

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

CRIMINAL REVISION NO 24 OF 2016

MISHACK MUTUMA.....APPLICANT

- VERSUS-

REPUBLIC.....RESPONDENT

(From original conviction and sentence in Criminal Case No. 92 of 2015 of the Senior Resident Magistrate F.M. NYAKUNDI - RM in Marimanti Court)

R U L I N G

1. **MESHACK MUTUMA** the applicant herein was charged with the offence of defilement contrary to **Section 8(1) (2)** of Sexual Offences Act No. 3 of 2006 vide ***Marimanti PM's Court Criminal Case No.92 of 2015***. The particulars of the charge presented in the trial court were that on 6th March 2015 in Tharaka South District within Tharaka Nithi County intentionally caused his penis to penetrate to the vagina of a child named (name withheld) aged 14 years. The applicant denied the charge but after trial the applicant was found guilty and convicted and sentenced to serve 20 years imprisonment.

2. The applicant has now moved this court for a review of his sentence under **Sections 362 and 364** of the Criminal Procedure Code on the grounds that though he is satisfied with the conviction, he is asking this court for a review of the sentence in view of the fact that he has since learnt his lessons and regrets committing the offence. He has also pointed out that he is young man aged 24 years old and would wish to start a family of his own because his parents are 100 years old and depend on him for assistance.

3. I have considered this application for a review of sentence meted out against the applicant. I have looked at the court proceedings from the lower court where the applicant was charged. I have noted that there was a minor defect on the charge sheet which indicated that the applicant was being charged with the offence of defilement contrary to **Section 8(1)(2)** instead of **Section 8(1)** as red with **Section 8(3)** of the Sexual Offences Act. I have however noted with satisfaction that the trial court noted the error and correctly found that the same was curable under **Section 382 of the Criminal Procedure Code** as the same defect did not affect the substance of the charge or led a miscarriage of justice. This court finds that the applicant herein was correctly convicted under **Section 8(3)** of the Sexual Offence Act No. 3 of 2006 and is satisfied with that conviction.

4. The applicant has involved this court's power under **Sections 362 and 364** of the Criminal Procedure Code to call for the lower court's record for purposes of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such subordinate court. I did call for the lower court record and went through the proceedings and apart from grammatical hitches which could have been caused by challenges in translations, I do not find any significant or substantial ground or basis to invoke my powers under **Section 362** of the Criminal Procedure Code. The complainant was aged 14 years as per birth certificate tendered in evidence as P Exh.II. The trial court hands were tied by the clear provisions of the law under **Section 8(3)** of the Sexual Offence Act which reads as follows:-

"A person who commits an offence of defilement with a child between the ages of twelve and fifteen years is liable upon conviction to imprisonment for a term not less than twenty years."

The sentence could be seen as harsh given the circumstances and the age of the applicant but then that is the law and the lower court completely had no choice or discretion over the same. He was obligated to

hand applicant, the minimum sentence of 20 years as provided by law which he did and that was perfectly legal, regular and proper given the cited provisions of the law.

In the premises this court finds no merit in this application for review. The same is disallowed.

Dated and delivered at Chuka this 8th day of March, 2017.

R .K. LIMO

JUDGE

8/3/2017

Ruling signed, dated and delivered in open court in Macharia for the state and the applicant in person.

R.K. LIMO

JUDGE

8/3/2017