



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, MURGOR & SICHALE, JJ. A)**

**KISUMU CRIMINAL APPEAL NO. 98 OF 2014**

**BETWEEN**

**CHRISTOPHER TSAVULA LIANGA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a conviction and sentence of the High Court of Kenya*

*at Kakamega (G. B. M. Kariuki, J.) dated 22nd October, 2008*

*in*

*H.C.C.R.A. No. 42 of 2007)*

\*\*\*\*\*

**JUDGMENT OF THE COURT**

**Christopher Tsavula Lianga** (the appellant) is an old man in his late 70s. He was arrested and charged before the Senior Resident Magistrate Court Vihiga with the offence of defilement of a girl child contrary to **Section 8(1)(2) of the Sexual Offences Act No. 3 of 2006**. After the charge and all particulars were read over to him in Kiswahili language which he clearly understood, he admitted having defiled the girl. The detailed facts were read over to him and he admitted them saying that he committed the offence as a result of “*emotional confusion*”.

The learned trial Magistrate convicted him and sentenced him to life imprisonment which she said was the minimum mandatory sentence prescribed in law.

Aggrieved, the appellant moved to the High Court challenging both conviction and sentence. The learned Judge (G.B.M. Kariuki (as he then was) held, and rightly so, that the appellant could not challenge the conviction by dint of section **348 Criminal Procedure Code**, having pleaded guilty on plea.

On the sentence, the learned Judge expressed himself as follows:-

**“... the estimated age of the complainant is about 11 years. In the circumstances, the court was bound to met (*sic*) out the sentence provided under section 8(2) of the **Sexual Offences Act No. 3 of 2006** which is imprisonment for life. I find no merit in the appeal. I hereby dismiss it.”**

Undeterred, the applicant has now moved to this Court in an ardent plea that his sentence be reduced in view of the Supreme Court decision in **Francis Karioko Muruatetu (2015) eKLR**. His submission is a long address in mitigation. He pleads that he has reformed while in prison; he is very remorseful and has sought for forgiveness from the complainant; he has been incarcerated for almost 13 years and has become sickly and senile in prison. He entreats the court to reduce the sentence to the term already served.

In response, vide the written submissions dated 6th July, 2020, the principal prosecution counsel, appearing for the state, reiterates that both conviction and sentence are legal and by dint of **section 361(1) of the Criminal Procedure Code**, severity of sentence is a

matter of fact and not law, hence this appeal does not lie.

The learned state counsel nonetheless concedes that since the impugned sentence was passed before the Supreme Court's decision in the **Muruatetu Case** (Supra), and in view of the appellant's age and other circumstances surrounding the matter, the Court can interfere with the sentence and reduce the same to a term of 20 years' imprisonment.

We have considered the submissions by the appellant and the learned counsel for the state. We reiterate that ordinarily, severity of sentence is a matter of fact that this Court would be precluded from dealing with it by dint of **section 361(1) of the Criminal Procedure Code**.

We nonetheless appreciate that the law has changed during the pendency of the appellant's appeal and the findings by the learned Magistrate and learned Judge of the High Court have since been displaced by the Supreme Court decision in the Muruatetu case (*supra*), which decision has been applied in many decisions of this Court. See **Jared Koita Injiri v. R. 2019 eKLR**.

In view of the above, we hold the view that the appellant is entitled to a review of his sentence as his matter is still live. We note that he has offered detailed mitigation in his submissions. We wish to emphasise the fact that the offence he committed was a heinous one which must be discouraged at all costs. Nonetheless, in view of the appellant's advanced age and poor health, we allow **the appeal and set aside the sentence of life imprisonment and substitute thereof**

a sentence to the term already served.

**Dated and delivered at Nairobi this 25th day of September, 2020.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**A. K. MURGOR**

.....

**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**