



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)**

**CRIMINAL APPEAL NO. 154 OF 2015**

**BETWEEN**

**JARED OKOTH AKUNO.....APPELLANT**

**AND**

**REPUBLIC .....RESPONDENT**

*(Appeal from the judgment of the High Court of Kenya at Homa Bay (Majanja, J.) dated 9<sup>th</sup> July, 2015  
in*

**HCCRA NO. 106 of 2014.)**

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**JUDGMENT OF THE COURT**

[1] The appellant was convicted by the trial court on his own plea of guilty to a charge of defilement contrary to **section 8(1) and (3) of the Sexual Offences Act, 2006** and sentenced to 20 years' imprisonment. The appellant had defiled a child aged 13 years.

That notwithstanding, the appellant preferred an appeal to the High Court (**D. S. Majanja, J.**) against the conviction and sentence. His appeal was however unsuccessful.

[2] The appellant preferred a second appeal to this Court. In his self-drawn memorandum of appeal, the appellant alleged that the age of the complainant was not proved; that the doctor who filled the P3 form was not called to testify; and that the sentence was quite severe, considering that he was barely 18 years old at the time he was convicted and sentenced.

[3] When the appeal came up for hearing, the appellant relied on his one page written submissions that he briefly highlighted.

[4] **Mr. Kakoi**, learned Principal Prosecution Counsel, opposed the appeal. In his written submissions, counsel stated that this being a second appeal, by dint of **section 361(a) of the Criminal Procedure Code**, the Court can only deal with matters of law; and that the plea was properly taken and the age of the complainant proved by production of a P3 form, where a doctor assessed the complainant's age to be

between 12 and 13 years.

[5] On the issue of sentence, Mr. Kakoi submitted that following the ratio by the Supreme Court in **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC [2017] eKLR**, the Court can vary the sentence. He stated:

***“In our view, given that he took responsibility for what he did without going to full trial, the State has no issue even if he is sentenced to time already served.”***

[6] We have considered the record of appeal and the submissions made as summarized above. This is a second appeal and **section 361(1)** of the **Criminal Procedure Code** enjoins this Court to consider matters of law only. In **NJOROGE V REPUBLIC [1982] KLR 388** Page 389, the Court held:

***“On this second appeal, we are only concerned with the points of law and consider ourselves bound by the concurrent findings of fact arrived at in the courts below, unless shown to be based on no evidence.”***

[7] The issue regarding the complainant’s age is one of fact, and the two courts below established that she was aged between 12 and 13 years. We cannot revisit that issue. There was no need to call a doctor to produce the P3 form, which showed the doctor’s findings as to whether the complainant had been defiled or not, given that the appellant had pleaded guilty to the charge of defilement. The appeal against conviction must therefore fail.

[8] As regards sentence, **section 361(1)(a)** of the **Criminal Procedure Code** states that severity of sentence is a matter of fact; and this Court cannot hear a second appeal on a matter of fact. Similarly, under **section 361(1)(b)**, the Court cannot hear an appeal against sentence, except where a sentence has been enhanced by the High Court, unless the trial court had no power to pass the sentence in the first place. This was not the case here. That notwithstanding, the learned Principal Prosecution Counsel submitted that in view of the recent Supreme Court decision in **FRANCIS KARIOKO MURUATETU & ANOTHER V REPUBLIC** (supra), this Court can vary the mandatory sentence that was passed by the trial court and affirmed by the High Court.

[9] **Section 8(3)** of the **Sexual Offences Act, 2006** prescribes a mandatory sentence of 20 years’ imprisonment upon conviction for the offence of defilement where the complainant’s age is between 12 and 15 years. The trial court’s hands were tied; the learned magistrate had to pass the prescribed sentence.

[10] In **FRANCIS MURUATETU** matter (supra), the Supreme Court, after a careful and thorough review of the law with regard to mandatory death sentence delivered itself as follows:

***“48. Section 204 of the Penal Code deprives the court of the judicial discretion in a matter of life and death. Such law can only be regarded as harsh, unjust and unfair. The mandatory nature deprives the courts of their legitimate jurisdiction to exercise discretion not to impose the death sentence in an appropriate case. Where a court listens to mitigating circumstances but has, nevertheless, to impose a set sentence, the sentence imposed fails to conform to the tenets of fair trial that accrue to accused persons under Article 25 of the Constitution; an absolute right.”***

[11] In **DISMAS WAFULA KILWAKE V REPUBLIC [2019] eKLR**, where the appellant was convicted for the offence of defilement of a child contrary to **section 8(1)** as read with **section 8(3)** of the **Sexual Offences Act, 2006** and sentenced to 20 years’ imprisonment, this Court stated:

***“... we hold that the provisions of section 8 of the Sexual Offences Act must be interpreted so as not to take away the discretion of the court in sentencing. Those provisions are indicative of the seriousness with which the Legislature and the society take the offence of defilement. In appropriate cases, therefore, the court, freely exercising its discretion in sentencing, should be able to impose any of the sentences prescribed, if the circumstances of the case so demand. On the other hand, the court cannot be constrained by section 8 to impose the provided sentences if***

***the circumstances do not demand it.”***

[12] In the matter before us regarding sentence, to the extent that the legality of the sentence passed is in question, in light of the jurisprudential shift as highlighted above, is no longer an issue of fact; it is one of law. This Court therefore has jurisdiction to consider the appeal.

[13] The appellant was barely 18 years when he committed the offence, as noted by the learned trial magistrate. The facts of the case as narrated by the prosecution, and which were admitted by the appellant were as follows:

***“The complainant was at her grandmother’s house together with a lady friend when their grandmother had gone to attend a funeral. Then the accused person seduced the complainant at the said house, who was aged 13 years old (sic). Before the complainant agreed to the accused’s approach, the accused dragged her to the bedroom and forced her to have sex with her (sic). He thus defiled her and he told the complainant not to inform anybody as he could take care of all her needs.”***

[14] Upon conviction on his own plea of guilty, the prosecution indicated that the appellant had no previous conviction. In mitigation, the appellant stated:

***“I am a 1<sup>st</sup> offender. I swear and promise that I shall not repeat the offence.”***

[15] The appellant has been in prison custody since 28<sup>th</sup> February, 2012. Considering his age at the time he committed the offence; the circumstances under which the offence was committed; that he readily pleaded guilty to the said charge and thus saved the trial court valuable judicial time; the submissions by the learned Principal Prosecution Counsel; and considering that he was remorseful, we are inclined to interfere with the sentence that was passed by the trial court. We hereby set aside the sentence of imprisonment to 20 years and substitute therefor sentence of imprisonment to a term of 15 years from the date of conviction.

**Dated and delivered at Kisumu this 21<sup>st</sup> day of November, 2019**

**D. K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCI Arb**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**