



**REPUBLIC OF KENYA**

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

**CRIMINAL DIVISION**

**CRIMINAL APPEAL NO.108 OF 2012**

*(An Appeal arising out of the conviction and sentence of HON. IRERI - SRM delivered on 30<sup>th</sup> March 2012 in Kibera CM. CR. Case No.2436 of 2009)*

**JOSEPH MUSEE MUBENGEI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The Appellant, Joseph Musee Mubengei was charged with **defilement of a child** contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act**. The particulars of the offence were that on 17<sup>th</sup> May 2010 at [Particulars withheld] Village, Ongata Rongai in Kajiado County, the Appellant intentionally and unlawfully committed an act which caused penetration by inserting his male genital organ (penis) into the female genital organ (vagina) of T M, a girl aged fourteen (14) years. He was alternatively 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 by placing his male organ (penis) on the surface of the female organ (vagina) of T M, a girl child aged fourteen (14) years. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged. He was sentenced to serve twenty (20) years imprisonment.

Although the Appellant was aggrieved by his conviction and sentence, during the hearing of the appeal, the Appellant abandoned his appeal on conviction and instead pleaded with court to consider reducing the custodial sentence that was imposed on him. The Appellant stated that he was remorseful, had learnt his lesson, was reformed and was seeking the exercise of leniency by the court. The Appellant urged the court to consider that he was a first offender and that he deserved to be sentenced to serve a non-custodial sentence. Ms. Aluda for the State submitted that although the Appellant had not abandoned his appeal on conviction, she was however of the view that the prosecution had not established the age of the complainant during trial. She submitted that there were inconsistencies in the prosecution's case regarding the circumstances under which it was alleged that the offence was committed. She was of the view that the court should act appropriately to redress the shortcomings in the prosecution's case.

This court has carefully considered the submission made by the Appellant and by Ms. Aluda for the State. As stated earlier in this judgment, the Appellant was not appealing against conviction. He was only appealing against sentence. Having perused the proceedings of the trial court, this court agrees with Ms. Aluda that from the evidence adduced by the prosecution witnesses, it was not possible for the court to determine the age of the complainant. The age of the complainant is important where an accused person is charged with **defilement** under **Section 8** of the **Sexual Offences Act**. This is because it is the age of the complainant that would determine the custodial sentence that will be imposed upon the accused on conviction. This court has no doubt that the prosecution did establish that indeed the Appellant had unlawful sexual intercourse with the complainant. However, since the age of the complainant was not established, it was possible that the Appellant was older than the years indicated in the charge sheet. For

that reason, this court will resolve the doubt as to the age of the complainant in the Appellant's favour.

In the premises therefore, this court will allow the appeal on sentence. The Appellant's conviction under **Section 8(3)** of the **Sexual Offences Act** is set aside and substituted with a conviction under **Section 8(4)** of the **Sexual Offences Act**. The sentence of twenty (20) years imprisonment is therefore set aside and substituted with a sentence of fifteen (15) years imprisonment with effect from 30<sup>th</sup> March 2012 when the Appellant was convicted by the trial court. It is so ordered.

**DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF OCTOBER 2015**

**L. KIMARU**

**JUDGE**