



**REPUBLIC OF KENYA**

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

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

**CRIMINAL APPEAL NO. 53 OF 2017**

**BETWEEN**

**EOM.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from the original conviction and sentence of Hon. N. Wairimu – SRM dated 8<sup>th</sup> September 2016 at the Principal Magistrate’s Court at Ogembo in Sexual Offence Case No. 8 of 2016)*

**JUDGMENT**

1. The appellant, EOM , was charged and convicted of the offence of defilement contrary to **section 8(1) and (3)** of the Sexual Offences Act. It was alleged that between 29<sup>th</sup> August 2016 and 3<sup>rd</sup> September 2016 within Kisii County, he intentionally caused his penis to penetrate the vagina of DGM, a child aged 15 years. The appellant pleaded guilty and was sentenced to 20 years imprisonment.
2. The appellant does not contest the conviction but urges the court to consider his sentence in view of his age which was not ascertained at the trial. Since he appeared to be young, I directed the court to conduct a social inquiry to determine his real or apparent age.
3. According to the Report by the Probation Officer, he is likely aged 20 meaning that when the offence was committed he was aged about 17 years.
4. As the appellant was below the age of 18 years when he committed the offence, he ought to have been sentenced as a child under **section 191(1) of the Children Act**. The probation report recommends a non custodial sentence.
5. I therefore quash the sentence and substitute it with a sentence of two (2) years probation. The appellant is released unless otherwise lawfully held.

**Dated and delivered at Kisii this 29<sup>th</sup> day of November 2018.**

**D.S MAJANJA**

**JUDGE**

Mr. Otieno, Senior Prosecution Counsel, instructed by Office of Director of Prosecutions.

Appellant in person.