

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.549 OF 2009

(An Appeal arising out of the conviction and sentence of A. ONGERI (MRS) - SPM

delivered on 16th November 2009 in Kiambu CMC. CR. Case No.598 of 2009)

JAMES NGETHE KAGENI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, James Ngethe Kageni, was charged with two (2) counts of **defilement** Contrary to **Section 145(1)** of the **Penal Code**. The particulars of the offence were that on 9th February 2005 at *[particulars withheld]* Village in Kiambu District, the Appellant intentionally and unlawfully committed an act which caused the penetration of his genital organ (penis) into female genital organ (vagina) of M W K and L W K, both girls under the age of eleven (11) years. In the alternative, he was charged with two (2) counts of the offence of **indecent assault of a child** Contrary to **Section 144(1)** of the **Penal Code**. The particulars of the offence were that on the same day and in the same place, the Appellant indecently assaulted M W K and L W K, both girls under the age of eleven (11) years by touching their private parts, namely vagina. 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 as charged on the main count of defilement. He was sentenced to serve fourteen (14) years imprisonment on each count. The sentences were ordered to run concurrently. The Appellant was further sentenced to hard labour. The Appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

Although the Appellant appealed against his conviction and sentence, during the hearing of the appeal, the Appellant abandoned his appeal on conviction. Instead, he pleaded with the court to have the sentence that was imposed upon him reduced. He told the court that he contracted Tuberculosis (TB) while in prison. He also suffers from ulcers. He told the court that since his incarceration, he had learnt several trades. He had reformed. He would not repeat the offence. If the sentence was reduced, and he is released, he would be a good member of society. Miss Ndombi for the State opposed the appeal and sentence. She submitted that the offences on which the Appellant was charged and convicted was heinous because the Appellant had defiled two girls then under the age of eleven (11) years. In her opinion, the Appellant was lucky that he was not charged under the **Sexual Offences Act** (which had not come into operation at the time) because the sentence imposed on him would have been much stiffer. She urged the court not to be persuaded by the Appellant's plea for reduction of sentence. The State was of the view that the appeal should be dismissed.

This court has carefully considered the plea by the Appellant for reduction of sentence. The court has also considered the objection to the plea by the State. The court has taken into account the facts of this case. The Appellant is not appealing against his conviction. In effect, he admits committing the two offences. This court agrees with the State that the offences that the Appellant committed were serious and deserved the stiff custodial sentences that were imposed by the trial court. However, this court was not persuaded

that the trial court was justified in sentencing the Appellant to serve the two sentences consecutively instead of concurrently. There were no aggravating circumstances to warrant the decision by the trial court. It was conceded by the State that the Appellant was a first offender. Despite the serious nature of the offences that the Appellant was charged with, the order that the Appellant serves the two sentences consecutively instead of concurrently amounted to a miscarriage of justice which must be rectified by this court on appeal.

In the premises therefore, the Appellant's appeal on conviction is hereby dismissed. His appeal on sentence is hereby allowed to the extent that the sentences imposed on him of fourteen (14) years imprisonment on the two counts of defilement shall run concurrently instead of consecutively. The sentence shall take effect from the date that the Appellant was convicted by the trial magistrate's court *i.e.* 16th November 2009. It is so ordered.

DATED AT NAIROBI THIS 6TH NOVEMBER 2014.

L. KIMARU

JUDGE