



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
(CORAM: CHERERE-J)

CRIMINAL APPEAL NO. 58 OF 2020

BETWEEN

PATRICK GITONGA MIKWA.....APPELLANT

AND

REPUBLIC.....RESPONDENT

(Being an appeal against judgment, conviction and sentence in Tigania Principal Magistrate's Court Criminal SO Number 16 of 2018 by Hon. G.Sogomo (PM) on 05th February, 2019)

JUDGMENT

Background

- 1) **PATRICK GITONGA MIKWA (Appellant)** has filed this appeal against conviction and sentence on a charge of defilement contrary to section 8(1) as read with section 8(3) of the Sexual Offences Act No. 3 of 2006 (**the Act**). The offence was allegedly committed on 08.03.2018 against **ZT** a male child aged 14 years.
- 2) The prosecution called 5 witnesses in support of the charges. **PW1** the complainant stated that he was 15 years and in class 6 when he testified on 26.10.2018. He recalled that on 08.03.2018 at about 6.00 pm, he was walking home through [Particulars Withheld] when the Appellant who was commonly referred to as SAUTI caught up with him and defiled him. **PW2 FRANCIS ITHALIE** upon being informed about the incident by PK and SK proceeded to [Particulars Withheld] River at about 06.00 pm where he found the Appellant sodomizing the complainant. He called the assistant chief **PW5 Maricella Kainda** and both Appellant and complainant were apprehended and handed over to police. Complainant was examined on 08.03.2018 by **PW3 Geoffrey Muthomi**, a clinical officer who found that he had lacerations on the anal walls. He tendered complainant's P3 form, treatment notes and lab results as PEXH. 1 to 3 respectively. **PW5 PC Stanley Kipchumba**, the investigating officer received the Appellant and the complainant on 08.03.2018 and after recording witness statements had Appellant charged.
- 3) When Appellant was placed on his defence, he stated that he was fabricated by PW5 after he refused to sell his land to her.
- 4) Appellant was convicted on 22nd January, 2019 and was on 05th February, 2019 sentenced to serve 25 years' imprisonment.

Appeal

5) *Dissatisfied with the sentence, the Appellant lodged the instant Appeal and in the amended grounds of appeal only challenged sentence on the grounds THAT:*

i. Sentence was harsh and excessive

ii. He was entitled to a lesser sentence under Article 50 (2) (p) of the Constitution

6) *In his submission, Appellant asked for revision of his sentence which the state opposed.*

Analysis and determination

7) *It is the duty of a first Appellant Court to consider the evidence, evaluate it itself and draw its own conclusions in deciding whether the*

judgment of the trial court should be upheld. (See Okeno vs. Republic (1972) E.A. 32)

8) In the case of Alfayo Gombe Okello v Republic [2010] eKLR, the Court of Appeal stated that:

In its wisdom, Parliament chose to categorise the gravity of that offence (defilement) on the basis of the age of the victim, and consequently, the age of the victim is a necessary ingredient of the offence which ought to be proved beyond reasonable doubt. That must be so because dire consequences flow from proof of the offence under section 8 (1).

9) There was no age assessment report but both the treatment notes and P3 form demonstrate that complainant was 13 years old. Although the complainant stated that he was 15 years old, I find that the sentence in cases of victims aged between 12 and 15 years are the same and Appellant has not been occasioned any prejudice.

10) Section 8(3) of *the Act* provides that: - **A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.**

11) Mandatory minimum and maximum sentences were declared unconstitutional by gist of the Supreme Court holding in Francis Karioko Muruatetu & another v Republic SC Petition No. 16 of 2015 [2017] eKLR.

12) In Dismas Wafula Kilwake v Republic [2018] eKLR, the Court of Appeal set out the factors to be considered in sentencing under the Sexual Offences Act and observed as follows:

[W]e hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.

13) Even though Appellant was a first offender, the psychological effect of the offences on the minor complainant cannot be underestimated.

14) From the foregoing, the Appeal succeeds. The 25-year sentence imposed on the Appellant is hereby set aside and substituted with the sentence of **ten (10) years** which shall run from 05th February, 2019 when he was sentenced.

DELIVERED AT MERU THIS 13TH DAY OF MAY 2021

T. W. CHERERE

JUDGE

In the presence of-

Court Assistant - Kinoti

Appellant - Present

For the State - Ms. Mbithe