

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 23 OF 2014

DANIEL MWANGI KIMUCHU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the Chief Magistrate's court

at Kiambu Criminal Case No. 2313 of 2012 delivered by Hon. J.N. Onyiego,Ag, CM)

JUDGMENT

The Appellant was in the main count charged with defilement contrary to Section 8(3) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 29th July, 2012 at [particulars with] village, Kiambu County intentionally and unlawfully caused his penis to penetrate the anus of E K N a child aged 14 years.

In the alternative, he was charged with indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that on 29th July, 2012, at [particulars withheld] Village in Kiambu County intentionally and unlawfully touched the anus of E K N a child aged 14 years. The Appellant was convicted in the alternative charge of indecent act and was sentenced to 10 years imprisonment. He has appealed against the sentence only. In a Petition of Appeal filed on 6th March, 2014, he was dissatisfied that the prosecution did not prove its case beyond all reasonable doubts. At the hearing of the appeal on 10th December, 2015, he abandoned his appeal against the conviction and proceeded as against the sentence only. He submitted that he was sick having sustained fractures on both legs which had been fitted with metals. He also informed the court that he was married with one child and was the bread winner of the family. He asked the court to set aside the sentence and allow him to go back home and take care of his family.

Learned state counsel Ms. Atina opposed the appeal submitting that the sentence imposed on the Appellant was the minimum mandatory sentence which the court could not vary.

Under Section 11(1) of the Sexual Offences Act No. 3 of 2006 any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction for a term of not less than 10 years. The provision is couched in mandatory terms which implies that the court cannot exercise its discretion to vary the sentence. In that regard, the Appellant escaped with the minimum sentence and should be satisfied to serve the same. Effectively, this appeal lacks merit and the same is dismissed.

DATED and **DELIVERED** this 22nd Day of **DECEMBER**, 2015.

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

1. *Appellant present in person.*
2. *No appearance for the Respondent.*