



REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CRIMINAL APPEAL NO. 15 OF 2012

BETWEEN

KEVIN OTIENO OBETCH APPELLANT

AND

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence of Hon. P.C. Biwott, PM dated 29th July 2010 at the Principal's Magistrates Court at Winam in Criminal Case No. 3163 of 2009)

JUDGMENT

1. The appellant **KEVIN OTIENO OBETCH** was charged and convicted of the offence of defilement contrary to **section 8 (1) and (2) of the *Sexual Offences Act, 2006***. The particulars of the charge were that on 23rd October 2009 in Nyanza Province he intentionally and unlawfully caused his penis to penetrate the vagina of SA, a child aged 13 years. He was convicted and sentenced to 10 years' imprisonment.
2. When his appeal against conviction and sentence came up for hearing, the appellant abandoned the appeal against conviction and told the court that he was only challenging the sentence which he felt was harsh and excessive. He requested the court to reconsider the same and impose a lower sentence. Ms Osoro, learned counsel for the respondent, submitted that the penalty for defilement under the ***Sexual Offences Act*** is mandatory and that the court has no discretion in imposing a sentence below the prescribed minimum.
3. This appeal is essentially on the sentence imposed by the subordinate court and the general principle is that an appellate court can only interfere with the sentence if it is manifestly harsh or excessive or that the magistrate took into account irrelevant factors or failed to take into account relevant factors (see ***Macharia v Republic* [2003]KLR 115**).
4. The appellant was charged with an offence under **section 8 (1) and (3) of the *Sexual Offences Act* although given the age of the child he ought to have been charged under section 8(3) 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. As the child was 13 years old, the appellant ought to have been sentenced, "**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 lesser than the prescribed minimum penalty.

6. However, this is a case where the court imposed an illegal sentence. The respondent did not cross-appeal against the sentence or raise the issue. Likewise, the appellant was not warned that the sentence would be enhanced if the appeal was not successful hence I cannot intervene in the sentence without violating his rights to a fair hearing under **Article 50** of the Constitution (see ***Charles Muriuki Mwangi v Republic* NYR CA Criminal Appeal No. 24 of 2014**).

7. The appeal is dismissed.

DATED and DELIVERED at KISUMU this 10th day of August 2016.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Osoro, Prosecution Counsel, instructed by the Office of Director of Public Prosecutions for the respondent.