



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.15 OF 2016

*(An Appeal arising out of the conviction and sentence of D.N. Musyoka – PM delivered*

*on 16<sup>th</sup> December 2015 in Kikuyu CM. CR. Case No.S. 02 of 2014)*

BENSON MUTUTU KIMANI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Benson Mututu Kimani was charged with **defilement** contrary to **Section 8(1) and (3)** of the **Sexual Offences Act**. The particulars of the offence were that on 30<sup>th</sup> May 2014 at *[particulars withheld]* Village in Kiambu County, the Appellant intentionally caused his penis to penetrate the vagina of H W N (hereinafter referred to as the complainant), a child aged 15 years who had mental disability. He was alternatively charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant intentionally touched with his penis the vagina of the complainant. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted of the main count of **defilement**. He was sentenced to serve twenty (20) years imprisonment.

Although the Appellant filed an appeal challenging his conviction and sentence, during the hearing of the appeal, the Appellant abandoned his appeal against conviction. He however pleaded with the court for a reduction of sentence. He told the court that he was married with children who depended on him. He urged the court to take into account the fact that he was in remand custody for a period of one and half years before he was convicted. This court perused the proceedings of the trial court and indeed noted that although the Appellant was granted bail pending trial, he was unable to raise it. He was therefore in remand custody during the entire trial period. The Appellant urged the court to exercise leniency on him and accordingly consider reducing the custodial sentence that was imposed on him. Ms. Nyauncho for the State submitted that the Appellant was sentenced to serve the minimum sentence provided under the **Sexual Offences Act**. She however conceded that the period that the Appellant was in remand custody before his conviction can be taken into account in order to accord justice to the Appellant. Other than that, she was of the view that the Appellant's appeal against sentence had no merit and should therefore be dismissed.

This court has carefully considered the arguments made on this appeal. As stated earlier in this judgment, the Appellant is not appealing against conviction. He is appealing against sentence. Under **Section 8(3)** of the **Sexual Offences Act**, any person convicted of defiling a child aged 15 years is liable upon conviction to serve a term of imprisonment of not less than twenty (20) years. According to the proceedings, the complainant was aged 15 years and 7 months at the time of the sexual assault. She was therefore aged more than 15 years at the time of the assault. The Appellant should therefore have been sentenced to serve the term of imprisonment specified under **Section 8(4)** of the **Sexual Offences Act**. In that case, the Appellant should have been sentenced to serve 15 years imprisonment and not 20 years imprisonment. Further, under **Proviso of Section 333(2)** of the **Criminal Procedure Code**, the trial court should have taken into account the period that the Appellant was in remand custody at the time of sentence. The

**Sentencing Policy Guidelines** published by the Judiciary, at Page 20 re-emphasizes the point that the period in which an accused person had been in remand custody before his conviction should be taken into account.

Taking into account the entire circumstance of this case, this court finds the Appellant's plea for reduction of sentence has merit. The Appellant was sentenced to serve an illegal sentence. In the premises therefore, the sentence of twenty (20) years imprisonment which was imposed upon him by the trial court on 16<sup>th</sup> December 2015 is hereby set aside and substituted by a sentence of this court sentencing the Appellant to serve thirteen and a half years imprisonment. This period has been calculated thus: the 15 years imprisonment that the Appellant ought to have been sentenced to serve less than the one and a half years period that he was in remand custody before his conviction. The sentence shall take effect with effect from 16<sup>th</sup> December 2016. It is so ordered

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF JULY 2016**

**L. KIMARU**

**JUDGE**