REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CRIMINAL APPEAL NO. 41 OF 2019

KASSIM SANGURA …… APPELLANT

VERSUS

REPUBLIC ……. RESPONDENT

(From the original conviction and sentence in Criminal case No. 344C of 2018 of the Chief Magistrate's Court at Busia by Hon. M.A.Nanzushi–Principal Magistrate)

JUDGMENT

1. Kassim Sangura, the appellant herein, was convicted for the offence of defilement contrary to section 8(1) (4) [sic] of the Sexual Offences Act No. 3 of 2006.

2. The particulars of the offence were that on 17th May 2018 in Teso North sub County of Busia County, intentionally and unlawfully caused his penis to penetrate the vagina and anus of MA, a child aged seventeen years.

3. The appellant was sentenced to 15 years imprisonment on this count. He has appealed against the sentence which he has described as harsh.

4. The state opposed the appeal through Mr. Mayaba, learned counsel.

5. The charge was erroneously drafted. It ought to have read:

> **…contrary to section 8(1) as read with section 8(4) ….**

The appellant was not in any way prejudiced by the erroneous drafting for he understood the charge and fully participated in the trial. The error is curable under section 382 of the Criminal Procedure Code.

6. Section 8 (4) of the Sexual Offences Act provides:

> **A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years.**

7. An appellate court would only interfere with the sentence of trial court where some sufficient circumstances exist. These circumstances were spelled out in the case of in the case of **Nelson vs. Republic [1970] E.A. 599** as follows:

> **The principles upon which an appellate court will act in exercising its jurisdiction to review sentences are fairly established. The court does not alter a sentence on the mere ground that if the members of the court had been trying the appellant, they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless as was said in James v Rex (1950), 18 EACA 147, it is evident that the Judge has acted upon some wrong principle or overlooked some material factor! To this, we would also add third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case. R v Shershewsity (1912) C.CA 28 T.LR 364.**

In the instant case the learned trial magistrate imposed the only legal available minimum sentence. I will therefore not interfere with it.

8. From the foregoing analysis, I find that the appeal lacks merit and the same is dismissed.

DELIVERED and SIGNED at BUSIA this 8th Day of April, 2020

KIARIE WAWERU KIARIE

JUDGE