



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT KIAMBU**

**CRIMINAL APPEAL NO. 33 OF 2018**

**PHENELLAH NANJALA.....APPLICANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

*(From original sentence in Sex Offence 43 of 2017, Chief Magistrate's Court Thika*

*before Hon. B.J. Bartoo – Resident Magistrate delivered on 8<sup>th</sup> May 2018)*

**JUDGMENT**

1. The appellant, a twenty-four year old female adult and a mother of a five year old child was on the 8<sup>th</sup> May 2018 sentenced to serve life imprisonment having been convicted for an offence of **Defilement Contrary to Section 8(1) (2) of the Sexual Offences Act No. 3 of 2006** upon her own plea of guilt that on the 7<sup>th</sup> May 2017 at Kahawa Wendani Ruiru, Kiambu County she intentionally and unlawfully caused her virgina to be penetrated by the penis of CM a child aged two and half years.

2. **Section 8(1) and (2) of the Sexual Offence Act** states

*(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.*

*(2) 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.*

3. The above legal provisions provide for a minimum sentence once a conviction has been entered. The victim of the offence was 2 ½ years old who was entrusted to the appellant as a child minder by her parents. The case before the trial court proceeded during which **PW1** the mother of the child produced the birth certificate of the child as proof of age but midway the appellant sought to change the plea and pleaded guilty as charged, and was convicted and sentenced accordingly.

4. The matter of minimum sentences especially under the Sexual Offences Act has been a thorny issue as the sentences prescribed therein are heavy and deprives to courts any discretion to meet lesser sentences-despite circumstances and individual characteristics of each case, and the purpose of sentencing in the criminal justice system-*vis-a-vis* Constitutional imperatives under the 2010 Constitution of Kenya and principles of fair trial under **Article 25 and 27 of the Constitution** where the dignity of the person ought to be considered together with the sentencing policy guidelines.

5. The superior courts have since the promulgation of the 2010 Constitution interpreted the law and particularly the minimum sentences and reduced them appropriately. Of great impact is the Supreme Court of Kenya decision in the celebrated **Muruatetu** decision, **Francis Karioko Muruatetu & Another -vs- Republic – Petition No. 154 of 2015**.

6. Minimum sentences that are prescribed by any legislation deprive the courts of its discretion and undermines its independence in decision making upon interrogation of circumstances pertaining to the Commission of the offence, and in most cases such sentences are not consumerate and proportionate to the offences committed and the victim reports impact and therefore poses serious injustices to the offenders - See **Nyamawi Nyawa -vs- Republic (2014) e KLR**.

7. The purpose of sentencing is both deterrence and retributive. In the case **S.V. Mchunu & Another (AR 24/11 (2012) ZAKZPHC6** Kwa Zulu Natal **High Court** and cited in **Criminal Appeal No.262 of 2012 Hamisi Mwangeka Mwero -vs- Republic (2018) e KLR**, and **Supreme Court of South Africa in Mokela -vs- The State (135/11)(2011) ZASCA 166**,

The Courts were of opinion, across board, that sentencing remains pre-eminently within the discretion of the sentencing court, that mandatory sentences reduce the Court's function to the level of rubberstamping the legislative's function which is undesirable as being an intrusion on the court's sentencing function by curtailing its discretion on sentencing.

8. In particular, in *S. -vs- Jansen 1999 (2) SACR 362, Davis J* held that:

*“---Mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused.”*

9. There is no doubt that the offence committed by the appellant is serious and against all moral decency and against a very young child.

However considering the purpose of sentencing stated above, would the life imprisonment sentence meted against the appellant serve the purposes of deterrence and retribution to the appellant?

10. It was the appellant's submission before me that she has reformed during the incarceration period since May 2018 and has joined prisoners reform programmes and indeed produced several certificates in entrepreneurship programmes and Development initiatives programmes.

11. I have taken into account the appellant's individual circumstances including the dignity of the person under Article 27 of the Constitution. I am persuaded to accede to the appellant's plea for a reduction of the sentence term.

Consequently, I reduce the appellant's sentence of life imprisonment and substitute it with 5 (five) years imprisonment, to run from the date of sentence.

**Dated and signed at Nakuru this 23<sup>rd</sup> Day of January 2019.**

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**J.N.MULWA**

**JUDGE**

**Dated, signed and Delivered at Kiambu this 14<sup>th</sup> Day of February 2019**

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**C. MEOLI**

**JUDGE**