REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 29 OF 2020

BENEDICT MUNYAO KYALO.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(From the original judgment of Hon. Sagero (SRM) in Makueni Chief Magistrate's Court

SRMCRC No. 08 of 2019 delivered on 4th December, 2019).

JUDGMENT

1. The Appellant was charged in the magistrates' court at Makueni with defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on diverse dates between the month of July 2018 and August 2018 at [Particulars Withheld] village, Makueni district within Makueni county intentionally and unlawfully caused his penis to penetrate the vagina of D.N.M (*name withheld*) a girl aged 15 years.

2. In the alternative, he was charged with committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of the offence were that between the same dates and at the same place intentionally and unlawfully caused his penis to touch the vagina of D.N.M a child aged 15 years.

3. He initially denied the charge. After two Prosecution witnesses testified however, the Prosecutor with the concurrence of the Appellant applied that a DNA test be conducted as the Complainant had delivered which was done. When the DNA report was produced which confirmed that there were 99.9% chances that the Appellant was the biological father of the child, the Appellant pleaded guilty to the main charge of defilement.

4. The trial court consequently convicted him on a plea of guilty on the main count, and after considering the mitigation of the Appellant and the victim impact report prepared by the Probation Officer, sentenced the Appellant to seven (7) years imprisonment.

5. The Appellant has now come to this court on appeal on sentence, claiming that his mitigation factors and the victim impact report were not taken into account by the trial court in sentencing him. The DPP on the other hand has opposed the request for review of sentence and stated that if any review of sentence is done, then the sentence should be enhanced to 15 years imprisonment which was the minimum statutory sentence for the offence.

6. I note that both the Appellant and the Director of Public Prosecutions (DPP) filed written submissions to the appeal. Having considered the facts of the case, the grounds of appeal and submissions on both sides, I first of all start by reminding myself that sentencing is an exercise of discretionary power by a trial court and an appellate court should be very slow to interfere with the exercise of such discretionary power, unless the sentence imposed was manifestly high or manifestly low or the trial court took into account irrelevant matters or failed to take into account relevant matters in sentencing.

7. In the present case, the trial magistrate took into account the mitigation of the Appellant as well as the victim impact report. The minimum statutory sentence under the Sexual Offences Act was 15 years imprisonment, but the magistrate on the authority of the Supreme case decision of **Muruatetu & Others –vs- Republic** (2016) eKLR handed down a sentence of seven (7) years imprisonment which was less than half of the minimum statutory sentence. Taking into account the age of the Appellant (*born in 1985*) and who was thus 33 years at the time of commission of the offence committed on a 15 year old primary school girl, I do not find the sentence imposed to be excessive. I will however, not increase the sentence imposed as proposed by the State.

8. I thus find no merit in the appeal against sentence. I dismiss the appeal and uphold the sentence imposed by the trial court.

Delivered, signed & dated this 11th day of March, 2021, in open court at Makueni.

GEORGE DULU

JUDGE