



**REPUBLIC OF KENYA**

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

**CORAM: D.S.MAJANJA J.**

**CRIMINAL APPEAL NO. 111 OF 2018**

**BETWEEN**

**DKM ..... APPELLANT**

**AND**

**REPUBLIC ..... RESPONDENT**

***(Being an appeal against the original conviction and sentence of Hon. N. Wairimu, PM dated 31<sup>st</sup> October 2018 at the Magistrates Court at Eldoret in Criminal Case SO No. 188 of 2017)***

**JUDGMENT**

1. The appellant, **DENNIS KIPKORIR MUTAI**, was charged, convicted and sentenced to life imprisonment for the offence of defilement contrary to **section 8 (1) and (2)** of the *Sexual Offences Act* (“the Act”). The particulars of the offence were that on 25<sup>th</sup> September 2017 at [particulars withheld] in Eldoret West District within Uasin Gishu County, he intentionally and unlawfully caused his penis to penetrate the anus of BK, a child aged 8 years old.

2. The appellant does not contest the conviction but seeks to this court’s intervention in the sentence. At the hearing of the appeal and upon perusal of the record, I noted that from the Probation Service Report submitted to the trial court before sentencing, the appellant was stated to be aged 18 years old at the time. Although he stated that he was 22 years old in his defence, the Probation Service Report was done after a social inquiry. In this case I am prepared to give the appellant to benefit of doubt regarding his age. Had the trial magistrate taken the appellant’s age into account, she would have paid attention to the provisions of **section 191** of the *Children Act* which provides the options for sentencing for of child offenders.

3. It is now established that **section 191** of the *Children Act* does not exclude the sentence of imprisonment particularly when the offender is aged above 16 years and is excluded from attending a Borstal Institution (see the Court of Appeal decisions in *JKK v Republic NYR CA Criminal Appeal No 118 of 2011 [2013] eKLR* and *DKC v Republic NYR CA Criminal Appeal No. 189 of 2009 [2014] eKLR*). In the circumstances, I will set aside the sentence of life imprisonment but since the offence was serious enough to warrant a custodial sentence, I consider the sentence of 7 years’ imprisonment appropriate.

4. I affirm the conviction the conviction but I quash the sentence of life sentence and substitute with 7 years’ imprisonment.

**DATED and DELIVERED at ELDORET this 23<sup>rd</sup> day of APRIL 2019.**

**D.S. MAJANJA**

**JUDGE**

Appellant in person.

Ms Mumu, Prosecution Counsel, instructed by the Director of Public Prosecutions for the respondent.