HUDSON MWUGUSI LUMADEDE..... APPELLANT

VERSUS

REPUBLIC …….....…… RESPONDENT

(From the original conviction and sentence in Criminal Case No. 3855 of 2009 of the Chief Magistrate's Court at Makadara by A. Lorot – Senior Resident Magistrate)

JUDGMENT

The appellant, **HUDSON MWUGUSI LUMADEDE,** was convicted for the offence of Defilement of a child **contrary to section 18(1) as read with section 8 (2) of the Sexual Offences Act.**

The learned trial magistrate then sentenced the appellant to twelve (12) years imprisonment.

When he lodged his appeal to the High Court, the appellant challenged both the conviction and sentence. He indicated that he would argue that the evidence tendered by the prosecution was contradictory.

The appellant also indicated that he intended to show that crucial witnesses were not summoned to testify at the trial; that he was denied the opportunity to cross-examine three (3) of the prosecution witnesses; that he was held in police custody for one day longer than was permissible under **section 72 (3) of the Constitution**; and that his defence was not given due consideration by the trial court.

Notwithstanding the said issues, when the appeal came up for hearing, the appellant changed his mind.

He told the court that he no longer wished to canvass the appeal against his conviction and sentence. Instead, he had decided to canvass a "mitigation appeal."

In his written submissions, the appellant stated that he was satisfied with the decision that was reached by the learned trial magistrate.

He said that he was an orphan, as he had lost his parents, during the Post-Election Violence.

Secondly, he pointed out that during his stay in custody, he had contracted various ailments. As at the time he was canvassing the "mitigation appeal", the appellant was suffering from ulcers.

He therefore sought leniency, promising that he would never engage in crimes again. In the result, he

asked this court to substitute the sentence.

The appellant prayed to this court for a second chance, so that he could rejoin the society, where he would henceforth serve God and his country, Kenya.

He informed this court that he was the first-born in his family. Therefore, following the demise of their parents, he remained responsible for the Welfare of his siblings.

The applicant sought favour in the eyes of God and in the eyes of his victim. He did so before this court because, in his view, he had nowhere else where he could seek leniency.

It was the contention of the appellant that he was a reformed person, who was ready to help educate the society about the dangers of committing criminal offences.

The appellant is convinced that whoever asks for forgiveness should be given the same, as to err is human. As he had learnt a lesson from the mistake he had made, the appellant asked this court to acquit him, so that he could have an opportunity to seek medication, in a free atmosphere.

In answer to the appeal, Ms Ikol, learned state counsel, submitted that the sentence of 12 years imprisonment was very lenient.

The respondent pointed out that the prescribed sentence was life imprisonment.

In my considered view, as the appellant has chosen to abandon his challenge against conviction and sentence, there can be no legal basis for quashing the said conviction, or for setting aside the sentence.

The appellant says that he was satisfied with the decision made by the learned trial magistrate. If that be the case, there can be no basis for upsetting the said decision.

The appellant sounds like he was very repentant and remorseful. He vows never to commit criminal offences again.

Much as I appreciate the remorse demonstrated by the appellant, it cannot form the foundation for either quashing the conviction or for setting aside the sentence.

I sympathise with the appellant's siblings, who do not now have the support that he used to provide them with. But that too cannot be the basis, in law, for allowing the appeal.

In the event, I find no merit in the appeal or the "mitigation appeal". The same is rejected.

I uphold both the conviction and sentence.

Dated, Signed and Delivered at Nairobi this 17th day of May, 2012.

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FRED A. OCHIENG

JUDGE