



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CRIMINAL APPEAL NO.9 OF 2013**

**OWEN KINUTHIA KANGETHE.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the judgment of the Hon. C. Oluoch (Principal Magistrate) in Kiambu Chief Magistrate's Criminal Case No.1334 of 2011 delivered on 07<sup>th</sup> December, 2012)*

**JUDGMENT**

Owen Kinuthia Kangethe, the appellant herein, was charged with defilement of a child under the age of 15 years contrary to Section 8(1) as read with Section 8(3) of the Sexual Offences Act No.3 of 2006. It was alleged that on diverse dates between the month of January and February 2011 at **[particulars withheld]** village in Kiambu County unlawfully and intentionally committed an act which caused penetration with genital organs (penis) into the genital organ (vagina) of P N K a child aged 15 years.

He was found guilty, convicted and sentenced to 20 years imprisonment. In a Memorandum of Grounds of Appeal filed on 9<sup>th</sup> January, 2013 he appealed only against the sentence. He stated that the sentence was harsh and excessive in the circumstances. That he was remorseful and urged the court to give a none custodial sentence preferably under Community Service Orders for the balance of the term of imprisonment. Learned State Counsel Mr. Mureithi submitted that there is only one sentence provided by the law which cannot be varied.

Whereas sentencing is in the discretion of trial court where mandatory sentence has been provided by the law the court has no alternative but to impose the mandatory sentence. See the case **of David Kundu Simiyu –Vs- Republic Criminal Appeal No.8 of 2008**, Court of Appeal sitting in Eldoret in which it was held, with respect to the **minimum sentences provided under the Sexual Offences Act, that:-**

**“Those are minimum sentences and parliament appears to give no discretion to the courts to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the act which is prevention and protection from harm, from unlawful sexual act.”**

Under Section 8(3) of the Sexual Offences Act **“A person who commits an offence of defilement with a child between the age of 12 and 15 years is liable upon conviction to imprisonment to a term of not less than 20 years.”** This provision is couched in mandatory terms which means that the court cannot impose anything short of the provided penalty. In that respect the learned trial magistrate deviate from the sentence. Thus, the appellant's appeal cannot succeed despite having sentenced the appellant to 20 years imprisonment was not obliged to the fact that he is remorseful.

In the result, this appeal fails, the same is dismissed and the appellant shall continue to serve his sentence unless he is otherwise set free.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of MAY 2015.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:-**

1. Appellant in person.
- 2 . .....for the respondent.