



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 111 OF 2017 [SOA]

(CORAM: HON. R.E. ABURILI - J)

MARTIN MAWINDA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal against Conviction and Sentence from Judgment delivered

on 6/11/2017 vide Siaya PM's Court in SOA Case 193 of 2017 before Hon. T.M. Olando, SRM)

JUDGMENT ON RESENTENCING

1. The Appellant herein **Martin Mawinda** is a 77 years old frail and sick looking man. He was convicted by SRM, Siaya PM's Court for the offence of defilement of a child aged 13 years on 6/11/2017 vide Siaya PM SOA No 193 of 2017. The particulars of the offence were that on 27/3/2017 in Gem Sub County within Siaya County, he intentionally caused his penis to penetrate the vagina of YAO a girl aged 13 years.
2. He denied the offence and after the full trial, he was found guilty of the offence by Hon. T.M. Olando, SRM and sentenced to serve a minimum of 20 years imprisonment as stipulated in **Section 8(3) of the Sexual Offences Act**.
3. Dissatisfied with the conviction and sentence, he filed this appeal on 10/11/2017. However, today he has withdrawn the challenge against conviction and urged the court to consider reducing sentence imposed because he is old, sickly and remorseful.
4. I have considered the sentence imposed on the Appellant by the trial court. The same is lawful as it is stipulated in **Section 8(3) of the Sexual Offences Act**. However, the mandatories of the minimum sentences has since been successfully challenged before the Supreme Court in **the Francis Karioko Muruatetu Vs. Republic** case, **SC Petition No. 15 & 16 of 2015** and as applied in the Court of Appeal at Kisumu in **Criminal Appeal No. 93 of 2014 in Jared Koita Injiri v Republic [2019] eKLR**. In the earlier case, the Apex Court held:

“

“Section 204 of the Penal Code deprives the Court of the use of judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives that the Courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a Court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to the accused persons under the Article 25 of the Constitution; an absolute right.”

5. I have also considered the age of the child victim who was defiled. From the evidence on record, the Appellant used to defile the child after luring her into his house with mangoes and little monies. The Appellant was caught red-handed and it is wise of him that he has conceded that he defiled the child, despite initially vehemently denying the offence.
6. I have observed the Appellant who is 77 year old man, married to his age mate a 78 year old woman. They are not blessed with any issue and therefore he may not appreciate the pain of having one's child defiled. I have also considered the Probation Officer's Report dated 6/11/2017 which was ordered by the trial court prior to sentencing.
7. The Appellant is said to be a generous man and of good conduct but his insatiable thirst for sex with a young child betrayed his erstwhile good behavior. He has strong ties with the family. He suffers from arthritis and dental problems. The parents of the victim child had difficulties deciding what would be the best action in the circumstances because they feared that he may not survive if imprisoned because of his age and that that may cast a dark cloud over their heads.

8. As earlier stated, the sentence imposed is lawful though not mandatory. The appellant has already served about 1½ of the 20 years imprisonment. He still has a long way to go. At his age, and the prison life and conditions obtaining in prison, obviously, he may not survive there long which then amounts to him serving life imprisonment.

9. Considering all the above circumstances, and the fact the law under **Section 26(3) of the Penal Code** stipulates that a person liable to imprisonment for life or any other period may be sentenced to any shorter term, and noting that under the Second **Schedule** to the **Sexual Offences Act** on Consequential **Amendments and Repeals, Section 26(2) of the Penal Code** was not amended or repealed, I would, in the circumstances of this case, exercise judicial discretion and resentence the appellant to a prison term equivalent to the period already served in prison and warn him that the law and the society at large whole abhor sex predators.

10. Accordingly, unless otherwise lawfully held, the appellant shall forthwith be released from prison.

Orders accordingly.

Dated, signed and Delivered at Siaya, this 10th Day of July 2019.

R.E. ABURILI

JUDGE

In the Presence of:

Appellant (present in person)

Mr. Okachi, Senior Principal Prosecution Counsel for State

Court Assistants: Brenda and Modestar