifty-eight years of age at the time. That is the age of elders. It is not an overly great age, but in the middle. It is person of such age who ought to be a protector of minors, against predators of much younger ages. More is expected of persons of such age. It is unfortunate that the accused person, in the instant case, turned predator. A deterrent sentence was called for. Five years was obviously not deterrent at all. He should have been sentenced to a custodial sentence of twenty years and over, if there was any discretion in sentencing, to deter him and to send out a message to men of his age, who might be tempted to turn predators instead of being protectors.

9. Unfortunately for the convict, the Supreme Court in *Francis Karioko Muruatetu & another vs. Republic; Katiba Institute & 5 others (Amicus Curiae* [2021] (Koome CJ&P, Mwilu DCJ&VP, Ibrahim, Wanjala, Ndung'u & Lenaola SSJJ), has clarified that the decision, in *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR (Maraga CJ&P, Mwilu DCJ&VP, Ojwang, Wanjala, Njoki and Lenaola SCJJ), had arisen from proceedings relating to murder, under section 204 of the Penal Code, Cap 63, Laws of Kenya, and the position stated in the said decision was intended to apply only to mandatory sentences with respect to murder cases, and not in other cases, such as defilement. The discretion that the trial court exercised in that case was not available to it, and it should have imposed the mandatory sentence prescribed in the Sexual Offences Act.

10. Consequently, I find and hold that the sentence that was imposed by the trial court was improper and illegal, and I hereby set it aside, and substitute for it a sentence of life imprisonment.

11. The file herein shall hereafter be closed. The appeal file in Kakamega HCCRA No. 46 of 2020 shall be separated from the revision file, should the appellant in it be keen on prosecuting his appeal. It is so ordered.

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4<sup>TH</sup> DAY OF FEBRUARY 2022**

**W MUSYOKA**

**JUDGE**

**Mr. Erick Zalo, Court Assistant.**

**Ms. Mburu, instructed by Malalah & Co. Advocates, for the appellant/respondnet.**

**Ms. Omondi and Mr. Mwangi instructed by the Director Of Public Prosecutions, for the respondent/appellant.**