



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYAHURURU**

**CRIMINAL APPEAL NO. 26 OF 2019**

**SAMUEL AMOKA NYAWANDA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from the Judgment of the Resident Magistrate's Court at Nyahururu*

*SPMC No. 998 of 2014 on the 31st day of March, 2015 by A. Mukenga(R.M.)*

**JUDGEMENT**

Samuel Amoka Nyawanda, the appellant, was convicted by Hon. Mukenga – R.M. for the offence of defilement contrary to section 8(1) as read with 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 16.04.2014 in Nyandarua County, intentionally and unlawfully caused his penis to penetrate the vagina of DA, a girl aged 11 years.

In the alternative, the appellant faced a charge of committing an indecent act with a child contrary to section 11(1) of the sexual offences act. It was alleged that on 16.04.2014 at [particulars withheld] intentionally and unlawfully caused his to come into contact with the vagina of DA, a girl aged 11 years.

Upon conviction, he was sentenced to serve life imprisonment. He filed this appeal on 11.07.2019 challenging the whole judgement of the trial court.

When the appeal came up for hearing, the appellant abandoned the appeal on conviction and only proceeded with the appeal on sentence through the supplementary grounds of appeal filed in court on 05.10.2020. The appellant contends that he is 78 years old, that his health has deteriorated as he has been diagnosed with a kidney problem; that he was operated upon last month and he is yet to recover. That his leg was amputated for allegedly having cancer; that the conditions in prison do not favour his health status and therefore prays for leniency; that he has been of good conduct in prison, is disciplined and relates well with both the prisoners and the officers and requests the court to give him a non-custodial sentence on humanitarian grounds.

Ms Rugut, Learned Counsel for the State opposed the appeal for reasons that the appellant was charged with a very serious offence. He opted to remain silent in his defence, was not remorseful in his mitigation and the court properly gave him the mandatory sentence of life imprisonment. Counsel urged the court not to interfere with the sentence. As regards the appellant's allegation that he is sick, counsel urged that the prison has excellent treatment facilities and that is why he was operated upon.

As to the character, it was submitted that the appellant has not availed any evidence to prove a change in his character.

I have considered the submissions by the appellant and the learned state counsel. The appellant was treated as a first offender. He was not remorseful. The court notes that indeed he is an elderly man but he did not produce evidence of his age. Though the appellant claimed to be sick and had just undergone an operation, he did not produce any medical reports before the court in support of his allegations.

The appellant was convicted for a very serious offence which carries a sentence of life imprisonment, upon conviction under section 8(1) as read with section 8(2) of sexual offences act. He was sentenced before the Supreme Court decision in ***Francis Karioko Muruatetu and others v Rep. petition 15 & 16/2015***, where the court held that mandatory sentences were unconstitutional. The court has therefore a discretion to pass sentence guided by the law and based on the special circumstances of each case. In this case the appellant took advantage of a child of tender age, 11 years, who was like a grandchild to him, was a neighbor and had won his trust. He did not do it once but twice

and could have continued to prey on the girl had the girl not revealed it. The appellant's actions were heinous and should be deterred at all costs so that the vulnerable in society like the child herein are protected.

In exercise of my discretion and having taken the appellant's mitigation into account, though he claims to be unwell, there are sufficient medical facilities in prison; I also take his age into account. I hereby set aside the sentence of life imprisonment. Instead, I sentence the appellant to 10 years imprisonment. The sentence will commence on the date that the appellant was sentenced on 31.03.2015. The appeal succeeds to that extent.

**Dated and Signed at NYAHURURU this 14<sup>th</sup> day of October, 2020.**

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**R.P.V. Wendoh**

**JUDGE**

**PRESENT:**

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Ms Rugut for the state

Henry - Court Assistant

Appellant present(virtual)