

REPUBLIC OF KENYA

IN THE HIGH COURT AT NANYUKI

CRIMINAL APPEAL NO 100 OF 2017

DANIEL WAHOME KIRUMBA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal from original Sentence dated 1/11/2017 in Nanyuki CM Sexual Offence Case No 59 of 2016 – L Mutai, CM)

J U D G M E N T

1. The Appellant herein, **DANIEL WAHOME KIRUMBA**, was convicted after trial of the alternative charge of ***committing an indecent act with a child*** contrary to **section 11(1)** of the ***Sexual Offences Act***. It was alleged in the particulars that on 14/12/2016 at 11 am in Laikipia Central Sub-county of Laikipia County, he intentionally touched with his penis the vagina of one **DWW**, a child aged 11 years. He was sentenced to ten (10) years imprisonment. He has appealed only against the sentence.
2. The Appellant was sentenced on 01/11/2017, about 1 year and 11 months ago. At the hearing of this appeal he stated that he was 76 years old. Indeed he looked old and frail.
3. When he was sentenced, and upon the trial court deciding that he deserved a custodial sentence, it had to impose a term of imprisonment of not less than ten (10) years. That was the law then.
4. However, the ***Supreme Court of Kenya*** in the case of ***Francis Karioko Muruatetu & Another -vs- Republic, Petition No 16 of 2015*** has since held that the mandatory sentence of death prescribed for the offence of murder in section 204 of the Penal Code was unconstitutional because, *inter alia*, that mandatory nature of the legislation deprived the courts of their legitimate discretion in sentencing.
5. By parity of reasoning, the ***Court of Appeal*** at Eldoret very recently extended that holding of the ***Supreme Court*** to the mandatory sentences prescribed in the ***Sexual Offences Act***. This was in the case of ***Evans Wanjala Wanyonyi - vs- Republic, Criminal Appeal No 312 of 2018***.
6. That being the state of the law now, and this court as the first appellate court having the same powers as the trial court in matters of sentencing, I must decide what sentence would serve the ends of justice in this case.
7. A sentence of ten (10) years imprisonment for a person of the Appellant's circumstances is like a sentence of life imprisonment. Obviously it was not the intention of the trial court to impose imprisonment for life upon the Appellant; it was only that it then had no discretion in the matter.
8. The law now having changed as seen above, I am satisfied that the ten (10) years imprisonment imposed upon the Appellant was manifestly harsh and excessive in the circumstances. I will reduce it to three (3) years imprisonment from the date he was sentenced. To that limited extent only does his appeal against sentence succeed. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 25TH DAY OF SEPTEMBER 2019

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 26TH DAY OF SEPTEMBER 2019