REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NUMBER 192 OF 2014

JOEL WAWERU GATHONI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against conviction and sentence by Hon. E. Tanui (SRM) on 7th December, 2011

in Nakuru Chief Magistrate's Court Adult Criminal Case Number 72 of 2011.)

J U D G M E N T

1. The appellant Joel Waweru was charged with the offence of **Defilement Contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act**. The particulars are;

> *"On the 3rd day of May 2011 at [particulars withheld] Farm Solai in Rongai District within Rift Valley Province, unlawfully and intentionally committed an act causing penetration by inserting his male genital organ (penis) into the female genital organ (vagina) of SC a child aged 10 years which caused penetration."*

In the alternative he was charged with **Indecent Act with a Child Contrary to Section 11(1) of the Same Act.** The particulars are;

> *"On the 3rd day of May 2011 at [particulars withheld] Farm Solai in Rongai District within Rift Valley Province, unlawfully and intentionally did an indecent act to SC a girl aged 10 years by touching her private parts (vagina).*

2. On 7th December 2011, the trial magistrate found him guilty of the main charge, convicted him and sentenced him to life imprisonment.

3. Upon hearing his appeal I found no reason to tamper with the conviction. In any event the appellant did not contest the conviction.

4. On Sentence I am guided by the Court of Appeal in **Dismas Wafula Kilwake vs Republic [2018] eKLR**, where it set out the factors to be considered in sentencing under the **Sexual Offences Act;** The Court stated:

> *"[We] hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if the circumstances do not demand it. The argument that mandatory sentences are justified because sometimes courts impose unreasonable or lenient sentences which do not deter commission of the particular offences is not convincing, granted the express right of appeal or revision available in the event of arbitrary or unreasonable exercise of discretion in sentencing.*
>
> *The Sentencing Policy Guidelines require the court, in sentencing an offender to a non-custodial sentence to take into account both aggravating and mitigating factors. The aggravating factors include use of a weapon to frighten or injure the victim, use of violence, the number of victims involved in the offence, the physical and psychological effect of the offence on the victim, whether the offence was committed by an individual or a gang, and the previous convictions of the offender. Among the mitigating factors are*

provocation, offer of restitution, the age of the offender, the level of harm or damage inflicted, the role played by the offender in the commission of the offence and whether the offender is remorseful."

5. These coupled with the provisions of **Section 354 of the Criminal Procedure Code** on the powers of the High Court on appeal;

(3) The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may—

(a) in an appeal from a conviction—

(i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction or

(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;

(b) in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence;

6. In his mitigation the appellant had spoken of being sick, had just undergone some surgery and addressed the court while seated. In my mind and with the decision of the Court of Appeal above, I considered this to be an appropriate case for sentence review. In order to assist the court in arriving at an appropriate sentence I requested for a social inquiry report in the nature of a pre-sentence report from probation and after care services.

7. The report indicated that the appellant had accepted he had done wrong. In addition the officer established the appellant was *'not mentally sound'*. There was no elaboration of the same as to whether it was actual mental illness requiring treatment, or just mentally challenged. I had to go by my own observation during the appeal. First the lower court record shows he was not represented and he cross examined witnesses. Once he sought a treatment order, it was given and he came back to say that he was now well and ready to proceed. During the hearing of the appeal the appellant, though a bit slowly, spoke cogently, and I was able to follow his submissions. In fact he could recall very well that on the date I gave him for this ruling he would be attending a clinic.

8. The probation officer also established that the appellant was epileptic and had other health issues which the family was ready to deal with. What was absent was the supporting evidence for these facts

9. In addition the family was ready to *'get him a wife'* to address his *'pedophile tendencies'*. If the appellant has pedophile tendencies, and this offence was not a one off, what is the likelihood of re-offending?

10. Finally the officer was of the view that all factors considered, the appellant had reformed and learnt a lesson while in prison.

11. The Probation Officer observed that *"the Sexual Offences Act no. 3 of 2006 does not give room to someone who committed this nature of offence to benefit from a non -custodial sentence'* and concluded by saying ***"It* (the Sexual Offences Act*) prevents us from recommending non-custodial sentence"***. I have perused the Sexual Offences Act and I did not find any section of the Sexual Offences Act that expressly prohibits the probation officer from recommending a non-custodial sentence.

12. That besides, there are the provisions of **Section 39** of the same Act, on post release supervision of a dangerous sexual offender. The appellant herein having committed a sexual offence against a child falls into the category of dangerous sexual offender, whose release, for any reason, must be accompanied by a supervisory order. This is what **Section 39** says in part: ***Supervision of dangerous sexual offenders.***

(1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has—

(a) more than one conviction for a sexual offence;

(b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or

(c) been convicted of a sexual offence against a child.

(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, ***the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence. (Emphasis added)***

(3) For purposes of subsection (2), long term supervision means supervision of a rehabilitative nature for a period of not less than five years.

4) A court may not make an order referred to in subsection (2) unless the court ***has had regard to a report by a probation officer,*** *social worker, or other persons designated by the court for the purposes of this section as such, which report shall contain an exposition of—*

(a) the suitability of the offender to undergo a long-term supervision order;

(b) the possible benefits of the imposition of a long-term supervision order on the offender;

(c) a proposed rehabilitative programme for the offender;

(d) information on the family and social background of the offender;

(e) recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and

(f) any other matter directed by the court.

13. Hence, in a case like this the probation officer is allowed to make recommendations, in the event that the offender is released, there be post release supervision. This is what I expected. The officer in his report was alive to the fact that the court has discretion to alter the appellant's sentence but fell short of making appropriate recommendations in the event that the appellant was released. This is more so because this case has one identified peculiarity. The appellant is said to have a mental condition that the family also recognizes as a problem, and which may be the cause for his committing this offence. Without clear directions on post release supervision, it is difficult to consider review of the appellant's sentence to an immediate release because, in my consideration of the report, the risk of re offending looms.

14. In the circumstances I find and hold that;

1. The appellant is indeed a dangerous sexual offender as defined under Section 39 of the Sexual Offences Act. He was convicted of defiling a ten (10) year old child.

2. After considering the pre-sentence report, his mitigation and the aggravating circumstance of the age of the victim, and Section 333(2) of the CPC, and guided by the Court of Appeal decision in **Jared Koita Injiri v Republic [2019] eKLR** the sentence of life is hereby set aside and substituted with a sentence of 30 years imprisonment from 7th December 2011.

Dated at Nakuru this 24th March 2020.

Mumbua T Matheka

Judge

Delivered and signed at Nakuru this 9th day of April, 2020.

Mumbua T Matheka

Judge

In the presence of: Via Zoom

Appellant present

Ms Edna Court Assistant

Ms Mburu for state