



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO. 162 OF 2018**

*(An Appeal arising out of the conviction and sentence of Hon. C. NJAGI – RM delivered on 27<sup>th</sup> July 2018 in Nairobi CMC. CR. Case No.92 of 2015)*

**PKN.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**RULING**

On 11<sup>th</sup> March 2020, this court dismissed the Appellant’s appeal against conviction. It however reserved its decision on sentence pending receipt of a probation report. The probation report was filed in court on 30<sup>th</sup> April 2020. The court had instructed the probation officer to prepare a social inquiry report so that the views of all concerned parties may be obtained on the suitability of the Appellant to serve a non-custodial sentence. The Appellant’s relatives, the victim and her mother and the local administrators were interviewed. It was clear from the report that the Appellant and the victim lived together as “*husband and wife*” for a period of over five months with the consent of both their parents. Things turned sour when the victim formed the view that the Appellant was not in a position to provide for her and the child born of the relationship. The Area Chief and Assistant Chief were requested to arbitrate the issue. Unfortunately, the Appellant’s mother was intransigent. Things took a turn for the worse when the victim’s mother reported the matter to the police. It is then that she remembered that the victim was a minor. The Appellant was tried and convicted since defilement is an offence of strict liability: where the age of the victim is established, it does not matter whether the relationship was “*consensual*” or not. This court confirmed the conviction.

It is apparent from the probation report that since the Appellant’s conviction and incarceration, the attitude of the victim and her mother has changed. They have mellowed from their previous hard stand. The Area Chief and Assistant Chief confirm that the Appellant is a person of good behaviour and is a resourceful member of the community. Of course, the Appellant’s mother misses her son and desires that her son be released from prison the soonest possible. On his part, the Appellant has learnt the folly of his ways. While in prison, he has engaged in studies that has put him on the path to rehabilitation. He attributes his actions to ignorance. This court formed the opinion that taking into consideration the circumstances in which the offence occurred and the current views of the concerned parties including the victim (who is now an adult), it will be just for the custodial sentence of the Appellant to be converted to a non-custodial one.

In the circumstances therefore, the sentence of twenty (20) years imprisonment imposed on the Appellant is hereby set aside and is substituted by a non-custodial sentence sentencing the Appellant to serve three (3) years’ probation. During this period, the Appellant shall abide by the directions issued by the probation officer and if he fails to do so, he shall be returned to this court where he shall be appropriately sentenced to serve a custodial term in prison. It is so ordered.

**DATED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JUNE 2020**

**L. KIMARU**

**JUDGE**