



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO.E012 OF 2020

JACKSON MWANZIA MUSEMBI.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J. O Magori

in Makindu Senior Principal Magistrate's Court PMCR Case No.237 of 2013

pronounced on 30th September, 2020).

JUDGMENT

1. The appellant herein was convicted of defilement contrary to section 8(1) as read with section 8(2) of the Sexual Offences Act No. 3 of 2006 – the particulars of offence being that on 8th March 2012 at around 9:00 pm at Particulars Withheld] Village, Nguumo Location within Makueni County intentionally and unlawfully caused his male genital organ namely penis to penetrate the female genital organ namely vagina of MM a child aged 11 years.
2. He was sentenced to life imprisonment on 10th May 2013.
3. He appealed to the High Court in Machakos High Court Criminal Appeal No. 99 of 2013 which was dismissed. He again appealed to the Court of Appeal in Nairobi Criminal Appeal No. 42 of 2016 which was also dismissed and both conviction and sentence upheld.
4. He then appealed to the High Court again when a court was opened at Makueni, in Makueni High Court Criminal Appeals No. 265 of 2017 and Criminal Appeal No. 40 of 2018 – both of which were dismissed, as an abuse of the court process.
5. Thereafter, the appellant again came to this court under Makueni High Court Miscellaneous Criminal Revision No. 167 of 2020 for review of sentence, wherein the High Court remitted the matter to the trial court for sentence re-hearing.
6. On the above orders, the trial court subsequently on 30th September 2020 determined a sentence of 30 years imprisonment from the date the appellant was initially sentenced. Thus in effect, the life sentence was reduced to a 30 years' imprisonment term.
7. The appellant has now again come to this court on appeal on the above 30 years imprisonment sentence imposed by the trial court, claiming that he is young and reformed and wants to start a family.
8. This court does not consider that there is any reason to interfere with the reviewed sentence. First the mitigation being raised by the appellant in this court on his young age and his eagerness to start a family should have been raised in the trial court to which this court referred the matter for sentence re-hearing. The trial court having heard the appellant in mitigation before reducing the life sentence to 30 years imprisonment, one cannot say that the exercise of sentencing discretion was erroneous.
9. Secondly, the Supreme Court has recently on 6/7/2021 clarified that the reasoning and jurisprudence in the famous **Muruatetu** case which the appellant relies, on only applies to cases of mandatory death sentences for murder, not other cases. The appellant having already benefited in his sentence reduction before that clarification of the Supreme Court should thus count himself lucky as this court is not inclined to review the sentence upwards.
10. Consequently, I find no merits in the appeal of the appellant on sentence. I dismiss the appeal and uphold the sentence imposed by the

trial court.

DELIVERED, SIGNED & DATED THIS 1ST DAY OF DECEMBER, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE