



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT BUNGOMA  
HIGH COURT CRIMINAL CASE NO. 205 OF 2019

ELIUD WEKESA.....APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

(Appeal against the sentence of Hon. S. MOGUTE – PM dated 11.12.2019 in Bgm Cr.Case No. 95 of 2018)

J U D G M E N T

1. **ELIUD WEKESA**, the Appellant, was charged with the offence of Defilement Contrary to Section 8 (1) as read with Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars were that on diverse dates between the month of July, 2016 and October, 2018 at unknown time at [Particulars Withheld] village in Bumula Sub- County within Bungoma County intentionally and unlawfully caused his penis to penetrate the vagina of ANM alias LM a child aged 14 years.
2. In the alternative, the Appellant was charged with committing an Indecent Act with a Child Contrary to section 11(1) of the Sexual Offences Act No. 3 of 2006. Particulars being that on diverse dates between the month of July, 2016 and October, 2018 at unknown time at [Particulars Withheld] village in Bumula Sub-County within Bungoma County intentionally and unlawfully caused his penis to come into contact with the vagina of ANM alias LM a child aged 14 years.
3. Having been taken through full trial, he was convicted for the offence of defilement and sentenced to serve eight (8) years imprisonment.
4. Aggrieved, he appeals against the sentence on the grounds that the eight (8) years period in prison will deteriorate his future, the sentence is harsh, he is remorseful and regrets what happened.
5. The appeal was canvassed through written submissions. The appellant called upon the court to reduce the sentence as he is young and during the period he has been in custody he has studied and acquired a diploma in Theology, Technical skills, Carpentry and Joinery. And, if granted a non – custodial sentence he would teach the youth good morals.
6. The Respondent/State opposed the appeal. It was urged that the trial court on meting out the sentence considered the **Muruatetu** case , and the favorable reputation of the Appellant, otherwise the offence committed called for imprisonment for a term of 20 years.
7. The Appellant’s major complaint is that the sentence meted out by the trial court was harsh. To interfere with the discretion exercised by the trial court I have to satisfy myself that the court acted on wrong principles. In the case of *Ogolla S/O Owour -VS- Republic ( 1954) EACA 270* the court stated as follows:

**“ The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”**

8. Section 8 (3) of the Sexual Offences Act provides thus;

**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.**

9. Having been found guilty of defiling a minor aged 14 years, the court was supposed to impose a minimum sentence of 20 years. But, as correctly submitted by Counsel for the State, the trial court exercised discretion following the decision of the supreme court in **Muruatetu and Another – vs Republic (2017) eKLR**, jurisprudence that was developed declaring mandatory death sentence unconstitutional. The court of Appeal following the decision questioned the constitutionality of minimum and mandatory sentences stipulated in the sexual

offences Cases ( *see Christopher Ochieng -vs Republic ( 2018) eKLR, William Okungu Kittiny - Vs -Republic ( 2018) eKLR.*

11. Subsequently in the case of **Francis Karioko Muruatetu & another v Republic; Katiba Institute & 5 others (Amicus Curiae) [2021] eKLR**, the Supreme Court reviewed the Muruatetu case. It clarified that the principle that was set declaring the mandatory death sentence unconstitutional was only applicable to murder cases. This means that the minimum and mandatory sentences provided by the Sexual Offences Act are applicable.

12. That having been a lawful position, then, the trial court did not fall into error and in all circumstances, the sentence meted out was lenient.

11. From the foregoing the appeal lacks merit. Accordingly, it is dismissed.

12. It is so ordered.

**L. N. MUTENDE**

**JUDGE**

**10.9.2021**

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

**L. N. MUTENDE**

**JUDGE**

**10.9.2021**