Case Number:	Criminal Appeal 170 of 2019
Date Delivered:	15 Dec 2021
Case Class:	Criminal
Court:	High Court at Bungoma
Case Action:	Judgment
Judge:	David Kipyegomen Kemei
Citation:	Stanely Wefwila Benjamin v Republic [2021] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Criminal
History Magistrates:	Hon. G. Adhiambo (P.M)
County:	Bungoma
Docket Number:	-
History Docket Number:	Sor Cr 50 of 2018
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO. 170 OF 2019

STANELY WEFWILA BENJAMIN.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the conviction and sentence of Hon. G. Adhiambo (P.M) delivered on

30th October, 2019 at SPM'S Court at Kimilili SOA CR NO. 50 OF 2018)

BETWEEN

REUBLIC .....PROSECUTOR

AND

STANELY WEFWILA BENJAMIN.....ACCUSED

JUDGEMENT

1. The Appellant herein filed a petition of appeal on **05th November, 2019** and later on filed an amended petition of appeal for revision of sentence only on **29th November, 2021** seeking for review of sentence that had been passed by **Hon. Adhiambo** Principal Magistrate in Kimilili SPM's Court sexual offence case number **50 of 2018** in which the Appellant was sentenced to serve ten years' imprisonment for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006.

2. Vide his Amended Petition of Appeal for Revision of sentence only, the Appellant contends that he has served two years and one month of the ten-year sentence meted out and points out that he has undergone spiritual trainings with a certificate in theological studies to prove so. He indicated that he has maintained high standards of discipline and has committed no prison offence. He added that he is a family man and that his mother is too old to take care of his children.

3. Parties agreed to dispose the application by way of written submissions.

4. I have given due consideration to the application for revision of sentence as well as the submissions and I shall limit myself to the aspect of the sentence meted out by the trial court. The Appellant is seeking a review of his sentence. The Appellant had been convicted for the offence of defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act No. 3 of 2006 and sentenced to serve 10 years' imprisonment. It is not in dispute that the Appellant is not appealing against conviction but on sentence only. It is also not in dispute that the Appellant was out on bond the entire duration of the trial. It is also not in doubt that under section 8(4) of the Sexual Offences Act No. 3 of 2006 a person found guilty of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years. That being the position, the only issue for determination is whether the revision sought is merited.

5. It is trite law that this court can only exercise supervisory jurisdiction over subordinate courts. The enabling law for revision is **Article 165(6)** and **(7)** of the Constitution and **section 362** as read together with **section 364** of the Criminal Procedure Code.

6. The revisionary jurisdiction of this court is wide in scope but it is strictly limited to the parameters set out in **section 362** of the Criminal Procedure Code which states as follows:

"The High Court may call for and examine the record of any criminal proceedings before any Subordinate court for the purpose 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."

7. It is my humble view that section **362** should be read together with **section 364** of the **Criminal Procedure Code** which specifies the orders the court can make, in its discretion, if it is satisfied that there was an illegality, error, irregularity or impropriety in the impugned proceedings, sentence or order issued by the trial court. The provision empowers the court to exercise any of the powers conferred on it as an appellate court by sections **354, 357 and 358** of the **Criminal Procedure Code** if what is impugned is a conviction and if it is any other order except an order of acquittal, the court can alter or reverse the order challenged on revision with the aim of aligning it to the applicable law.

8. In this case, the Appellant contends that the sentence passed by the trial court ought to be reviewed as part of re-integration noting that he has undergone spiritual trainings, maintained high standard of discipline while in jail and that he has children and an old mother who will not be able to take care of them.

9. I have read the record of the trial court. It reveals that the Appellant was convicted of the offence of defiling a child aged 14 years' and was sentenced to serve a mere 10 years' imprisonment. As the law is very explicit on the punishment to be prescribed for the offence of defilement where the victim is aged between 12 and 15 years old, the sentence applicable should be 20 years or more, as reiterated by the Respondent in its submissions.

10. The evidence in this case discloses that the victim was in that age bracket as can be seen from the charge sheet where the Appellant was charged with the offence of defilement contrary to section 8 (1) as read with section 8 (3) of the Sexual Offences Act.

11. The trial court despite the evidence adduced during the trial showing the age of the victim, proceeded to impose a sentence on the Applicant which did not conform to the Sexual Offences Act provision under which he was charged and which provided for a mandatory minimum sentence of not less than 20 years' imprisonment.

12. In his mitigation, the Appellant pleaded for leniency saying that his parents were poor and that he has always supported them. The court noted that the age assessment report of the Appellant dated 19/7/2018 indicated that approximately 10 days after the offence, he was aged 18 years and proceeded to sentence him as an adult.

13. In passing sentence, the learned trial magistrate did note that considering the nature and gravity of the offence which the Appellant committed, his mitigation, the fact that he was a first offender and the age of the complainant and recognizing that the Appellant ought to be rehabilited before he is released back to society lest he preys on other innocent children, but however, she did not factor in the law when meting out the sentence of 10 years' imprisonment.

14. The argument by the Respondent that the sentence that was applicable to the Appellant ought to be not less than 20 years' imprisonment given the age of the victim and that the sentence of 10 years' imprisonment was very lenient is persuasive and must be considered herein. It is clear that the trial court must have considered other factors despite making reference to section 8(1) as read together with section 8 (3) of the Sexual Offences Act No. 3 of 2006 and thus arrived at the sentence which the appellant now seeks to be reviewed.

15. In the case **Shadrack Kipkoech Kogo - Vs - R., Eldoret Criminal Appeal No.253 OF 2003** the Court of Appeal stated thus: -

"Sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered."

16. In addition, in exercising supervisory jurisdiction under Article 165(6) of the Constitution, the High Court does not under its

powers of revision, exercise appellate jurisdiction and therefore cannot review or re-weigh evidence upon which the determination of the lower court was based.

17. To revert back to the issue herein, as to whether to revise the sentence imposed herein, i note section 8(1), (3) of the Sexual Offences Act provides as follows:

(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits am offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

18. In this instance, the Appellant was sentenced at the age 18 years old. The appropriate sentence as per the provisions of section 8(3) of the Sexual Offences Act ought to be twenty years' imprisonment which is to commence from the date of conviction namely 30th October, 2019.However, it would appear that the appellant must have been aged below the age of 18 years at the time of the commission of the offence and that explains the learned magistrate's sentiments during sentencing that the appellant had now turned 18 years and she thus dealt with him as an adult. Looking at the sentence imposed by the learned magistrate, it is obvious that she had in mind that the appellant had been a minor at the time of the commission of the offence and thus sentenced him to ten years' imprisonment despite being aware of the minimum sentence to be imposed. She must have taken into consideration those circumstances and arrived at the ten-year sentence. Ordinarily, appellate courts do not interfere with sentence imposed by lower courts since the same is always on matters of discretion unless the trial court considered irrelevant factors in coming up with the sentence. Indeed, had the conviction been arrived at by the trial court when the appellant was still aged below 18 years of age, then he would have been dealt with as a child in conflict with the law and punished accordingly under the Children Act 2011 by being placed in a Borstal institution or under probation whichever was appropriate. It is under those circumstances that I see the mind of the trial magistrate. Iam persuaded to agree with the sentence imposed by the trial court as being reasonable and not excessive and warranted in view of the offence committed. The appellant has not presented evidence that the trial court took into account irrelevant factors when meting out the sentence or that the sentence was harsh and excessive. The appellant deserved a custodial sentence as the appropriate form for rehabilitation.

19. In light of the foregoing observations, the appeal against sentence lacks merit. The same is dismissed. trial court's sentence of ten (10) years dated 30th October, 2019 is hereby upheld.

20. It is so Ordered.

DATED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF DECEMBER, 2021.

D. KEMEI

JUDGE

In the presence of:

Stanley Wefwila Benjamin Appellant

Miss Kiptanui for Respondent

Wilkister Court Assistant