

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.248 OF 2012

(An Appeal arising out of the conviction and sentence of Hon. B.M. Nzakyo - SRM

delivered on 31st August 2012 in Githunguri PM. CR. Case No.896 of 2011)

SAMUEL NGARUIYA MUCHINA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Samuel Ngaruiya Muchina, was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 12th March 2011 at *[particulars withheld]* Village, Githunguri in Kiambu County, the Appellant intentionally and unlawfully committed an act which caused penetration with his genital organ (penis) into the genital organ (vagina) of J W M, a female child aged 8 years. He was alternatively charged with **committing an indecent act** 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 committed an indecent act with a female child age 8 years namely J W M, by rubbing his genital organ (penis) against the genital organ (vagina) of the said J W M. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of **defilement**. He was sentenced to serve life in prison. The Appellant was aggrieved by his conviction and sentence. He filed an appeal to this court.

Although the Appellant filed an appeal challenging both his conviction and sentence, during the hearing of the appeal, the Appellant abandoned his appeal against conviction. He pleaded with the court to review his sentence. The Appellant presented written submission pleading with the court to consider reduction of the custodial sentence that was imposed on him. Ms. Nyauncho for the State opposed the appeal on sentence. She submitted that the sentence imposed on the Appellant was legal since it was the mandatory sentence prescribed under the **Sexual Offences Act**. He urged the court to dismiss the appeal.

When the trial court sentenced the Appellant to serve the custodial sentence, it was exercising judicial discretion. As an appellate court, this court will only interfere with such exercise of judicial discretion if it is established that the sentence was manifestly harsh and excessive or was so lenient as to amount to a miscarriage of justice. This court will interfere with the sentence if it is established that the sentence was unlawful. In the present appeal, the Appellant was sentenced to serve life imprisonment. Under **Section 8(2)** of the **Sexual Offences Act**, any person found guilty of defiling a child less than 11 years of age, shall be sentenced to serve life imprisonment. The complainant in this case was at the time of trial aged 8 years. Her birth certificate was produced in evidence. It indicated that she was born on 2nd September 2003. The **Sexual Offences Act** does not give discretion to the trial court in sentencing. The sentence to be imposed on a convicted person is determined by the age of the complainant. This court therefore cannot interfere with the sentence imposed by the trial court because it was legal.

The upshot of the above reason is that the appeal lodged by the Appellant challenging his sentence lacks merit and is hereby dismissed. He shall serve the sentence imposed by the trial court. It is so ordered.

DATED AT NAIROBI THIS 22ND DAY OF JULY 2015

L. KIMARU

JUDGE