



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 24 OF 2018**

**POO .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**RESENTENCING**

1. The appellant **POO** was vide Siaya PM CR Case (SO) No. 1 of 2016, convicted of the offence of **defilement contrary to Section 8(1) as read with Sub-Section 8(4) of the Sexual Offences Act**. The victim was aged 16 years then. He was sentenced to serve 15 years imprisonment by Hon. T.M. Olando – SRM, on 22.3.2018.
2. Dissatisfied with the conviction and sentence, the appellant appealed to this Court. His appeal was heard and determined on 22.7.2019 wherein this Court dismissed his appeal against conviction. On Sentence, the Court called for a pre-resentencing social inquiry report from the Siaya County Probation Officer, which report was only filed on 19.9.2019.
3. I have considered the Social Inquiry Report dated 18.9.2019 by Mr. David O. Odumba Probation Officer.
4. I have also considered the appellant's plea that he is remorseful and that he will not commit another offence. He pleads for leniency. That the complainant was his Auntie's daughter hence his Cousin and that they live together in the village. He stated that he had issues with his Aunt and that he is aged 39 years.
5. In the Social Inquiry Report, the appellant is said to be disciplined while in prison and he is married with 8 children. He is said to be disciplined and hardworking and provides for his family and his orphaned nieces and nephews and his aged widowed mother. His family is said to be suffering due to his absence. The said report too acknowledges that the defiled victim is his niece and in standard seven. The Probation Officer spoke to her guardians who told him that she was growing up normally and that because the appellant's family was suffering due to his long absence, he should be allowed to return home to provide for his children who are suffering, as his wife can hardly provide for them from peasantry and as they are frequently send out of school for lack of school fees.
6. The Probation Officer recommends a Probation sentence due to the pathetic situation of his family.
7. Having considered all the above, I note that from the evidence on record, the appellant took advantage of a young girl who was on her way, took her on a motorcycle and defiled her (**in the bushes**). He vehemently denied the offence and put up a spirited fight at the trial stage and on appeal but this Court has found overwhelming evidence linking him to the offence.
8. Whereas it was in his Constitutional right to challenge the trial and maintain his innocence, it is clear that the appellant had no respect for a child whom he was expected to protect. He instead took advantage of her and defiled her.
9. In my view, the appellant deserved a deterrent sentence despite his mitigation and the social inquiry report which paints a gloomy picture of his family who must learn to live without him as the rule of Law must be respected and upheld.
10. This Court cannot release the appellant on probation for such a heinous traumatic offence which is very prevalent in this part of the country. The appellant has a wife and therefore there is absolutely no justification for him to defile a young girl who was his relative.
11. The Probation Officer did not even make an effort to track down the victim of the offence who was in school at the time of the social inquiry. He should have spoken to her and even obtained her Victim Impact Statement which is critical in considering whether or not to be lenient to such an offender as the offence is traumatizing to the victims. In as much as I empathize with the appellant's family, this Court cannot decide cases or mete out sentences based on sympathy.

12. I note that the appellant was convicted on 22.3.2018. He has served one year and a half in prison. His appeal has been determined expeditiously. However, he must remain behind bars to be rehabilitated and to reform. He can benefit from remission of sentence in prison if he demonstrates good character and industry in prison, upon serving 2/3 of the sentence.

13. The Community is sympathetic towards the appellant because his family is suffering but they must understand that the Law and punishment for crime is for the benefit of the Society at large. They must therefore learn lessons from such convictions and educate others to be Law abiding and responsible Citizens.

14. As the sentence meted out was a mandatory minimum though lawful, I would exercise discretion and reduce the sentence to ten (10) years imprisonment to be calculated from 22.3.2018.

15. Orders accordingly.

**Dated, signed and delivered at Siaya this 16<sup>th</sup> day of October, 2019.**

**R.E. ABURILI**

**JUDGE**

**In the presence of:**

The appellant in person

Mr Okachi Snr Principal Prosecution Counsel for the Respondent State

CA: Brenda and Modestar