



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Criminal Appeal 88 of 2010**

**MUTIE MUTUVI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an appeal from original sentence in Makindu Principal Magistrate's Court Criminal case No. 1590/09 by B. Ochieng, PM on 11/11/2009)*

**JUDGMENT**

The appellant was charged with the offence of defilement contrary to section 8(1) (4) of the Sexual Offences Act No. 3 of 2006.

He pleaded guilty to the charge and was convicted and sentenced to fifteen (15) years imprisonment.

Aggrieved by the sentence imposed he now mitigates on appeal.

In his mitigation of appeal he expresses remorse, states that he is aged 88 years and pleads with the court to commute his sentence to a non-custodial one.

The State Counsel **Mr. Mukofu** left it to the court to exercise its discretion.

The appellant herein was charged with an offence of defilement under section 8(1) (4) of the Sexual Offences Act. The child was aged eight (8) years per the medical report filled; hence the proper section that should have been applied was section 8(1) as read with section 8(2) of the Sexual Offences Act. Had this been the case the appellant would have been sentenced to life imprisonment.

This being the case it brings section 382 of the Criminal Procedure Code into play.

It states as follows;-

***“subject to the provisions hereinbefore contained, no finding, sentence or order passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account of an error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, order, judgment or other proceedings before or during the trial or in any inquiry or other proceedings under this Code, unless the error, omission or irregularity has occasioned a failure of justice.***

***Provided that in determining whether an error, omission or irregularity has occasioned a failure of justice the court shall have regard to the question whether the objection could and should have been raised at an earlier stage in the proceedings”.***

With that provision in mind, the sentence having been passed by a court of competent jurisdiction this court cannot alter it on account of irregularity. This is a case where the appellant defiled a child. Today he does not dispute that fact hence no injustice was occasioned by the sentence imposed.

The Sexual Offences Act does not give the court the discretion to reduce the sentence. It can only be enhanced. As a human being I would sympathise with the appellant because of his age but this is not a moral court, it is a legal court. In the circumstances, I find the ***“Mitigation on appeal”*** lacking merit.

In the result, I dismiss it and uphold the sentence imposed. It is so ordered.

**DATED, SIGNED and DELIVERED at MACHAKOS this 26<sup>TH</sup> day of FEBRUARY, 2013.**

**L.N. MUTENDE**

**JUDGE**