



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.324 OF 2012**

*(An Appeal arising out of the conviction and sentence of HON. G.H. ODUOR - SPM delivered on 5<sup>th</sup> December 2012 in LIMURU SPM. CR.C. Case No.69 of 2010)*

**GEORGE IKUA WAITITU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, George Ikua Waititu was charged with **defilement** contrary to **Section 8(1)** as read with **Section 8(4)** of the **Sexual Offences Act**. The particulars of the offence were that on 2<sup>nd</sup> October 2009 at *[particulars withheld]* Village in Kiambu County, the Appellant intentionally and unlawfully defiled M N W, a girl under the age of 16 years, by penetrating his male organ (penis) into her vagina. He was alternatively charged with **indecent assault on a female** 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 with M N W by causing his penis to touch her vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charges. After full trial, he was convicted of the main count of **defilement**. He was sentenced to serve fifteen (15) years imprisonment. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

However, during the hearing of the appeal, the Appellant abandoned his appeal on conviction and instead mitigated on his sentence. He told the court that he committed the offence during a period when he was frustrated after not getting a job for a long time. He had started drinking. It was the drunkenness that led him to commit the offence. He was remorseful. He pleaded with the court to consider his plea for reduction of sentence. In his written submission, the Appellant claimed that the complainant was his girlfriend. He claimed that he did not know that the complainant was aged below 18 years. In the period that he has been in prison, he had learnt a trade and would be a good citizen if released. Ms. Atina for the State opposed the appeal. She submitted that the sentence that was imposed on the Appellant was legal. The Appellant had placed no grounds before the court to persuade this court to reduce the custodial sentence that was imposed on the Appellant.

The allegation made by the Appellant to the effect that the complainant was his girlfriend led this court to order for a social report to be prepared by a probation officer. The two reports filed in court debunked the claim made by the Appellant. The complainant reiterated that she had been defiled by the Appellant as a result of which she conceived. She was now saddled with a four (4) year old child who was born as a result of the sexual assault. She told the probation officer that she was traumatized and psychologically affected after the sexual assault to the extent that she had to undergo counselling for a period of two (2) years. She denied the allegation that she had any relationship with the Appellant. It was clear to the court that the information given by the Appellant to the court in his mitigation was false.

When the trial magistrate sentenced the Appellant to serve the custodial sentence, he was exercising

judicial discretion. This court cannot interfere with such exercise of judicial discretion unless it is established that the trial magistrate applied the wrong principle of the law or that he sentenced the Appellant to serve an illegal sentence. In the present appeal, the Appellant was sentenced to serve 15 years imprisonment. Under **Section 8(4)** of the **Sexual Offences Act**, this is the minimum sentence that the Appellant was required to serve. This court cannot fault the trial magistrate. It was apparent that the Appellant is prepared to tell the court untruths in order to secure his freedom. This court cannot interfere with the sentence imposed by the trial magistrate.

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

**DATED AT NAIROBI THIS 20<sup>TH</sup> DAY OF JULY 2015**

**L. KIMARU**

**JUDGE**