**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CRIMINAL APPEAL NUMBER 1 OF 2019**

**ROBERT KIPLANGAT TOO ..... APPLICANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

1. The appellant Robert Kiplangat Too was charged with defilement Under Section 8(1) as read with 8(3) of the Sexual Offences Act. In the alternative that he committed an indecent act with a child Under Section 11(1) of the same Act.

It was alleged that the offences were committed between October 2017 and March 2018 in Kuresoi South District within Nakuru County where he intentionally caused his penis to penetrate the vagina of MCR aged 15 years/ or in the alternative touched her vagina with his penis.

2. When he took plea for the first time on 27/3/18, he pleaded guilty.

3. The complainant MCR testified on 10/1/2019. By then she was 16 years old. Her testimony was that the appellant defiled her. That she became pregnant and bore a child. That at some time before she testified samples were from her the baby and the appellant for DNA

4. The clinical officer testified on the same date and confirmed that she was defiled and became pregnant.

5. After these two testified the appellant told the court that he was changing his plea to a plea of guilty. The trial court warned that there was a minimum sentence of 20 years attached to the charge. He still pleaded guilty. The facts were read to him. He pleaded guilty to those as well. He was convicted and sentenced to 20 years' imprisonment.

6. He filed this appeal but when it came for hearing he submitted that he was only appealing against the sentence seeking that this court;

   i) considers the period he spent in custody prior to the conviction and sentence and

   ii) reviews the sentence downwards.

7. This was opposed by the Ms. Wambui for the state. It was her argument that the appellant pleaded guilty to the charge; that he accepted the mandatory minimum of 20 years, and that the defilement was forceful sexual intercourse, which led to the pregnancy of the complainant and the interference with her life. That she was denied the right to her childhood by the actions of the appellant.

8. I requested for a pre-sentence report to guide the sentence which upon perusal I found gaps with regard to the information in respect of the victim. (S. 216 of the Criminal Procedure Code and s 33 of the Sexual Offences Act)

9. The victim impact statement lacked certain details except for stating that the victim and her mother have no ill will with the appellant and in the event of his release, he ought to take parental responsibility of the child born out of the defilement.

10. There was nothing in the report to show the appellant/his family's attitude towards the child and whether they had acknowledged the said child. Secondly the report did not provide me with an assessment of the impact of the offence on the complainant. Yes, she may have "moved on'' but what was the impact of the offence on her? Thirdly, there was a recommendation that the appellant could benefit from a probation order. The report did not say why the officer arrived at this conclusion. And being a sexual offender I thought there ought to have been some outline on what the Department intended to do with the offender in terms of rehabilitation should the offender be placed on probation. I directed that the probation officer to conduct a further enquiry and provide a further report on the following: -

***1. An assessment of the impact of the offence on the complainant***

***2. Why the appellant a sex offender would benefit from probation supervision.***

***3. Whether there were any specific rehabilitative programs available for him as a sex offender in the circumstances he is placed on probation supervision?***

**4. *The appellant and his family's attitude towards the child*.**

11. A further report was filed on 13/7/2020. The Probation Officer noted that because of the offence the complainant dropped out of school at class 7, to take care of the baby. However, she had recently returned to class 7 at 17, that her mother was the one assisting with the child.

12. Even as we reconsider the appellant's sentence it is unfortunate that the Victim Protection Act fund and other services set out there for the support of victims such as the victim herein are not in place up and running. Victims such as the complainant herein are left to struggle on their own yet the statute is in place.

13. The report confirmed that there were no specific treatment plans or rehabilitation programs for sex offenders placed on probation supervision except for counselling and guidance.

14. I have carefully considered the submissions by both the appellant and the state.

15. The issue is whether the appellant's appeal on sentence is tenable him having pleaded guilty.

16. Section 348 of the Criminal Procedure Code Cap 75 states that no appeal shall be allowed in the case of an accused who has pleaded guilty and has been convicted on that plea by a subordinate court except to the extent of the legality of the sentence.

17. In **Wandete David Munyoki v Republic [2015] eKLR** the **Court of Appeal** had this to say on the issue:

> *It has long been settled that Section 348 of the Criminal Procedure Code which provides that no appeal is allowed in a conviction arising from a plea of guilty, except to the extent and legality of the sentence, is not an absolute bar to challenging such a conviction on any other ground. Indeed, in **Ndede v R [1991] KLR 567**, this Court held that the court is not bound to accept the accused person's admission of the truth of the charge and conviction as there may be an unusual circumstance such as injury to the accused person or the accused person may be confused or there have been inordinate delay in bringing him to court from the date of arrest. The list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty, are not closed*.

18. Clearly there for the court's hands are not tied in considering the appellant's appeal against the sentence on its merits.

19. On the legality of the sentence of 20 years' imprisonment: Section 8(3) of the Sexual Offences Act provides sentence of "not less than 20 years" imprisonment where an offender is convicted of defilement of a child between the age of 12-15 years. In this case the complainant was aged 14 years at the time of the offence. Hence the trial court did not mete out an illegal sentence

20. However, in the wake of the **Francis Karioko Muruatetu [2017] eKLR** case where the mandatory nature of the death sentence was declared unconstitutional and the **Dismas Wafula Kilwake case [2018] eKLR** in which the Court of Appeal stated that the principle of Muruatetu is applicable to section 8 of Sexual Offence Act, and the fact that the trial court treated the 20 years' imprisonment sentence as a mandatory minimum sentence, adds to the *list of circumstances and examples that may lead the first appellate court to consider the appeal on merit even when the conviction was on the accused person's own plea of guilty.*

21. Perusing the court file, I came across the DNA report. Although it was not produced in evidence, it must have contributed to the appellant's plea of guilty because it confirmed that he was the biological father of the complainant's child. The appellant having been supplied with the same realised and knowing he had done this saw no escape route. He pleaded guilty from the beginning and though that plea wavered after he was remanded in custody, he pleaded guilty again and despite the court's warning that he risked 20 years in prison he still pleaded guilty.

22. The victim's family and the community are willing to take the appellant back into the community should he get a non-custodial sentence and the Probation and After Care Services Department is ready to supervise and guide him

23. The appellant expressed remorse for what he did.

24. In considering the merits of the sentence it is important to look at the circumstances of the offence. This is the purport of s 33(b) of the Sexual Offences Act which states.

> ***Evidence of the surrounding circumstances and impact of any sexual offence upon a complainant may be adduced in criminal proceedings involving the alleged commission of a sexual offence where such offence is tried in order to prove— (a) …***
>
> ***(i) …***
>
> ***(ii) ….; and***

***(b) for purposes of imposing an appropriate sentence, the extent of the harm suffered by the person concerned.***

25. It is evident from the record that the appellant was twice the complainant's age at the time of the offence hence he was the adult in the room. He ought to have known better.

26. The complainant became a child with child. She was robbed of something that can never be replaced, her childhood. In addition to that she suffered the stigma of being a pregnant child, add to that the trauma of the defilement, having to take care of a child while a child herself. It is harm Secondly Section 39(2), (4), (5), (6), of the Sexual Offences Act;

***"(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.***

***(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.***

***5. An order referred to in subsection (2) shall specify -***

(a) ***that the offender is required to take part in a rehabilitative programme;***

(b) ***the nature of the rehabilitative programme to be attended;***

(c) ***the number of hours per month that the offender is required to undergo rehabilitative supervision; and***

(d) ***that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs.***

***6. An order referred to in subsection (2) may specify that the offender is required to -***

a. ***refrain from visiting a specified location;***

b. ***refrain from seeking employment of a specified nature; and (c) subject himself or herself to a specified form of monitoring."***

This law envisages that where an offender such as the appellant is to be released to serve the remainder of his sentence on supervision certain conditions must be met.

It is conceded by the Probation and Aftercare Services that there does not exist a rehabilitative treatment program for sexual offenders. This is a serious gap in the enforcement of the Sexual Offences Act. We all recognise the negative impact of sexual offences in that they do not just steal but rob victims of their human dignity. Simply locking them up for long periods of time does not necessarily mean they will reform hence the provisions for long specific long term supervision. It therefor high time that an appropriate treatment plan was developed between the Commissioner of Prisons and the Probation and Aftercare Services especially in light of *Muruatetu, and Dismas Kilwake* and the current shift where sexual offenders are ending up out of prison earlier than later.

It is important that courts, and the society at large be assured that sexual offenders released back into the community on supervision is not seen as a let off and that may lead to the loss of the deterrence and rehabilitative effect intended.

Hence I find that even though under Section 354(3) (b) of the CRIMINAL PROCEDURE CODE this court has power to alter the nature of the sentence, thus appellant's case is not suitable for that.

However, taking into consideration all the circumstances of the offence as per Section 33 of the Sexual Offence Act and the PROVISO to Section 333(2) of the CRIMINAL PROCEDURE CODE the appeal against the sentence is allowed.

Appellant was remanded in custody on 27th March 2018.He was sentenced on 11th January 2019.

He will serve 10 years' imprisonment with effect from 27th March 2018

Right of Appeal 14 days

**Dated Delivered and signed at Nakuru this 9th October 2020**

**Mumbua T Matheka**

**Judge**

**VIA ZOOM**

**Edna Court Assistant**

**Ms. Rita for state**

**Appellant present in Person**