REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 79 OF 2015

AKS...APPELLANT

VERSUS

REPUBLIC..RESPONDENT

(Being an appeal from the original conviction in Senior Principal Magistrate's Criminal Case No. 946 of 2015 Delivered on 16th June 2015 in the Senior Principal Magistrate's Court at Kapsabet by Hon. Wattimah (Resident Magistrate)

JUDGMENT

1. The appellant filed the present appeal against the sentence for the offence of defilement contrary to section 8(1) of the sexual offences act as read with section 8(3).

2. The particulars of the offence are that on 15th April 2015, at around 10.00 pm within Nandi county, being a male person caused his penis to penetrate the vagina of MJ (name withheld), a female person aged 14 years, who was to his knowledge his daughter.

3. He was charged with an alternative count of deliberate transmission of life threatening sexually transmitted disease contrary to section 26(1)(c) of the sexual offences act.

4. In her judgement the learned trial magistrate considered both the evidence for the prosecution and the defence and concluded that the ingredients of the offence had been proved beyond reasonable doubt. She proceeded to convict the appellant and sentenced him to serve life imprisonment in count 1 and 15 years' imprisonment in count 2. The sentences were to run concurrently.

5. In this appeal, the appellant is only aggrieved with the sentence. According to his grounds of appeal, which are in fact mitigating factors, the appellant contends that he was a first offender, that he was remorseful and that he has already reformed. He has urged the court to invoke its discretional powers and reduce his sentence to ideal terms. The appellant cites the case of **Francis Karioko Muruatetu & Another vs. Republic, Petition No. 15 of 2015** and contends that the sentence of life imprisonment is unconstitutional.

6. Learned state counsel M/S Okok opposed the appeal on behalf of the state. Counsel urged that the appellant was convicted on his own plea of guilty in the two counts. That he had first pleaded not guilty on14th of April 2015 when he was first brought for plea, but changed his plea two months later on 16th of June 2015 after his daughter had testified. Counsel submitted that the appellant had sufficient time to contemplate decision and change his plea.

7. Counsel argued that the appellant was given a chance to mitigate and that his sentence was passed before the Muruatetu decision of the Supreme court. She contended that the minor would be traumatised for life and urged the court not to interfere with the sentences meted out by the trial court.

8. Notably, the appellant was sentenced to life imprisonment in count 1 and to 15 years in count 2. The Court of Appeal in the case of **Ogolla s/o Owuor vs. Republic, [1954] EACA 270**, pronounced itself on this issue as follows: -

> **a. "The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors."**

9. In considering mandatory minimum sentencing, I could not describe the circumstances of this case better than the Court of Appeal did, when it pronounced itself in **Jared Koita Injiri vs. Republic [2019] Eklr,** thus:

> **a. "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. The appellant was provided an opportunity to mitigate in the trial court**

where it was stated that he was a first offender. He pleaded for leniency. However, it cannot be overlooked that the appellant committed a heinous crime, and occasioned severe trauma and suffering to a young girl. His actions have demonstrated that around him, young and vulnerable children, like the complainant could be in jeopardy. Needless to say, pursuant to the Supreme Court decision in *Francis Karioko Muruatetu & Another vs Republic (supra)*, we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."

It is my humble view that each case must be determined on its own merits even on this issue. The appellant not only committed a heinous offence, he also infected the minor with a serious venereal disease in her childhood and there is no telling what repercussions she may suffer in future. Needless to say, if he could do this to his own child who looked to him for protection, other young and vulnerable children will be in jeopardy around him.

I have considered the record of appeal before me, together with the grounds of appeal and the submissions of the state counsel. I note the appellant's mitigation and that he was treated as a first offender. I also note that he pleaded guilty and saved the court the time it would have had to hear and determine the case.

Reasons wherefore I set aside the life sentence imposed in count 1 and substitute it therefore with a sentence of 30 years imprisonment. The sentences in count 1 and count 2 will run concurrently.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 9th day of SEPT. 2020

L. A. ACHODE

JUDGE