



REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

HIGH COURT CRIMINAL APPEAL NO 70 OF 2012

DAVID KIPKEMEI TORITICH.....APPELLANT

=VERSUS=

REPUBLICPROSECUTOR

(An appeal arising from the original conviction and sentence in Criminal Case No65 of 2009 in the Chief Magistrates Court at Eldoret- Hon. B.N Mosiria (Resident Magistrate))

JUDGEMENT

1. The appellant **David Kipkemei Torotich** had been charged with the principal count of defilement contrary to **Section 8(1)** as read with **section 8(2)** of the sexual offence Act and an alternative count of committing an indecent act with a child contrary to **Section 11 (1)** of the same Act.
2. After full trial, he was convicted of the alternative count whose particulars were that on the 5^h day of February, 2009 at about 7.30pm in Keiyo District of the Rift Valley Province did cause his pennies to penetrate the vagina of **DC** a child aged 7 years in violation of section 8(1) as read with section 8(2) of the Sexual Offences Act No 3 of 2006.
3. Following his conviction, the appellant was sentenced to fifteen (15) years imprisonment. Being aggrieved by the conviction and sentence, he appealed to the High Court through his petition of appeal filed on 20th February, 2012. In his grounds of appeal, the appellantthis court to allow his appeal on grounds that he had health challenges, that he was an only child in his family; that his mother was aged and physicallywith nobody to take care of her and lastly, that he had young children who were suffering in his absence.
4. The above grounds of appeal were obviously not supportive of he appellants appeal against conviction but were only relevant to his appeal against sentence. And when the appeal came up for hearing on 25th November, 2014, the appellant disclosed that he was abandoning his appeal conviction and was only interested in pursuing his appeal against sentence. He relied entirely on written submissions he submitted to the court urging I to review his sentence and either reduce it or substitute it with a non custodial sentence.
5. The state through learned prosecuting Counsel Mr. Mulati opposed the appeal pointing out that the sentence of fifteen years imprisonment imposed on the appellant was lawful as the law prescribed a minimum sentence of ten years for the offence for which the appellant was convicted. Counsel invited the court to dismiss the appeal for lack of merit.
6. The appellant having expressly abandoned his appeal against conviction, this court is only left

with the task of determining his appeal against sentence. I have considered the rival submissions made by the appellant as well as Mr. Mulati for the state. I have also read the record of proceedings in the trial court. The record confirms that the appellant was a first offender. Though the sentence of fifteen years imprisonment passed against the appellant was lawful, I am of the view that the sentence was rather harsh for a first offender. I find that the minimum sentence of ten years would have been more appropriate for the appellant given the circumstances in this case. Consequently, I allow the appellant's appeal against sentence only to the extent that the sentence imposed on the learned trial magistrate is set aside and substituted with a sentence of ten years imprisonment with effect from the date of conviction.

Orders accordingly.

C. W. GITHUA

JUDGE

27/11/2014

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18th DAY OF DECEMBER, 2014

In the presence of:

The Appellant

Mr. for the state

Ruth Mwendu- Court Clerk