



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 117 OF 2015**

**MATUKU WAMBUA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

*(Being an Appeal from Original Conviction and Sentence in **Mutomo Principal Magistrate's Court Criminal Case (S.O.) No. 24 of 2015** by **Hon. S. K. Ngii (RM)** on 17/12/15)*

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

1. Upon arraignment in Court, the Appellant was charged with the offence of **Defilement** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **29<sup>th</sup> day of May, 2015** at around **6.00 p.m.** at **Mathima Location** in **Mutomo District** within **Kitui County** intentionally and unlawfully caused his penis to penetrate the vagina of **AM**, a child aged **13 years**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **29<sup>th</sup> day of May, 2015** at around **6.00 p.m.** at **Mathima Location** in **Mutomo District** within **Kitui County** intentionally and unlawfully touched the buttocks, breasts and vagina of **AM**, a child aged **13 years** with his penis.
3. Having been taken through full trial he was convicted and sentenced to **twenty (20) years imprisonment**.
4. Aggrieved, he mitigates on sentence on the grounds that: he had become dipsomaniac thus being patronized by the same; he was a first offender; and he is remorseful; his father died leaving him as a sole breadwinner whereby he was forced to abandon school and work to fend for his family.
5. In response the State through learned State Counsel, **Mr. Mutegi** opposed the Appeal. He urged that the sentence meted out was lawful.
6. Principles upon which an Appellate Court may interfere with the sentence of a trial Court were set out in the case of **Ogolla s/o Owour vs Republic (1954) EACA 270** where the Court of Appeal stated thus:

*“The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors”. To this, we would add a third criterion namely, “that the sentence is manifestly excessive in view of the circumstances of the case (R - v- Shershowsky (1912) CCA 28TLR 263).” See also In Omuse - v- R (Supra) while in the case of Shadrack Kipkoech Kogo –vs- R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:- “ sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant factor or factor or that a wrong principle was applied or that short of these, the sentence itself is so harsh and excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306).”*

7. **Section 8(3)** of the **Sexual Offences Act** provides thus:

*“(3) A person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.”*

8. The Appellant was sentenced to the minimum prescribed sentence for the offence that he committed. Therefore, I have absolutely no reason to interfere with the sentence meted out.
9. In the result the Appeal is dismissed.
10. It is so ordered.

**Dated, Signed and Delivered at Kitui this 10<sup>th</sup> day of July, 2019.**

**L. N. MUTENDE**

**JUDGE**