



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT SIAYA**  
**HIGH COURT CRIMINAL APPEAL NO. 14 OF 2015**  
**(CORAM J. A. MAKAU J)**  
**DANIEL OUMA OPONDO.....APPELLANT**  
**-VERSUS-**  
**REPUBLIC.....RESPONDENT**

**(Being an appeal against sentence in Criminal Case No. 260 of 2015**

**in Bondo Law Courts - before C. A. Kutwa , P.M)**

**JUDGEMENT**

1. The Appellant was charged with defilement contrary to **section 8 (1) as read with Section 8 (4) of the Sexual offences Act No. 3 of 2006.** It was alleged on 17th March 2015 in Bondo District within Siaya County unlawfully and intentionally caused his penis to penetrate the vagina of P A O a girl aged 16 years. In the alternative it was alleged on the same date at the same venue the Appellant unlawfully touched and intentionally touched the vagina of P A O a juvenile aged 16 years using his penis.
2. The Appellant pleaded guilty to the main count of defilement. He admitted the facts to be true and was after mitigation sentenced to serve fifteen (15) years imprisonment.
3. The Appellant was aggrieved by sentence and filed this appeal on the grounds that his mitigating factors were overlooked, and the court imposed a harsh and excessive sentence.
4. The State through Mr. Namasake, learned State counsel opposed the appeal and urged that the offence was of defilement to which the Appellant pleaded guilty and conceded all facts of the case. He urged the sentence be upheld as the same was within the law.
5. The Appellant was charged with defilement contrary to **section 8 ( 1), (4) of the Sexual Offences Act** which provides:-

**"8 (1) A person who commits an act of which causes penetration with a child is guilty of an offence termed defilement.**

2) .....

(3) .....

**(4) A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term not less than fifteen years."**

6. The victim herein was a girl aged 16 years whose age the prosecution proved through production of Baptismal certificate and whose age the Appellant did not challenge.

7. The sentence provided for an offence of defilement under **section 8 (4) of the Sexual Offences Act** is mandatory as the words used thereto are "**for a term not less than fifteen years**" (**Underlining mine is to emphasis the sentence provided**). The law is well settled that where a mandatory sentence is prescribed in law, the Court cannot impose a sentence other than the prescribed penalty. (**See the case of Joseph Mwaura Njuguna (2013) eKLR and Abdirizak Abdi V R, H. Criminal Appeal No. 250 of 2009 (Meru)**)

8. The relevant law under **section 8 (4) of the Sexual Offences Act** provides;-

**"A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term not less than fifteen years".**

The word, used is for imprisonment for a term of not less than fifteen years. Let me borrow from the case of **Abdirizak Abdi V R HCRA NO. 250 Of 2009 (Meru)** in which the court dealt with an offence of attempted defilement contrary to **section 9 (1) and (2) of the Sexual offences Act No. 3 of 2006** in which the Court declined to interfere with the sentence imposed by the trial court and held where a minimum sentence is provided for an offence the Court cannot interfere with the sentence so imposed once the conviction is upheld.

9. The sentence provided for under **Section 8 (4) the Sexual Offences Act**. I note that there is no ambiguity which need the craft of interpretation other than giving effect to the plain meaning of the section. There's no room for the Court to exercise it's discretion and impose any other sentence than the one provided by law, in spite of any mitigating factors. The accused convicted of such an offence is supposed to serve the said mandatory sentence as he is not entitled to any other sentence. The Court's hands are tied by the provisions of the law. In my view **Section 8 (4) of the Sexual Offences Act** prescribes a minimum mandatory sentence of 15 years of imprisonment upon any person found guilty of defilement of a child aged between 16 and 18 years. The period of sentence in my understanding of the said section can even be enhanced beyond 15 years. The section does not mean the court can only hand 15 years. The court depending on the circumstances of the case can impose a sentence beyond 15 years.

10. In view of the foregoing it is my view the court would have no discretion in such a situation but to impose the minimum prescribed sentence or even hand higher sentence than the prescribed minimum sentence of 15 years. The complainant herein was aged 16 years at the time of defilement and, therefore, the appropriate minimum sentence is 15 years. I find the trial Court in imposing a sentence of 15 years acted within the law and imposed a lawful minimum sentence. The Appellant was sentenced to serve the minimum sentence prescribed in law and as provided and as such the Court cannot interfere with the sentence imposed as it was within the prescribed law.

11. The Appeal against the sentence is therefore without merits and is accordingly dismissed.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 8TH DAY OF OCTOBER 2015.**

**J. A. MAKAU**

**JUDGE**

**8/10/2015**

**Delivered in open Court in the presence of:**

Appellant in person present

Mr. Namasake for state.

Court Clerk - Vincent Onyango.

**J. A. MAKAU**

**JUDGE**