



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT VOI**

**CRIMINAL APPEAL NO E025 OF 2021**

**DAFTON KILILO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal against sentence from the Judgment by Hon.E.M.Nyakundi-Resident Magistrate*

*in Wundanyi SRM Court Sexual Offence No 15 of 2018 delivered on 12.2.2019)*

**JUDGMENT**

1) The Applicant Dafton Kililo was accused in Wundanyi Senior Resident Magistrates Court Sexual Offence Case Number 15 of 2018 with the offence of defilement of an imbecile contrary to Section 146 of the Penal Code.

2) Particulars are that Dafton Kililo on the 22<sup>nd</sup> day of July 2018 at about 1800 hrs at [particulars withheld] village, Wundanyi Location within Taita Taveta County intentionally and unlawfully had carnal knowledge of BM a girl aged 13 years he knew was an imbecile.

3) In the alternative the applicant was charged with the offence of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act.

4) The Appellant was convicted at the conclusion of the trial and sentenced to serve 14 years jail term.

5) The Appellant was aggrieved by the sentence and he filed appeal hence is based on the following grounds;

1. That the Learned Trial Magistrate failed to consider that Appellant was a 1<sup>st</sup> Offender.
2. That the Learned Trial Magistrate failed to consider about age.
3. That the Learned Trial Magistrate failed to consider that the appellant is an only son in his family.
4. That the Appellant was remorseful of what he did.
5. That the court should be pleased to reduce sentence imposed.

6) This appeal was canvassed by way of written submissions.

7) The Appellant relied in the authorities of **Josephine Arissol Versus Republic (1957) EA 477** in which it was held that *“it would be wrong to impose the maximum sentence on a 1<sup>st</sup> Offender.”* He argued that prescribed punishments deprive Magistrates of their legitimate power to discretion. He submitted that this court exercises the power under Section 354 of CPC to reduce the sentence.

8) The Appellant also urged the court to consider the period he was in remand custody as provided for in Section 333 (2) CPC. The Appellant indicated that he was remorseful.

9) The Respondents submissions were that the sentences of 14 years under section 146 of the Penal Code was legal and the trial Magistrate must have considered that the victim was a minor and also an imbecile. It was argued that the sentence was not harsh and excessive.

10) It was argued that failure by the court to give the Appellant an opportunity to mitigate is curable under Section 382 CPC. The Respondent urged the court to dismiss appeal.

11) The appellant was arraigned in court on 24<sup>th</sup> July 2018 and was sentenced on 12<sup>th</sup> February 2019. It is apparent that he was in custody during trial and the trial Magistrate didn't factor in this period spent in custody.

In total the Appellant spent 6 months and 18 days in remand custody and the jail term of 14 years should run from 24<sup>th</sup> July 2018. In consideration of period spent in remand and being guided by the and holding in **Malindi High Court Criminal Appeal No 30 of 2014 Mwalibeje Kalama Juba Versus Republic (2015) eKLR** I do hereby substitute the sentence from 14 years to ten years imprisonment. The sentence of 10 years will run from date of sentence. Right of Appeal of 14 days explained.

**JUDGMENT DELIVERED, DATED AND SIGNED THIS 8TH DAY OF DECEMBER, 2021**

**HON.LADY JUSTICE A. ONG'INJO**

**JUDGE**

**In the presence of:-**

Otolo – Court Assistant.

Mr.Simbi for Respondent.

Applicant present in person.