

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 68 of 2012

FRANCIS OTUOMA OMWANGARE..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No. 5825 of 2009 dated the delivered by Hon. D. O. Onyango, PM on 2nd of March, 2012)

JUDGEMENT

The Appellant, Francis Otuoma Omwangare was charged with defilement contrary to **Section 8 (1)** as read with **Section 8 (3) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 21st of December, 2009 at Kibera [particulars withheld] within Nairobi Province, intentionally and unlawfully committed an act of defilement by inserting his penis into the vagina of C A O, a child aged 13 years.

He was also charged in the alternative with committing an indecent act with a child contrary to **Section 11 (c) of the Sexual Offences Act No. 3 of 2006**. The particulars were that on the 21st of December, 2009 at Kibera [particulars withheld] within Nairobi Province, intentionally and unlawfully committed an indecent act by touching his penis on the vagina of C A O, a child aged 13 years.

The Appellant was convicted in the main charge and subsequently sentenced to serve 20 years imprisonment. His appeal is only in respect of the sentence. In his on amended grounds of appeal filed on the 2nd of October, 2017 he urged the court to consider that he was in remand for a period of 2 years and 3 months as well as the fact that he had already served for 7 years and 10 months. He pleaded with the court to consider that he has aging parents whom he takes care of. He also sought clemency from the court on humanitarian grounds as he suffers from Peptic Ulcers Disease (PUD) and would like to seek more thorough treatment outside prison. The Appellant added that through his rehabilitation, he has acquired skills in Carpentry in grades 1 to 3 as well as skills in upholstery and theology among other skills. The Appellant submitted that the sentence of 20 years was harsh. Lastly, he told the court that he was remorseful and young, aged 26 years and that he would be more useful outside prison.

Learned State Counsel, M/s Sigei in opposing the appeal submitted that under Section 8 (3) of the Sexual Offences Act No. 3 of 2006 the sentence provided was mandatory. As such even if the Appellant was remorseful or would be more useful outside prison, the court cannot vary the sentence. Furthermore, the Appellant was insensitive to the fact that the complainant suffered trauma and had to undergo counseling for a period of 5 years and 10 months. She submitted that the appeal had no merit and ought to be dismissed.

I concur with the Respondent that Section 8(3) of the Sexual Offences Act No.3 of 2006 provide for a mandatory sentence of 20 years imprisonment. This court has no powers to vary the same. The mitigating circumstances cannot therefore aid the Appellant. The appeal lacks merit and I dismiss it accordingly. I uphold the sentence passed by the trial court safe that the Appellant will serve less the period spent in remand of two years, two months and seventeen days. It is so ordered.

Dated and delivered at Nairobi this 16th October, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of;

1. Appellant in person.

2. Miss Sigei for the Respondent.