



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITUI

CRIMINAL APPEAL NO. 44 OF 2016

PAUL KILONZI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Mutomo Senior Principal

Magistrate's Court Criminal Case (S.O.) No. 9 of 2013 by Hon. S. K. Ngii (RM) on 10/08/16)

J U D G M E N T

1. Paul Kilonzi, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **21st** day of **March, 2013** at about **6.00 p.m.** at **[particulars withheld] Village, Kanziku Location of Ikutha District** within **Kitui County**, intentionally caused his penis to penetrate the anus of **KM** a child aged 4 years.

2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **21st** day of **March, 2013** at about **6.00 p.m.** at **[particulars withheld] Village, Kanziku Location of Ikutha District** within **Kitui County**, intentionally touched the anus of **KM** a child aged 4 years with his penis.

3. After being taken through full trial he was convicted for defilement and sentenced to **life imprisonment**.

4. Aggrieved, he appeals against sentence. In his oral submissions he asked the Court to be considerate.

5. The State through learned State Counsel **Mr. Mamba**, did not oppose the Appeal. He urged that the Appellant had a right of Appeal.

6. I have duly considered the Appeal by the Appellant and I do remind myself of the duty to reconsider what transpired at the trial Court.

7. **Section 8(2)** of the **Sexual Offences Act** provides thus:

“A person who commits an offence of defilement with a child aged eleven years or less shall upon conviction be sentenced to imprisonment for life.”

8. However, following emerging jurisprudence the Court of Appeal has ruled otherwise. In the case of **Evans Wanjala Wanyonyi vs. Republic (2019)** the Court of Appeal stated thus:

“On the enhanced 20 year term of imprisonment meted upon the appellant by the learned judge, we are of the view that, the constitutionality of the mandatory minimum sentence meted out to the appellant raises a question of law. This Court in Christopher Ochieng – -Vs- R [2018] eKLR Kisumu Criminal Appeal No. 202 of 2011 and in Jared Koita Injiri – -Vs- R, Kisumu Criminal Appeal No. 93 of 2014 considered legality of minimum mandatory sentences under the Sexual Offences Act. This Court noted that the Supreme Court in Francis Karioko Muruatetu & another – v- Republic SC Petition No. 16 of 2015 held the mandatory death sentence prescribed for the offence of murder by Section 204 of the Penal Code was unconstitutional; that the mandatory nature deprives courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case; that a mandatory sentence fails to conform to the tenets of fair trial that accrue to the accused person under Article 25 of the Constitution. Guided by the foretasted Supreme Court decision, this Court in Christopher Ochieng – v- R

(supra) stated:

In this case, the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in the Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis. Needless to say, pursuant to the Supreme Court's decision in Francis Karioko Muruatetu & another – v- Republic (supra), we would set aside the sentence for life imprisonment imposed and substitute it therefore with a sentence of 30 years' imprisonment from the date of sentence by the trial court.

25. In this appeal, guided by the merits of the Supreme Court decision in Francis Karioko Muruatetu & another – v- Republic (supra) and persuaded by the decisions of this Court in Christopher Ochieng – v- R (supra) and Jared Koita Injiri – v- R, Kisumu Criminal Appeal NO. 93 of 2014 in relation to sentencing, we are convinced and satisfied that the enhanced mandatory 20 year term of imprisonment meted upon the appellant by the learned judge cannot stand. We are inclined to intervene. We hereby set aside the 20 year term of imprisonment meted upon the appellant. We substitute the 20 year term of imprisonment with one of imprisonment for a term of ten (10) years.”

9. The victim herein was 4 years old. The stated tender age is a factor that cannot be overlooked by this Court.

10. In the premises, I allow the Appeal by setting aside the sentence meted out which I substitute with twenty five (25) **years imprisonment**. The same will be effective from the date of conviction and sentence by the Trial Court.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 9th day of January, 2020.

L. N. MUTENDE

JUDGE