



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 17 OF 2020**

**DOMINIC ETYANG.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against sentence of Hon. GP Omondi – Bgm Court)***

**J U D G M E N T**

1. Upon arraignment, **Dominic Etyang**, 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. Particulars of the offence were that on 3<sup>rd</sup> day of August, 2017 at 8.00pm at [Particulars Withheld] Market in Bungoma Central District within Bungoma County, intentionally and unlawfully caused his penis to penetrate the vagina of VN a child aged 15 years.
2. Having been taken through trial he was found guilty, convicted and sentenced to serve ten (10) years imprisonment.
3. Aggrieved, the Appellant filed a Petition of Appeal. The grounds of appeal were that the trial court did not consider the age bracket of both sides to warrant a conviction, evidence was fabricated, there was no eye- witness or sufficient proof to warrant a conviction and he was remorseful for the offence that he committed.
4. This is a case where evidence was tendered of the victim in question having been 15 years old. Evidence of a birth certificate was adduced. The prosecution case was that the Appellant violated the complainant sexually, and the act of coitus that they engaged in resulted into the complainant conceiving; a pregnancy that resulted into a child being born. Results of the Deoxyribonucleic acid (DNA) paternity test conducted showed 99.99+% chances that the Appellant was the biological father to the child. The trial court analyzed evidence adduced and reached a finding that the complainant was a minor, the act of penetration occurred and the Appellant was the Perpetrator.
5. At the hearing of the Appeal which was canvassed through written submissions, the Appellant chose to abandon the appeal on conviction. He mitigated on sentence by expressing remorse for the act committed. He urged that being incarcerated for ten (10) years will destroy his future as he was preparing to join college and prayed for a non-custodial sentence.
6. The appeal was opposed by the State that called upon the court to uphold the sentence.
7. This court's duty is to re-consider and re-evaluate what transpired at trial in order to reach its own conclusion (see Okeno -V-Republic (1972) EA 32)
8. According to the Sexual Offences Act a person who commits an offence of defilement with a child aged 15 years is liable upon conviction to imprisonment for a term of not less than twenty years.
9. Although the minimum provided sentence is 20 years imprisonment, the trial court was of the view that mandatory minimum sentence deprived courts of the jurisdiction to exercise discretion. It followed the decision of **Muruatetu and Another -vs- Republic (2017) eKLR** before it was found not to be applicable to the sexual offences by the Supreme Court of Kenya. The appellant, a young adult aged 23 years who had completed fourth form and attained grade C- was at the time of the offence employed as an Mpesa Business Agent Attendant .
10. However, considering what is provided for by the law, the sentence cannot be interfered with. In the case of **Francis Karioko Muruatetu & Another -V- Republic, Katiba Institute & 5 others ( Amicus curiae ) (2021) eKLR** The Supreme Court directed that the decision of **Muratetu**(Supra) was only applicable in respect of sentences of murder under Sections 203 and 204 of the Penal Code.
11. From the foregoing, I find the appeal lacking merit. Accordingly it is dismissed.

12. It is so ordered.

**JUDGEMENT READ SIGNED,AND DELIVERED VIRTUALLY AT BUNGOMA THIS 10<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**L. N. MUTENDE**

**JUDGE.**

**10.9.2021**