REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CRIMINAL APPEAL NO.47 OF 2019

ROBERT KIPLANGAT CHEPKWONY.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(BEING AN APPEAL FROM THE DECISION OF HON. E. S. SOITA DATED 7TH JUNE 2019 IN CRIMINAL CASE NO.306 OF 2016 AT MOLO)

JUDGEMENT.

1. The appellant was charged with the offence of Defilement contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No 6 of 2006. The particulars of the offence were that on the 31st day of December 2015 at [Particulars Withheld]village in Londiani Sub County within Kericho County intentionally and unlawfully caused his penis to penetrate the vagina of FCL a child aged 17 years.

2. **The alternative charge was committing an Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 of 2006.** The particulars of the offence were that on the 31st day of December 2015 at [Particulars Withheld] village in Londiani Sub County within Kericho County intentionally and unlawfully touched the vagina of FCL a child aged 17 years old.

3. After a full trial the appellant was convicted and sentence to 15 years' imprisonment hence this appeal. When the same came up for hearing the appellant in his submissions admitted the offence and instead mitigated on the sentence. He said that the complainant has since died and he wishes to be set free so that he can take care of the child born out of the said offence.

4. The learned state counsel on her part conceded to this stating that although the sentence was lawful the authorities now emanating from the decision of the Supreme Court in the now famous **FRANCIS MURUATETU CASE (2017) eKLR**, emancipated the courts and allowed them the discretion to tamper with the mandatory sentence. For this reason, she urged this court to consider the circumstances of the case and if possible grant the appellant the chance to take care of the infant.

5. The facts herein are clear and not disputed. The appellant and the complainant who is now deceased had a love affair. The deceased was a student which fact the appellant although he denied knew it very well. In their long term relationship, she conceived and run away from home and went to stay with the appellant.

6. It later took the intervention of her parents to trace her at the custody of the appellant. Later the appellant was arrested and detained. The medical evidence produced in particular the P3 form concluded that she was pregnant. She later delivered and the trial court rightly undertook a DNA exercise which conclusively indicated the appellant to be the father of the child.

7. As submitted by the state, the sentence was lawful. The only issue is the fact that the child born out of the union is now left alone. It could be in the hands of its grandparents.

8. The logical thing to do now is to tamper with the trial court sentencing based on the fact that the interest of the child thus remains paramount. Keeping the appellant who is the only surviving parent in prison for now may not be efficacious and perhaps morally and or equitably right. The period served by the appellant in prison inclusive of when the trial was on in my view is sufficient.

9. The appellant shall however serve a one-year probation period so as to ensure that he is properly integrated in the community. He is obviously expected that he shall take care of the minor as a responsible parent.

10. **The appeal is hereby allowed, the appellant set free unless lawfully held. He shall serve a one year probation period under the guidance of the relevant probation office as shall be determined by the County probation office.**

Dated signed and delivered via video link at Nakuru this 11th day of March 2021.

H K CHEMITEI

JUDGE.