REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 144 OF 2015

PAUL KIPLANG'AT MUTAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in S.O.A case No.16 of 2010 of the

Chief Magistrate's Court at Busia by Hon. J.N. Nthuku– Senior Resident Magistrate)

JUDGMENT

1. **Paul Kiplang'at Mutai,** the appellant herein, was convicted for the offence of defilement contrary to section 8 (1) as read with section 8 (2) of the Sexual Offences Act No. 3 of 2006.

2. The particulars were that on the 25th January 2010 in **Nakuru** District within **Rift Valley** Province, unlawfully and intentionally caused his penis to penetrate the anus of **FK**, a boy aged 6 years.

3. The appellant was sentenced life imprisonment. He now appeals against both conviction and sentence.

4. The appellant raised his grounds of appeal as follows:

   a) The learned trial magistrate erred in law and in fact by erroneously basing the sentence on a mandatory minimum sentence.

   b) The learned trial magistrate erred in law and in fact by convicting him on insufficient evidence on age and penetration.

5. The learned trial magistrate erred in law and in fact by basing the conviction on evidence rife with contradictions and inconsistencies.

6. The appeal was opposed by the state through Mr. Chigiti, learned counsel who contended that the prosecution proved their case to the required standards. He urged the court to find that the sentence meted out was lawful.

7. This is a first appellate court. As expected, I have analyzed and evaluated afresh all the evidence adduced before the lower court and I have drawn my own conclusions while bearing in mind that I neither saw nor heard any of the witnesses. I will be guided by the celebrated case of **Okeno vs. Republic [1972] EA 32.**

8. It is now settled law that before a conviction for the offence of defilement can be made, the prosecution has to prove beyond reasonable doubt that (a) there was penetration, (b) that the person accused was responsible for the penetration; and (c) that the age of the complainant was established. These ingredients were recapitulated in the case of **Fappyton Mutuku Ngui vs. Republic [2012] eKLR** by the learned judge Joel M. Ngugi.

9. The learned trial magistrate was informed by **Serah Korkoren (PW1)** that the appellant went to her house in search of food. This was at around 7 p.m., on the material day. While in the house, he offered to go and buy *mandazi* for **FK**, and the two went out. After about 30 minutes **FK** returned home and looked depressed. When he was asked about the mandazi, he started crying and volunteered information that he had been defiled.

10. **FK** on his part testified that when he accompanied the appellant who had promised to buy mandazi for him, he (appellant) defiled him per-anus. He said that he felt pain and cried. He was examined by **Jacob Chelimo (PW4),** a clinical officer who made a finding that there

was penetration. The P3 form indicated that there was a laceration at the anal orifice.

11. The complainant's mother gave his date of birth as 2nd June 2002. This therefore meant that at the time of the offence he was aged about $7^1/_2$ years. In spite of the discrepancies in the estimated age of the complainant as indicated in the medical documents, the oral evidence and the age indicated in the charge sheet , the offence fell within section8 (2) of the sexual offences Act. The complainant was less than eleven years. Section 382 of the Criminal Procedure Code provides:

> **Subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice:**

In my view this error did not occasion any miscarriage of justice and is therefore curable under section 382 of the Criminal Procedure Code.

12. From the analysis of the evidence on record, I find that the prosecution proved its case against the appellant beyond any reasonable doubt. There were no material contradictions or inconsistencies. The conviction was therefore safe based on the evidence on record.

13. The appellant in his submissions cited the now famous case of **Francis Karioko Muruatetu & another v Republic [2017] eKLR.** He contended that the trial court proceeded as if the life sentence was mandatory. The **Muruatetu** decision has been both misinterpreted and misapplied. The Supreme Court while addressing the issue of life sentence in the said decision at paragraph 96 said:

> **We therefore recommend that Attorney General and Parliament commence an enquiry and develop legislation on the definition of 'what constitutes a life sentence'; this may include a minimum number of years to be served before a prisoner is considered for parole or remission, or provision for prisoners under specific circumstances to serve whole life sentences. This will be in tandem with the objectives of sentencing.**

As far as I know, no legislation has been enacted to address the issue of life sentence. The Supreme Court was alive to the fact that it is not within the jurisdiction of the court to amend the law. Earlier on the Court of appeal had correctly stated the role of the court while addressing death penalty. This is what it said in the case of **Joseph Njuguna Mwaura & 2 others v Republic [2013] eKLR**

A look at all the provisions of the law that impose the death sentence shows that these are couched in mandatory terms, using the word '*shall*'. It is not for the Judiciary to usurp the mandate of Parliament and outlaw a sentence that has been put in place by Kenyans, or purport to impose another sentence that has not been provided in law. It has no jurisdiction to do so, and in the words of the Nyarangi J in *The Owners of Motor Vessel "Lillian S". vs. Caltex Oil Kenya Ltd [1989] KLR 1*:

> ***"Jurisdiction is everything. Without it, a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."***

This is the correct legal position. Our duty is to faithfully interpret the law and point out areas for rectification by the legislature. This is what the Supreme Court in Muruatetu case did. Usurping the role of the legislature will result in anarchy of unimaginable magnitude. The Court of Appeal in the case of **Joseph Njuguna Mwaura & 2 others** (supra) went on to observe:

> **In our understanding, courts have no jurisdiction in matters over which other arms of government have been vested with jurisdiction to act. Even under the new Constitutional dispensation, this court cannot properly or legitimately review the decisions of the people of Kenya, made during the referendum, or those of the legislation when those decisions are lawful. To say otherwise would be to act in complete contravention of the Constitution.**

I need not say any more on this subject.

14. In the instant case, the sentence meted out was legal sentence any other would have resulted in an illegality. The upshot of the foregoing is that the appeal is dismissed.

DELIVERED and **SIGNED** at **Nakuru this 12th Day** of September**, 2019**

KIARIE WAWERU KIARIE

JUDGE