

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 124 OF 2013

GABRIEL MUTUA NGUTA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief

Magistrate's Court at Makadara Cr. Case No. 3766 of 2009 delivered

by Hon. D. Kinaro, RM on 19th December, 2011).

JUDGEMENT

The Appellant herein was charged with the offence of defilement contrary to Section 8 (1) (11) of the Sexual Offences Act no. 3 of 2006. It was allegedly that on the 13th day of September, 2009 in Nairobi East District within Nairobi Province intentionally and unlawfully caused his penis to penetrate the vagina of A W M a child aged 5 years. In the alternative, he was charged with the offence of indecent act with a child contrary to Section 11 (1) of the Sexual Offences Act No. 3 of 2006 in that he unlawfully and intentionally touched the private parts namely, vagina of A W M a child aged 5 years.

After the trial the Appellant was found guilty of the alternative count of indecent act. He was convicted accordingly and sentenced to serve the minimum 10 years imprisonment. He was dissatisfied with both the conviction and sentence and he preferred the instant appeal. At the hearing of the appeal on 2nd October, 2017 he submitted that he would proceed with the appeal only against the sentence. His plea to the court was that the sentence be reduced on account that he was remorseful and had since his imprisonment acquired life support skills such as carpentry and soap making which would help him earn a living outside prison in a lawful manner. The Respondent through learned State Counsel, Miss Kimiri opposed the appeal. She submitted that the law provided for mandatory minimum sentence which was duly imposed. She submitted that this court had no powers to either set aside or reduce a mandatory sentence in the circumstances.

I have considered the appeal and the respective submissions. Under Section 11 (1) of the Sexual Offences Act No. 3 of 2006, **“any person who commits an indecent act is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than 10 years”** It is trite then that the penalty provided cannot be varied below the minimum set by the law. Indeed, the Appellant was handed the minimum sentence which by all standard was not only reasonable but lenient. I say lenient because the victim was a very young child only aged 5 years. The Appellant being an adult was irresponsible in indecently dealing with the victim. It is hoped that by the time he serves the sentence he shall have learnt his lesson to become a more responsible adult.

In the circumstances, the appeal herein is without merit and I dismiss it. I uphold the sentence passed. However, I note that the Appellant did not meet the terms of bond granted to him and was in remand before the sentence was passed for a period of 2 years and 3 months. This period shall be deducted from

his sentence. It is so ordered.

Dated and delivered at Nairobi this 23rd October, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant in person.*
- 2. Miss Kimiri for the Respondent.*