



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYAHURURU

CRIMINAL APPEAL NO 23 OF 2018

(Appeal Originating from Nyahururu CM's Court Cr.No.720of 2015 by: Hon. V. A. Ochanda – R.M.)

SAMUEL MACHARIA KIMANI.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

The appellant, **Samuel Macharia Kimani** was charged with the offence of defilement contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act.

The particulars of the charge are that between 16/1/2015 and 23/2/2015 in Laikipia County, intentionally and unlawfully caused his penis to penetrate the vagina of MWK, a child aged 14 years.

In the alternative, he faced a charge of committing an indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act.

After a full trial, the appellant was convicted on the main charge and sentenced to serve 15 years imprisonment. No finding made on the alternative charge.

Aggrieved by the said decision, the appellant filed an appeal vide his petition dated 8/3/2018 challenging both conviction and sentence.

However, at the hearing of the appeal the appellant abandoned his appeal on conviction and urged the court to only consider his appeal on the sentence. His grounds of appeal on sentence are basically mitigation where he contends that 15 years imprisonment is excessive; that he was the sole bread winner of his family; that he underwent an operation while in prison whereby the doctor told him that if he stayed in prison longer, he would not sire children. He is remorseful for the offence he committed, has undergone counseling and has been rehabilitated; that he has acquired Government Trade Test Three and Two in tailoring and prays for an unconditional sentence. He also prays that in the alternative, the court should consider that he had been in remand for 22 months before he was sentenced and it should be taken as part of the sentence.

The appeal was opposed. **Ms. Rugut** submitted that the appellant was given the minimum sentence under Section 8(3) and the court has no discretion to interfere; that the prison has excellent medical facilities where he can be treated. Counsel urged the court to dismiss the appeal.

I have considered both the submissions of the appellant and the counsel for the State.

The appellant was charged convicted under Section 8(3) of the Sexual Offences Act which stipulates that a person who commits an offence of defilement with a child between the age of 12 and 14 years is liable upon conviction, to imprisonment for a term of not less than 20 years imprisonment. The court found that the complainant was in fact 15 years old at the time the offence was committed and therefore convicted the appellant under Section 8(4) of the Sexual Offences Act which provides for a minimum of 15 years imprisonment where the victim of defilement was aged between 15 and 18 years.

Though the law provides for minimum a sentence, I have considered the recent decision by the Court of appeal **CRA.93/2014 Jared Koita Injiri v Republic**, where Musinga, M'Inoti and Murgor JJA adopted the Supreme Court decision in **Francis Karioko Muruatetu and another v Republic SC.Pet.16/2015** where the Supreme Court held that Section 204 of the Penal Code which provided for a mandatory death sentence for the offence of murder deprived the court of discretion and found the law to be unconstitutional.

The Court of Appeal applied the same reasoning to Section 8(2) of the Sexual Offences Act, where the victim of defilement was 9 years and reduced the sentence of the appellant from life imprisonment to 30 years imprisonment. The effect of that decision is that the court has a discretion when sentencing under the Sexual Offences Act.

Guided by the said decision, I take into account the appellant's plea of leniency. I do take into account the fact that he had spent 21 months in remand during the hearing of his case. He is a young man of 28 years but I also do note the circumstances under which the offence was committed were aggravated in that the appellant traumatized his step sister by repeatedly defiling her, an ordeal she may never recover from.

I allow the appeal on sentence, set aside the sentence of 15 years imprisonment. Instead, I sentence the appellant to serve 10 years imprisonment from the date he was sentenced on 28/12/2016.

Dated, Signed and Delivered at NYAHURURU this 14th day of June, 2019.

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R.P.V. Wendoh

JUDGE

PRESENT:

Ms. Rugut – State Counsel

Soi – Court assistant

Appellant - present