

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL REVISION NO. 26 OF 2017

G K K.....APPLICANT

VERSUS

REPUBLIC.....RESPONDENT

RULING

The application herein is for revision of sentence imposed on the Applicant. He was charged with the offence of defilement contrary to **Section 8(1)** as read with **Section 8(2) of the Sexual Offences Act**. It is alleged that on the diverse dates between January 2014 and July 2015 at [particulars withheld] in Riruta within Nairobi County, the Applicant unlawfully and intentionally caused his penis to penetrate the vagina of C M, a child aged 9 years. He was charged in the alternative of an indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act**. It was alleged that on the diverse dates between January 2014 and July 2015 at [particulars withheld] in Riruta within Nairobi County, the appellant unlawfully and intentionally committed an indecent act on C M, a child aged 9 years.

The Applicant denied the charges leveled against him. The court, however, found him guilty of the offence of incest contrary to **Section 20(1) of the Sexual Offences Act** and sentenced to serve 10 years imprisonment as well as having his daughter kept away from him for 10 years in accordance with the **Section 114 orders of the Children’s Act Cap 141**. The sentence was passed on 1st of February 2017.

In his application, the Applicant requests the court to grant him a non-custodial sentence as well as having his child returned to him. The State, through the Learned Counsel Ms. Sigei opposed the application. She submitted that the Applicant, being the father of the complainant was able to exert his control and authority and therefore intentionally defiled her. She added that the Applicant was not properly charged under Section 2(1) and that the court should impose the proper sentence.

The lower court file in Kibera **Criminal Case No. 63 of 2015** was forwarded to this court so that this court, pursuant to **Section 362 of the Criminal Procedure Code** can satisfy itself as to the correctness or legality of the sentence. I have considered the application itself and the circumstances surrounding the case. This court under its supervisory jurisdiction over the courts subordinate to it under **Section 364 of the Criminal Procedure Code** is conferred with powers to correct any irregularity or illegality committed by a subordinate court. It is clear that the learned trial magistrate passed an illegal sentence. **Section 20(1) of the Sexual Offences Act** reads thus:

“Any male person who commits an indecent act or an act which causes penetration with a female person who is to his knowledge his daughter, granddaughter, sister, mother, niece, aunt or grandmother is guilty of a an offence termed incest and is liable to imprisonment for a term of not less than ten years.”

Provided that, if it is alleged in the information or charge and proved that the female person is under the age of eighteen years, the accused person shall be liable to imprisonment for life and it shall be immaterial that the act which causes penetration or indecent act was obtained with the consent of the female person.”

It is clear in the charge sheet that the complainant, C M, was noted to have been 9 years of age. The Applicant confirms that the complainant is indeed his daughter and that she was 9 years of age as confirmed by PW2 and himself. Thus the age of the victim was legally established.

Section 364 (1)(a) of the Criminal Procedure Code obligates this court in an application for revision to exercise any of the powers conferred on it as a court of appeal by Sections 354, 357 and 358 of the Act and may enhance the sentence. Section 354(3)(b) provides that where there are sufficient grounds in an appeal against sentence, the court may increase or reduce the sentence or alter the nature of the sentence. In the circumstances, it is gainsaid that the wrong sentence having been passed this court is obligated to correct the error by passing the correct sentence.

Accordingly, I set aside the 10 years imprisonment term and substitute the same with an order that the Applicant shall serve life imprisonment from the date of the sentence. With regard to the orders provided for under **Section 114(c) of the Children's Act**, the Applicant is barred from contact and authority over the complainant for the next 9 years until she attains the age of 18. It is so ordered.

DATED and DELIVERED this **9th** day of **May, 2017**

G.W. NGENYE-MACHARIA

JUDGE

In the present of

- 1. Applicant in person*
- 2. M/s Nyauncho for the Respondent*