

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CRIMINAL APPEAL NO. 47 OF 2018

STEPHEN OCHIENG ONYONG'A.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence in Criminal Case No. 7553 of 2015 of the Chief Magistrate's court at Thika)

R U L I N G

1. The Appellant, **Stephen Ochieng Onyong'a** was tried for the offence of Defilement contrary to **Section 8(1)** as read with **Section 8(2)** of the **Sexual Offences Act**. The particulars stated that on 29th December, 2015 at [particulars withheld] in Thika District within Kiambu County he caused his penis to penetrate the vagina of A.M. a child aged 8 years. There was an alternative count of committing an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**, based on the same facts at the close of the trial the Appellant was convicted on the alternative count and sentenced to 10 years imprisonment.

2. On 26th April 2017, he applied for leave to appeal out of time. The Application was allowed by this court and his Petition of appeal admitted on 8th May 2018. The appeal was set down for hearing on 9/7/18 in light of the fact that the Appellant appeared to be ailing and was bound to a wheel chair. On the morning of the hearing, the Appellant informed the court that he had filed submissions and the state indicated that the DPP did not oppose the appeal.

3. It turns out that what the Appellant had lodged was an application seeking re-sentencing. The submissions annexed relate to the sentence only, the Appellant stating in the first paragraph that he wished to abandon his appeal and substitute it with an application for resentencing. Evidently, the DPP was unaware of the withdrawal of the appeal and it is not clear whether the new application lodged within the appeal was served upon the DPP.

4. In the circumstances, and for the sake of good order, this court cannot proceed to write a judgment on the withdrawn appeal, or on the resentencing application. Rather, the court directs:

a) That the Petition of appeal filed herein be marked as withdrawn.

b) That the application filed on 9th July, 2018 be served upon the DPP together with the written submissions.

c) That the said application be listed before Ngugi J on 20th September 2018 during the service week so that it can be heard without further delay.

d) For the avoidance of doubt the review application is to be heard in the miscellaneous file entitled Misc. App. No. 25 of 2017 and housed within the appeal file (HCRA 47/18).

DELIVERED, DATED AND SIGNED THIS 18TH DAY OF SEPTEMBER, 2018

In the presence of:

The Appellant

Miss Ndumbi for the DPP

C. MEOLI

JUDGE