



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

CRIMINAL APPEAL NO.32 OF 2018

(Appeal Originating from Nyahururu CM's Court Adult Cr.No.2165 of 2009

by: Hon. T. Matheka – P.M.)

SIMON MUIRURI MBURURU.....APPELLANT

- V E R S U S -

REPUBLIC.....RESPONDENT

J U D G M E N T

Simon Muiruri Mbururu, the appellant was convicted on his own plea of guilty by Hon. T. Matheka (P.M.) for the offence of defilement of a girl contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act.

The particulars of the charge are that on 6/9/2009 in [Particulars Withheld] Area in Laikipia West District, Rift Valley Province, caused his genital organs, namely penis to penetrate into the vagina of RWM a girl aged 7 years.

The prosecutor adopted the evidence of PW1, 2 and 3 who had testified as the facts of the offence which the appellant confirmed were correct. He was then convicted and sentence to serve life imprisonment.

Although the appellant seemed to be challenging both conviction and sentence in his grounds of appeal and submissions, he confirmed to this court that he had abandoned his appeal on conviction but wished to proceed with the appeal on sentence. He admitted that he committed the offence for which he is remorseful and pleads for leniency because both his mother and brother died and is the only bread winner.

Mr. Maroro, counsel for the State opposed the appeal for reasons that the sentence is lawful; that the subject was a child of 8 years; that Section 8(2) Sexual Offences Act provides the sentence to be life imprisonment where the victim of defilement is less than 11 years. He urged the court not to interfere with the sentence.

This court takes into account the fact that the appellant pleaded guilty to the offence and therefore did not waste the court's time. He pleaded for leniency being the person his family depends upon. The trial court considered the fact that the law provided for minimum sentence for the said offence; that this offence committed is a heinous thing whereby the innocence of the child of a tender age was taken away and that she may never recover from the said trauma.

Having said the above, though Section 8(2) of the Sexual Offences Act provides the minimum sentence for such offence to be life imprisonment yet I am alive to the recent Court of Appeal decision – **CRA.93/2014 Jared Koita Injiri v Republic** (Kisumu) 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 deprived the court of discretion and found the law relating to sentence for a charge of murder under Section 204 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 is that the court has discretion in sentencing under the Sexual Offences Act.

Guided by the above decision, I hereby set aside the sentence of life imprisonment and substitute it therefor with a sentence of 32 years imprisonment from the date of sentence by the trial court.

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