

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 40 OF 2015

SAFARI MATHENGE MWANGI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original conviction and sentence in **Kitui Chief Magistrate's Court Criminal Case (S.O.) No. 14A of 2012 by A. S. Lesootia S R M on 04/04/14**)*

J U D G M E N T

1. **Safari Mathenge Mwangi**, the Appellant, was charged with the offence of **Defilement** contrary to **Section 8(1)(3)** of the **Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on the **17th** day of **March, 2012** at about **9.00 p.m.** in **particulars withheld** within **Kitui County**, intentionally and unlawfully penetrated his penis to the vagina of **M N** a child aged **15 years**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **17th** day of **March, 2012** at about **9.00 p.m.** *particulars withheld* in **Kitui County**, committed an act of indecency with **N M** a child aged **15 years** by touching her private parts namely vagina, breasts and buttocks using his hands.
3. Having pleaded not guilty he was tried, convicted on the main count and sentenced to **twenty (20) years imprisonment**.
4. Being dissatisfied with the decision of the Court, he appealed against the conviction and sentence. However, at the hearing of the Appeal he abandoned the Appeal against the conviction and mitigated on sentence.
5. In his mitigation he called upon the Court to find that he has reformed and is living a devoted life as a Christian. He sought to be given an opportunity to go back to the society so as to be a role model of the youth who are leading an immoral life. He asked the Court to accord him the opportunity of using the skills acquired while in prison so as to provide employment opportunities to other people.
6. In response thereto, the prosecuting Counsel, **Mr. Wanjala**, submitted that the sentence was proper as the provision of the law provides for a **twenty (20) years imprisonment**. He called upon the Court to dismiss the Appeal.
7. My duty as the first Appellate Court is to reconsider what transpired before the trial Court and come up with my own conclusions.
8. In the case of **Ogola s/o Owora vs. Reginum (1954) 21 270** the Court of Appeal stated thus:

“The principle upon which an appellate court will act in exercising its jurisdiction to review sentences are firmly established. The court does not alter a sentence on the mere ground that if the members of the Court had been trying the Appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James vs. Republic (1950) 18 EACA 147.

“It is now settled law that sentence is a matter of discretion of the trial court and must be based on the facts and circumstances of each case. An appellate court will not normally interfere with sentence unless the sentence is manifestly excessive or is based on wrong principles.”

9. The Appellant in this case was charged under a provision of law that provides for a minimum sentence of **twenty (20) years. (Vide Section 8(3) of the Sexual Offences Act).** The Lower Court having imposed the minimum prescribed sentence cannot be faulted.

10. In the circumstances the Appeal is devoid of merit and is hereby dismissed.

11. It is so ordered.

Dated, Signed and Delivered at Kitui this 20th day of April, 2017.

L. N. MUTENDE