

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.531 OF 2010

(An Appeal arising out of the conviction and sentence of L. GICHEHA - PM delivered on 10th October 2011 in Thika CM. CR. Case No.1864 of 2009)

KYALO MBITI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Kyalo Mbiti was charged with **defilement** contrary to **Section 8(1) & (2)** of the **Sexual Offences Act**. The particulars of the offence were that on 9th April 2009 at *[particulars withheld]* Village in Muranga South District, the Appellant unlawfully and intentionally committed an act which caused penetration with S N N's genital organs, a child aged eleven (11) years. In the alternative, the Appellant was charged with **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant committed an indecent act on S N N, a child aged eleven (11) years by touching her private parts. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, the Appellant was convicted on the main count of **defilement**. He was sentenced to serve fifteen (15) years imprisonment.

Although the Appellant filed an appeal challenging his conviction and sentence, during the hearing of the appeal, he abandoned his appeal on conviction. However, he pleaded with the court for a reduction of sentence. He told the court that he was a sole bread winner for his family. His father had died in 1974. He was taking care of his elderly mother together with his wife and children. He stated that he had been in prison since 2010. He had suffered. He had reformed and was ready to rejoin the society. He had learnt his lesson. He was no longer a danger to the society. He urged the court to take into consideration that he was a first offender. He was remorseful for the offence that he had committed. Ms. Ndombi for the State opposed the plea by the Appellant for reduction of sentence. She submitted that the State had served the Appellant with a notice of enhancement of sentence. She submitted that the sentence that was imposed on the Appellant was illegal. She urged the court to regularize the same by enhancing the sentence. Otherwise, she was of the view that the appeal lacked merit and should be dismissed.

The Appellant is not challenging his conviction. He is appealing against sentence. When the trial court sentenced the Appellant to serve the custodial sentence, it was exercising judicial discretion. As an appellate court, this court will only interfere with such exercise of judicial discretion if it is established that the sentence was manifestly harsh and excessive or was so lenient as to amount to a miscarriage of justice. This court will interfere with the sentence if it is established that the sentence was unlawful. In the present appeal, the Appellant urged the court to interfere with the custodial sentence that was imposed on him by the trial court. He pleaded with the court to exercise leniency on him. He told the court that he had learnt his lesson and should be allowed to be integrated back to society. On the other hand, the State urged the court to set aside the sentence that was imposed by the trial court because it was of the view that the sentence that was imposed by the trial court did not accord with the law.

Having carefully re-evaluated the facts of the case, this court is of the view that the Appellant's appeal on

sentence lacks merit because he failed to establish that the trial magistrate erred in either sentencing him to serve a manifestly excessive and harsh sentence or alternatively in sentencing him to serve a custodial sentence that did not accord with the law. The sentence that the Appellant was sentenced to serve was legal. The submission by the State for the custodial sentence imposed on the Appellant to be enhanced is not supported by evidence. Under **Section 8** of the **Sexual Offences Act**, the sentence to be imposed on a convict where defilement is established depends on the age of the victim. In the present appeal, even though it was alleged that the victim of defilement was eleven (11) years of age, no documentary evidence was produced in evidence to establish her age. No birth certificate or baptismal card or any other documentary evidence was produced to support the allegation by the prosecution that the victim of the offence was indeed aged eleven (11) years at the time the offence was committed. In the absence of such evidence, this court cannot sentence the Appellant to serve the prescribed sentence where the age of the victim was not established.

The upshot of the above reasons is that the appeal lodged by the Appellant lacks merit and is hereby dismissed. He shall serve the sentence that was imposed by the trial court. It is so ordered.

DATED AT NAIROBI THIS 10TH DAY OF MARCH 2015

L. KIMARU

JUDGE