



REPUBLIC OF KENYA

IN THE HIGH COURT AT HOMA BAY

CRIMINAL APPEAL NO. 8 OF 2016

BETWEEN

CHARLES OUMA DAMBA
APPELLANT

AND

REPUBLIC
RESPONDENT

(Being an appeal from the original conviction and sentence of Hon.S.O.Ongeri, SRM in Senior Resident Magistrates Court at Mbita in Criminal Case No. 48 of 2015 dated 22nd June 2015)

JUDGMENT

1. The appellant **CHARLES OUMA DAMBA** was charged and convicted of the offence of defilement contrary to **section 8 (1) and (3) of the *Sexual Offences Act, 2006***. The particulars of the charge were that on 4th March 2014 at [particulars withheld] Beach in Gwassi South Location within Suba District within Homa Bay County, he intentionally and unlawfully caused his penis to penetrate the vagina of COD, a child aged 12 years. He was convicted and sentenced to 20 years imprisonment.
2. The thrust of his Petition of Appeal filed on 16th February 2016 is that he wishes this court to reconsider his sentence as he remorseful, has dependants who have suffered and continue to suffer while he is in prison and that he is of ill health. He also states that he has undergone spiritual transformation and vocational training and that he is now reformed hence he should be considered for a non-custodial sentence. He has also filed written submissions in which he reiterates the grounds for this court to intercede and reduce the sentence.
3. Mr Oluoch, learned counsel for the respondent, submits that the penalty for defilement under the ***Sexual Offences Act*** is mandatory and that the court has no discretion in imposing the same. He therefore contends that the appellate court cannot review the lawful sentence imposed.
4. This appeal is essentially on the sentence imposed by the subordinate court. The appellant was charged with an offence under **section 8 (1) and (3) of the *Sexual Offences Act* which** provides:-

8(1) A person who commits an act which causes penetration with a child is guilty of an offence termed defilement.

(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.

5. In the written submissions, the appellant contended that the age of the child was not proved. Apart being an essential element of proof of the offence of defilement, the proof of age of the child is necessary to determine the appropriate sentence. Proof of age is a question of fact. In this case, the complainant testified on oath that she was 12 years old while the investigating officer (PW 6) produced the birth certificate which showed that she was born on 21st February 2002 which means she was just above 12 years when the offence was committed.
6. The sentence provided for defilement where the age of the child is 12 years under **section 8 (1) (3) of the Sexual Offences Act** is mandatory as the words used are, "**for a term not less than twenty years**". The law is well settled that where a mandatory sentence is prescribed in law, the Court cannot impose a sentence other than the prescribed penalty.
7. Accordingly the appeal is dismissed.

DATED and DELIVERED at HOMA BAY this 23rd day of May 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Oluoch, Senior Assistant Director of Public Prosecutions, instructed by the Office of Director of Public Prosecutions for the respondent.