



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**MISCELLANEOUS CRIMINAL CASE NO. 40 OF 2019**

**EMMANUEL JAPALA ELIAKIM.....APPLICANT**

**VERSUS**

**REPUBLIC.....DIRECTOR OF PUBLIC PROSECUTIONS**

**RULING**

1. The applicant herein was convicted in Butere PMCCRC No. of 56 of 2016, of defilement, contrary to section 8(1), as read with section 8(2) of the Sexual Offences Act, No. 3 of 2006, and sentenced to life imprisonment. The victim of the sexual assault was aged seven (7) years at the time of the offence. The applicant filed an appeal at the High Court, Kakamega HCCRA No. 69 of 2017, where the conviction was affirmed and the sentence upheld, on the basis that it was a mandatory sentence where the victim was below eleven years, and the hands of the court were tied.

2. There are recent developments in the Kenyan jurisprudence with respect to mandatory sentences. The Court of Appeal and the Supreme Court has led the way. It is from that background that the appellant has now moved the court in the instant cause, through an originating Motion, undated, but filed herein on 10<sup>th</sup> June 2019. The same principally seeks re-sentencing in view of the developments that I have referred to hereabove.

3. Upon conviction, the applicant pleaded for leniency. The trial court called for a pre-sentencing report. The probation office placed one on record, dated 26<sup>th</sup> June 2017. It recorded that the appellant was eighteen years old, and generally well regarded in his community, and those interviewed could not understand how the otherwise well-behaved young man did such a dastardly act to a girl so young. The hands of the trial court were, of course, tied, and it imposed the mandatory sentence of life imprisonment.

4. When this matter was placed before me for the purpose of re-sentencing, I called for a re-sentencing report. The probation office filed one on 21<sup>st</sup> October 2019, dated 18<sup>th</sup> October 2019. It is favourable to the applicant. It speaks well of him, based on interviews with him, the community and the prison service. That should be good enough for me to favourably look into his case.

5. I note, though, that the victim of his crime was a child of tender years, aged just seven years. No one can be as innocent as such. To be subjected to sexual assault by an adult of eighteen must have visited untold trauma on that young soul, who could not at all comprehend what was befalling her. The scars inflicted as a result of such misconduct live with such child victims for the rest of their lives.

6. It is difficult to understand what would drive an adult to assault such a small child, when there are possibly lots of mature females willing and able to meet the sexual needs of such an adult. He could, perhaps, had been labouring under psychological problems of a kind, or was high on some drug or some similar substance. Anyhow, no evidence was placed before the trial court or the appellate court, or even this court, with respect to the instant application, to explain or excuse his misconduct, if the same is capable of such explanation or excuse.

7. The bottom-line is that he preyed on a child of tender years. The Sexual Offences Act, by providing very stiff penalties for such misconduct, no doubt, intended to afford some protection to such defenceless children. The answer to such misconduct is to keep those who engage in it far away from those that they are likely to hurt so badly. Society is safer that way. It affords the offender the opportunity to pay for his crimes and to reflect on his evil ways, and, hopefully, change for the better.

8. In the spirit of *Francis Karioko Muruatetu & another vs. Republic* [2017] eKLR, I do hereby quash the sentence of life imprisonment that was imposed on the applicant by the trial court, and substitute it with a sentence of thirty (30) years imprisonment, to run from the date of conviction on 19<sup>th</sup> June 2017. It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 11<sup>TH</sup> DAY OF DECEMBER, 2019**

**W. MUSYOKA**

**JUDGE**