



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. E031 OF 2020

REGAN MURIITHI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original sentence by Hon. Oscar Wanyaga RM in

Maua S.O No. 78 of 2015 delivered on 17/5/ 2018)

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to **Section 8 (1)** as read with **Section 8 (3) of the Sexual Offences Act No. 3 of 2006** and sentenced to imprisonment for 20 years. The particulars of the offence were that the appellant had on 10/4/2015 at [Particulars withheld] Location in Igembe South District within Meru County, intentionally caused his penis to penetrate the vagina of **V.K** a child aged 14 years.

2. In convicting the accused, the trial court found that the following issues were not disputed; firstly, at the time of the commission of the offence, the complainant was slightly aged above 14 years; she had given birth to a child whose biological father was the appellant. The trial court in convicting the appellant to held and said: -

“The evidence before the court is clear that the accused defiled the complainant, the fact that he did not force her is immaterial as she was a minor and had no capacity to give consent to sexual intercourse. The accused cannot claim to have assumed she was an adult since having lived in her parent’s home and seeing her go to school, he was aware she was a minor...The upshot of the foregoing is that the court finds that the prosecution has proved its case against the accused beyond reasonable doubts”

3. Dissatisfied with the sentence, the appellant lodged this appeal on 28/6/2021. The grounds upon which the appeal is premised are that the appellant was remorseful of his previous acts and he had fully reconciled with the complainant. He wished to be set free in order to continue supporting his child, who was at my home in the care of his aging parents. He informed the court of the various vocational and theological courses he had undertaken in prison, and therefore he had fully rehabilitated. He beseeched the court to grant him a second chance to rebuild his life again, as he was only 30 years old.

4. On the 6/5/2021, directions were given by the court that the appeal be heard by way of submissions pursuant to which the appellant filed submissions on the 28/6/2021, the same day the respondent also filed. I read the submissions filed by the appellant to abandon the grounds of appeal challenging the conviction and approaching the court for sympathy and empathy with regard to the sentence. In the submissions the appellant asserts that being in prison, he has undergone reform processes by undertaking various courses including Resource Oriented Development Initiative as well as Theological Courses which he contends have equipped him to reintegrate back into society as a good and responsible person.

5. The prosecution in their submissions filed on 21/06/2021, maintained that the age of the victim was conclusively proved, by the production of the birth notification and that the fact of her giving birth to a child admittedly sired by the appellant, proved the element of penetration. They submitted that they proved their case beyond reasonable doubt, as there was no dispute as to the identity of the appellant.

6. In this appeal I take the view that only sentence is sought to be upset because even though there was a trial pursuant to a plea of not guilty, in that trial, the evidence by the appellant was nothing but an admission or rather a confession before the court. To quote the record, the appellant told the court: -

“I was in a relationship with the complainant. She became pregnant. I acknowledge that I am the father of the complainant’s child and we used to love the child...our relationship went on behind the complainant’s father.”

7. With such confession I see no substance in the appeal against conviction. No wonder the appellant seems to have abandoned it by the submissions filed. It thus leaves to court only the question of sentence. When an appellant court would interfere with the sentence meted was settled by the Court of Appeal in ***Bernard Kimani Gacheru v Republic [2002] eKLR*** as follows:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already states is shown to exist.”

8. Before the trial court, the appellant was charged under section 8(1) as read with section 8(3) of the Sexual Offences Act which sanctions a minimum sentence of twenty years for a child below fifteen years like the complainant was. The trial court while exercising inherent discretion, felt bound to impose the minimum sentence and by meting out a jail term of 20 years. That surely did not give regard to the current jurisprudence that sentencing is a judicial function not legislative. It was erroneous and being erroneous, it invites intervention by the court. I do set aside that sentence and taking into account the best interests of the child born consequent to the offence, which includes the right to know and get taken care of and given protection by both parents, whether the parents be married or not, I substitute therefore a sentence of 10 years. The sentence shall be computed as decreed by the trial court, from the 24/01/2017

DATED, SIGNED AND DELIVERED AT MERU VIRTUALLY BY MS TEAMS, THIS 20TH DAY OF SEPTEMBER 2021

PATRICK J.O OTIENO

JUDGE

In presence of

Mr. Maina for the respondent/ODPP

Appellant in person.

PATRICK J.O OTIENO

JUDGE