



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 161 OF 2015**

**JMK ..... APPLICANT**

*Versus*

**REPUBLIC ..... RESPONDENT**

*(Being an appeal from the original conviction and sentence in Nanyuki Chief Magistrate's Court Criminal Case No. 343 of 2013*

*by Hon. W. J. Gichimu Principal Magistrate on 30<sup>th</sup> October 2015).*

**JUDGMENT**

1. The Appellant **J M K** was charged before the Nanyuki Chief Magistrate's Court with the **offence of defilement contrary to Section 8(1)(3) of the Sexual Offences Act**. He pleaded not guilty. After trial the court in considering the evidence adduced found that the offence as set out in the charge sheet was not supported by the prosecution evidence. Rather the trial court found that the appellant had inserted his fingers into genitalia organ of the complainant who by then was 3 years old. Applying the provisions of **Section 186** of the **Criminal Procedure Code** the trial court convicted the appellant with the offence of sexual assault as provided under **Section 5(1)** of the **Sexual Offences Act**. On being convicted the appellant was sentenced to serve 10 years. When he appeared at the hearing of this appeal he proceeded to submit in support of his appeal against sentence. He abandoned his appeal against conviction.
2. The appellant in support of his appeal against sentence submitted that he was now repentant of the wrong he did. He told the court that his life has changed, that he had seen the light and that he had come to know God. He also stated that he had children whose whereabouts he did not know since his incarceration.
3. Senior Principal Prosecuting Counsel opposed the appeal against sentence. He submitted that the appellant was properly sentenced in accordance with the provisions of the law. He pointed out that the appellant rather than being convicted of the more serious offence of defilement he had been convicted of the lesser offence of sexual assault. Learned counsel referred to **section 5(2)** of the Sexual Offences Act which prescribes the term of sentence applicable for sexual assault which is not less than 10 years. In the learned counsel's opinion the sentence given to the appellant was very lenient.
4. **Section 354** of the Criminal Procedure Code gives the appellant court the discretion to reverse the finding or sentence and acquittal or discharge of an accused by the trial court. The appellant court is also given the discretion to reduce or increase the sentence of an appellant. The above discretion must be exercised judiciously as was held in the case of **MACHARIA VS REPUBLIC (2003)KLR 115**, that:-

***“ The court does not alter a sentence on the mere ground that if the member of the court had***

*been trying the appellant, they might have passed a somewhat different sentence.....The court will also not ordinarily interfere with the discretion exercised by a trial judge unless as was held in James Vs Republic (1950) EA 147. It is evident that the Judge has acted upon some wrong principles or overlooked some material facts”.*

5. The appellant in accordance with the prosecution evidence was left to take care of the minor child when PW 1 left her home. PW 1 left her home at 11.00 a.m. and returned at 7.00 p.m. It should be noted that the appellant is uncle to the minor child. The minor child informed her mother on her arrival that her uncle had removed her inner clothing and had inserted his fingers into her vagina. The mother to the minor on checking the minor’s private parts found them to be reddish. The minor child who was only 3 years old was very lucid in her testimony. She gave evidence which was very clear of the sexual assault she suffered in the hands of her uncle.

6. As I consider the appellants appeal against sentence it is important to note that the mother to the minor on being cross examined by the appellant stated that it was not the first time the appellant had committed such an offence. She stated that the appellant had previously defiled their neighbour’s child which led to the appellant disappearing from the locality for 7 years. She indicated that the family members supported him in going underground believing in his innocence. Appellant in his defence did not deny he had previously sexually assaulted a minor.

7. As correctly stated by the learned Senior Prosecuting Counsel Mr. Tanui the provisions of section 5(2) are very clear that when one is convicted of a sexual assault the sentence applicable is ten years which sentence can be enhanced to imprisonment for life. Senior Prosecuting Counsel was correct that the trial court was very lenient in the sentence against the appellant. There is no basis that is brought before this court why this court should reduce that sentence. The sentence was lawful. **The appellant’s appeal against sentence is dismissed. The lower court sentence is confirmed.**

**DATED AND DELIVERED THIS 9<sup>TH</sup> DAY OF NOVEMBER 2016.**

**MARY KASANGO**

**JUDGE**

**CORAM:**

Before Justice Mary Kasango

Court Assistant – Njue

Appellant: J M K .....

For the State: .....

**COURT**

Judgment delivered in open court.

**MARY KASANGO**

**JUDGE**