



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 21 OF 2019**

**EDWIN OMONDI OCHARE .....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

***(From Original Conviction and Sentence in Siaya PM Cr C [S.O.] 510 of 2014 dated 22.5.2015 before Hon. H. Wandere – P.M.)***

**JUDGMENT**

1. The appellant **Edwin Omondi Ochare** was vide Siaya P.M. [S.O.] case No. 510/2014 charged, tried and convicted of the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual offence Act No. 3 of 2006. He was sentenced to serve 20 years imprisonment on 22.5.2015.
2. The particulars of the offence were that on the night of 14<sup>th</sup> and 15<sup>th</sup> June 2014 at Gongo sub-location in Gem Sub-County of the Siaya County intentionally caused his penis to penetrate the vagina of BAA [ full name withheld] a child aged 14 years. The appellant had pleaded not guilty to the charge which also had the alternative charge of committing an indecent act with a child BAA aged 14 years.
3. At the time of the said alleged offence, the appellant was aged 18 years and he is now 22 years.
4. From the Birth Certificate No.[xxxx] for the Complainant, she was born on 8.5.1999. She was therefore aged 15 years.
5. The Appellant challenged the conviction and sentence meted out in 2015 but filed this appeal on 4.4.2019 together with an application for leave to file the appeal out of time. However, the application was never brought up for consideration. It is not the appellant's fault. It is the registry that failed to flag out the application from the Petition of appeal. Since the appellant filed the petition of appeal out of time simultaneous with the application for leave to file an appeal out of time, and as he is in prison custody, in my humble view, he should not be prejudiced by the failure to admit his appeal out of time. I exercise discretion and extend the period for filing of the appeal out of time and deem this appeal as duly filed within time. The reason for delay is that he believed that his family had lodged the appeal out of time but failed to do so.
6. Back to the validated appeal, the appeal was admitted to hearing on 12.6.2019 after the trial Court record was availed on 31.5.2019.
7. A mention date was then set for 15.7.2019 for directions and fixing of the hearing date, which date was set for 5.11.2019.
8. On the latter date, the appellant addressed the Court by saying that he did not want to disturb the Court that he committed the offence and was therefore rightly convicted. He only urged the Court to consider sentence reduction of 20 years imprisonment. He applied to withdraw his appeal.
9. The Prosecution led by Mr. Okachi Senior Principal Prosecution Counsel did not oppose the application to withdraw the appeal against conviction.
10. The appellant then submitted that he was a young man aged 22 years and had learnt carpentry and joinery while in prison. That he used to be a workman for somebody at the time of the offence. That he will not repeat the offence. That he was 18 years then and he knows he did the wrong thing. He then presented the Court with a letter of recommendation from the G.K. Kodiaga Maximum Prison, dated 28.10.2019 to the effect that he had qualified in various life's skills including carpentry and joinery and tested by (NITA) in Grades III and II. That his general character and discipline are exemplary. The above recommendation letter attached relevant certificates showing the relevant qualifications of the appellant.
11. The appellant pleaded with the Court saying that he had reformed and ready to get back into the society.

12. Prosecution Counsel submitted quite correctly that sentence meted out was legal as the offence was heinous and the Complainant was young. However, upon seeing the letter of recommendation from Officer-in-Charge Kodiaga Prison, Counsel for the prosecution-Respondent submitted that the appellant having acquired life's skills can help himself out there now that he is said to be well behaved.
13. I have considered the appeal herein against sentence as the appeal against conviction is hereby marked as withdrawn on the appellant's own application.
14. I have also considered the appellant's plea for leniency and the fact that while in prison he has learnt life skills and the officer-in-charge has written a good recommendation for him in terms of discipline and character while in prison.
15. I have also considered the fact that the appellant was aged 18 years old at the time he committed the offence and although he denied the charges, leading to a full trial, he has saved this court's time and resources of hearing the entire appeal and revisiting the evidence before the trial court. I also take judicial notice of the fact that sentence imposed on the appellant is the mandatory minimum sentence under Section 8(3) of the Sexual Offences Act.
16. However, examining particulars of the charge that stated that the Complainant was aged 14 years and her oral testimony and that of PW2 her guardian that the victim was 14 years, and comparing that with the birth certificate No. [xxxx] dated 8.4.2013 showing that the victim was born on 8.5.1999, and considering the fact that the offence took place on the night of 14<sup>th</sup> and 15<sup>th</sup> June 2014, I find that the victim was at that material time of the offence, aged 15 years old and not 14 years old.
17. That being the case the trial court should have invoked the provisions of Section 214 of the Criminal Procedure Code and amended the charge and proceeded to convict the appellant under Section 8(4) of the Sexual Offences Act, instead of Section 8(3) of the Sexual Offences Act. The latter subsection carries a lesser mandatory minimum sentence of 15 years imprisonment.
18. The effect of amending the charge would have been to the benefit of the appellant as the evidence on record by way of Birth Certificate showed that the Victim age was 15 years and not 14 years.
19. Under Section 8(4) of the Sexual Offences Act, upon conviction of the offence of defilement of a child under Section 8(1) of the Act, the mandatory minimum Sentence is 15 years imprisonment and not 20 years imprisonment which in this case was imposed upon the appellant.
20. From the above analysis, therefore, it is clear that the appellant was sentenced under a wrong Section of the law which would see him spent in prison n extra 5 years which would be prejudicial to him as he would be serving an illegal sentence.
21. Having said that, I proceed as the first appellate court and in exercise of supervisory and revisionary jurisdiction, I set aside the sentence meted out on the appellant by trial court under Section 8(3) of the sexual offences act and substitute it with an order resentencing the appellant under section 8(4) of the Sexual Offences Act.
22. The Appellant is, as earlier indicated, had readily admitted committing the offence with a minor whom this court has found was aged 15 years. He is remorseful and pleads for leniency. The sentences under sexual offences Act are mandatory minimum and therefore for a very long time, such sentences could not be revised even on appeal until the Court of Appeal, applying the principles set out in the **Supreme Court Petition Nos. 15 and 16 of 2015 in Francis Karioko Muruatetu Vs. Republic** held that the mandatoriness of death sentence is unconstitutional for reasons that is deprived the court of its judicial discretion to sentence as sentencing is a matter of judicial discretion to be exercised by the trial court. Secondly, that such mandatory sentence also deprived the accused persons the right to mitigate.
23. The Court of Appeal has applied the above principles to sentencing under the Sexual Offense Act and in **Jared Koita Injiri vs. Republic [2010] eKLR Court of Appeal CRA NO. 93 of 2014 at Kisumu**, the Court of Appeal held that mandatory sentences meted out in Sexual Offences can be interfered with taking into account the principles set out in the **Francis Karioko Muruatetu(supra case)**.
24. Applying the above principles to this appeal, I note that from the evidence on record, the complainant innocently used to sneak out of her Aunt's house at night and go to the Appellant's residence where he worked as a houseboy and caretaker of a house whose owner lived away. She would then have sex with the Appellant and return to her aunt's house at about 3 a.m. Her Aunt suspected her and laid a trap and that is when on the material night of 14<sup>th</sup> and 15<sup>th</sup> June 2014, she spotted the victim to have come from one such night-out with the Appellant.
25. The age difference between the Appellant and the Victim is only 3 years. The Appellant was 18 years and still appears like he is just 20 years old.
26. Since his incarceration on 15.6.2014, he has been in prison for now 5 years and four months. He concedes that what he did was wrong and he promises never to repeat an offence. The prisons authorities attest to the fact that the appellant is of good character and disciplined in prison.
27. The victim, out of ignorance and innocence so to say, asked the trial Court to forgive the accused person because according to her, she had willingly gone to have sex with the appellant. What I gather from such statement of the Victim is that she was not aware that at her age, she had no capacity to consent to consensual sex hence she could not be heard to say what she said in court that:
- “I ask the Court to forgive this Accused. He never forced me. I will now continue with schooling.”***
28. The child did not appreciate the risks involved in being defiled by the Appellant, which include contracting syphilis which she was found to be suffering from and so was the Appellant upon being medically examined.

29. As an adolescent, she could also have easily become pregnant thereby dropping out of school besides risking contracting HIV/AIDS virus as she was having unprotected sex with the appellant and that is why both of them were found to be suffering from syphilis, a sexually transmitted disease.

30. As a child, the Complainant is vulnerable and that is why the legislature legislated harsher sentences believing that such sentences would deter the would be sex pests or pedophiles.

31. Regrettably, the opposite is the scenario. As each day passes, I consider several criminal appeals and determine them. Over 98% of all the criminal appeals in this Court are defilement related and the ages of the Complainants, majority of whom are females, range between 1 year and 17 years. That being the case, Kenya as a country being part of the globe must, and it is time that now strategies are adopted to deal with this menace of sexual offenders.

32. Child protection is essential for the survival of human kind. Children who are defiled are indeed traumatized and some of them end up dropping out of school. Others contract serious ailments which ruin their lives and they spread it to others thereby eliminating the whole population through serial infections.

33. I have said enough but I have not mourned enough for the girl child. There is need, in my humble view, to mount community outreach programs that would educate the population of the need to protect children from sex pests. Sadly, majority of the sex offenders are older men defiling younger children. It is therefore not about young men rotting in jail but all men including an 80 year old in one of the cases who even claimed that his penile function was nil and that he could therefore not have defiled a child, notwithstanding the overwhelming evidence against him as he was found in the actual act. It is sad indeed and one cannot help but feel sad all the time whenever each red file is called out in this Courtroom. The Charge is always: ***“defilement contrary to Section 8(1) as read with Section 8(2),8(3) and 8(4) of the Sexual Offences Act No. 3 of 2006.”***

34. Having said all that but not enough of what I have to say by way of lamentation, I must nonetheless bring myself to back to this particular case. The Appellant is a young man who was only 18 years and the victim child was 15 years. The Appellant is remorseful. As to whether given as chance to get back into the society he will re-offend, the same law that protects children from sex pests and which caught up with him is still alive. It will still catch up with him because then law has a long arm. It is however expected that all persons take responsibility to protect children. That is what is expected of us all.

35. The discretion is now in my hands, which discretion I must exercise judiciously. I have agonized over this case and applying the sentencing guidelines, I note that the object of sentencing, among others, is retribution, deterrence, Rehabilitation, Restorative Justice, Community Protection and Denunciation.

36. Although the policy guidelines mandate the court to be bound by minimum sentences imposed by the law, this Court has just laid the basis upon such guidelines would be contrary to and or inconsistent with Judicial pronouncements coming from Superior Courts whose decisions bind this Court.

37. In my humble view, and in line with the sentencing policy guidelines, mitigating circumstances and the decisions from the Superior courts, the circumstances in this case warrant a more lenient penalty than would be ordinarily imposed. The circumstances in this case include: age of the offender and the victim. The offender being a first offender, his remorsefulness and admission of the offence on his first appearance at the hearing of this appeal and his good character and discipline while in prison.

38. Taking all the above circumstances into account, and as the appellant has already served 5 years of the 20 illegal years imprisonment imposed, which I have revised to 15 years owing to age of Complainant, I order that the Appellant herein **Edwin Omondi Ochare** shall serve a prison term of 5 years and 6 months imprisonment to be calculated from the date when he was first arraigned and held in custody on 15.6.2014.

39. Accordingly, the 20 years imprisonment imposed on the Appellant, instead of 15 years imprisonment is hereby set aside and substituted with a prison term of 5 years and six months.

40. The Appellant shall therefore, unless otherwise lawfully held, be released from prison on 14.12.2019.

41. Orders accordingly.

**Dated, Signed and Delivered at Siaya this 11<sup>th</sup> day of November, 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