REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 106 OF 2011

MATANO KAMULO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the Judgment of E.K. Usui Macharia, Senior Resident Magistrate, delivered on 18th April, 2011 in Kwale Chief Magistrate's Court Criminal Case No. 443 of 2011).

JUDGMENT

1. The appellant was convicted for the offence of defilement contrary to Section 8(1) as read with 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 14th day of April, 2011 at around 1330 hours at Gandini village Ndavaya location of Kinango District in Kwale County within Coast Region, willfully and unlawfully committed an act which caused the penetration of his genital organ (penis) into the genital organ (vagina) of SG [name withheld] a girl child aged 14 years.

2. When the appellant was arraigned in court on 18th April, 2011, the charge was read out to him and to he pleaded guilty. When the facts were read out to him, he said all the facts were true and that he had sex with the girl. He was then convicted on his own plea of guilty and sentenced to serve 20 years imprisonment.

3. On 28th April, 2011, the appellant filed a petition of appeal and grounds of appeal. When the appeal came up for hearing, the appellant informed this court that he was appealing only against the sentence meted out against him.

4. The appellant relied on his written submissions filed on 1st April, 2019 in which he mitigated against the sentence of 20 years imprisonment by stating that he was a first offender, he was remorseful and apologetic for having committed the offence. He further submitted that being held in custody had led him to learn how to relate socially to fellow inmates and that he had been of good character. He further indicated that he now knows the consequences of criminal acts. He stated that he was the sole bread winner of his family. He also said that he was not given an opportunity to mitigate which violated his rights to fair trial under the provisions of Sections 216 and 329 of the Criminal Procedure Code. The appellant further indicated that he was serving his 9th year of imprisonment. He urged this court to quash the conviction, set aside the sentence and set him free.

5. Ms Marindah, Prosecution Counsel, submitted that the plea in the case in the lower court was clear, unequivocal and free from any error in law. She pointed out that the appellant was given an opportunity to mitigate, although he had said here in court that he was not given such an opportunity. Counsel for the respondent also submitted that the minimum sentence for the offence the appellant was charged with is 20 years imprisonment. She prayed for the appeal to be dismissed.

6. I have considered the mitigation grounds of appeal proffered by the appellant. As stated by the Prosecution Counsel, he pleaded guilty to the charge of defilement of a child of the age of 14 years. The plea was clear and unequivocal. The proceedings before the lower court indicate that he was given an opportunity to mitigate, wherein he prayed for mercy and stated that he would not repeat the offence.

7. **In Wanjema v. Republic (1971) EA 493, the court** laid down the general principles upon which the first appellate court may act upon in dealing with an appeal on sentence. An appellate court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence the trial court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances of the case, the sentence is harsh and excessive. In so doing, the appellate court must not lose sight of the fact that in sentencing, the trial court exercised discretion and if the discretion is exercised judicially and not capriciously, the appellate court should be slow to interfere with that discretion.

8. The penal provisions for the offence of defilement of a child of 14 years, which was the age of the complainant herein, is provided under

Section 8(3) of the Sexual Offences Act which stipulates as follows:-

> ***"A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term <u>of not less than twenty years</u>."***

9. The above Section provides for the minimum sentence for the offence of defilement contrary to Section 8(1) of the Sexual Offences Act, which is not less than 20 years. The appellant having been sentenced to 20 years imprisonment means that the sentence that was imposed on him by the trial court was lawful. The foregoing therefore means that this court is left with no room for exercising its discretion in reduction of the sentence in this appeal. This court must remain true to the letter of the law and I therefore uphold the sentence that was meted out against the appellant. The appeal is hereby dismissed.

DELIVERED, **DATED and SIGNED at MOMBASA on this 9th day of April, 2019.**

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Marindah - Prosecution Counsel, for the respondent

Mr. Oliver Musundi - Court Assistant