



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 110 OF 2017**

**NICHOLAS WAMBUA KITHEKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the sentencing from Hon I. M. Kahuya (SRM) in the Chief Magistrate's Court at Machakos in Criminal Case No. 24 of 2015 delivered on 7/01/2016)***

**JUDGEMENT**

1. The Appellant was charged and convicted with the offence of defilement contrary to Section 8(1) as read with section 8(4) of the Sexual Offences Act. He was sentenced to 15 years imprisonment by the trial court in accordance with Section 8(4) of the Sexual Offences Act.
2. He then filed the appeal that seems to be hinged on the severity of the sentence. He indicated that he has reformed and acquired skills whilst in custody hence ought to be given a second chance. He also sought that the period spent in custody should be considered.
3. Mr. Cliff Machogu for the respondent opposed the application on the grounds that there is a mandatory sentence imposed by the law.
4. The issue for determination is whether the court may review the sentence.
5. Section 333 (2) of the Criminal Procedure Code states:

***“(2) Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.***

***Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.”***

6. It is the considered opinion of this court having had due regard to Section 333(2) of the Criminal Procedure Code that the application by the applicant has merit. Accordingly, this court finds that the computation of fifteen (15) years that the applicant was sentenced to be inclusive of the 2 years 11 months and 10 days that he was in remand to run from 7.9.2015 when he was arrested as he remained in custody the entire period of his trial.
7. On the second limb, the appellant has sought a variation of sentence that was imposed on him. The legislature has prescribed a minimum mandatory term of imprisonment of 15 years for such cases involving a victim aged between 15 and 18 years. This court notes the legislation provides that it is bound by minimum mandatory sentences (see Section 8(4) of the Sexual Offences Act).
8. Section 382 of the Criminal Procedure Code provides for instances where finding or sentence are reversible by reason of error or omission in charge or other proceedings. It states that:

***“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:***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings.”***

9. It is to be noted that the discretionary power exercisable by the court in sentencing with regard to capital offences had been well pronounced. (See **Francis Karioko Muruatetu & another v Republic [2017] eKLR**).

10. According to the Judiciary Sentencing Policy Guidelines, where the law provides mandatory minimum sentences, then the court is bound by those provisions and must not impose a sentence lower than what is prescribed. The guidelines indicate that the only recourse is reform of the law. See **Kennedy Munga v. Republic [2011] eKLR** in which an order for probation in a defilement case was held to be illegal and was revised to fifteen years.

11. Be that as it may, the preamble to the Sexual Offences Act provides that it is “**An Act of Parliament to make provision about sexual offences, their definition, prevention and the protection of all persons from harm from unlawful sexual acts, and for connected purposes**”

12. The authors of the act had in mind the protection of vulnerable members of society and the welfare of children hence accused persons convicted of such offences shall not expect leniency from the courts unless the circumstances really merit an interference with the sentence. Children are a precious gift from God and represent the future generation. They must be jealously protected, properly nurtured and given all the required support and care by each and every adult person instead of taking advantage of them.

13. In the Judiciary Sentencing Policy Guidelines “The guiding principles in sentencing are summed up in four words: retribution, deterrence, rehabilitation, restorative justice, denunciation and community. The authors of the Sexual Offences Act had in mind retribution in punishment of this crime to express the pain and disgust of the society when it convicts an accused with such a crime. They were aware of the lasting trauma the victims have suffered and will continue to suffer. Further the victim will have to live with the stigma of being a victim of sexual abuse for the rest of her life. Paedophiles are a curse unto our society and our children need to be protected from their acts. The specific provisions of the Sexual Offences Act relating to paedophiles need to be applied by the courts in the way it was intended so as not to normalize such deviant behaviour. I find that the sentence imposed by the trial court was neither wrong in principle, nor manifestly excessive nor illegal nor is there a miscarriage of justice and I do not propose to interfere with the said sentence since the same is the possible minimum in law. Under Section 8(4) of the Sexual Offences Act a person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. The appellant has not complained that the sentence was unlawful as his only request is that this court do reduce the sentence imposed on him. I find the appellant has not convinced this court that the sentence imposed was unlawful. The only relief however is that the period spent in custody will be factored in the sentence.

14. In the result the appeal partly succeeds. The sentence of 15 years by the trial court is ordered to commence from the 7.9.2015.

It is so ordered.

**Dated and delivered at Machakos this 11<sup>th</sup> day of November, 2019.**

**D. K. Kemei**

**Judge**