



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NANYUKI**

**CRIMINAL APPEAL NO 79 OF 2017**

**PETER EMATHE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal from Original Sentence dated 07/9/2016 in Maralal PM Criminal Case No 347 of 2016 – A Gachie, RM)***

**J U D G M E N T**

1. The Appellant **PETER EMATHE** was convicted after trial of the alternative charge of **indecent act with a child** contrary to **section 11(1)** of the **Sexual Offences Act No 3 of 2006**. It was alleged in the particulars of the charge that in the night of 1<sup>st</sup> September, 2015 in [particulars withheld] District within Samburu County in the Republic of Kenya, he intentionally and unlawfully committed an indecent act with a child called B by touching her vagina. He was acquitted of the main charge of **defilement** contrary to section 8(1) & (4) of the Act. The reason for his acquittal was that the age of the complainant was not proved to the required standard.

2. On 7<sup>th</sup> September, 2016 the Appellant was sentenced to ten (10) years imprisonment. He has appealed only against that sentence. He said he was satisfied with the conviction. In his “plea of mitigation” the Appellant has in effect, submitted that the sentence was manifestly harsh and excessive in the circumstances of the case.

3. The learned prosecution counsel for the Respondent has opposed the appeal. He pointed out that the sentence was not only lawful, but also the minimum prescribed by law.

4. Section 11(1) of the Sexual Offences Act states as follows -

***“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 to imprisonment for a term of not less than ten years.”***

The use of the term **“is liable to”** and not **“shall be sentenced to”** is of course an indication that the trial court had the discretion to consider a non-custodial sentence. But once it decided that the offender deserved a custodial sentence, then it must sentence him to a term of imprisonment of not less than ten years. There is nothing in the record of the trial court showing that the learned trial magistrate was aware of this discretion.

5. Secondly, the **Supreme Court of Kenya** in the case of **Francis Karioko Muruatetu & Another -vs- Republic, Petition No 16 of 2015** has since held that the mandatory sentence of death prescribed for the offence of murder in section 204 of the Penal Code was unconstitutional because, *inter alia*, that mandatory nature of the legislation deprived the courts of their legitimate discretion in sentencing.

6. By parity of reasoning, the **Court of Appeal** at Eldoret very recently extended that holding of the **Supreme Court** to the mandatory sentences prescribed in the Sexual Offences Act. This was in the case of **Evans Wanjala Wanyonyi - vs- Republic, Criminal Appeal No 312 of 2018**.

7. That being the state of the law now, and this court as the first appellate court having the same powers as the trial court in matters of sentencing, I must decide what sentence would serve the ends of justice in this case.

8. I have considered that the Appellant was a first offender and had sought leniency from the trial court in his mitigation. I have also considered the circumstances in which the offence was committed, and I have no doubt in my mind that the Appellant deserved a custodial sentence. He was a step-father to the complainant whose trust he betrayed and took advantage of the absence of her mother to defile her. He escaped the main charge of defilement only because the age of the complainant (who was about 11 to 12 years old) could not be proved beyond reasonable doubt.

9. That notwithstanding, I have considered that the Appellant was a first offender. He has not appealed against the conviction, and I consider that to be a sign of remorse. In the particular circumstances of this case I consider that the sentence of 10 years imprisonment was manifestly harsh and excessive. I will interfere it by reducing it to seven (7) years imprisonment from the date of sentencing by the trial court. To that limited extent only does the appeal against sentence succeed. It is so ordered.

**DATED AND SIGNED AT NANYUKI THIS 18<sup>th</sup> DAY OF JUNE 2019**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 20<sup>TH</sup> DAY OF JUNE 2019**