



**IN THE COURT OF APPEAL**

**AT KISUMU**

**(CORAM: OKWENGU, MUSINGA & GATEMBU, J.J.A.)**

**CRIMINAL APPEAL NO. 25 OF 2017**

**BETWEEN**

**MICHAEL LENNOX ODERO.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(An appeal from the Judgment of the High Court of Kenya at Homa Bay (D.S. Majanja, J.) delivered on 7th April 2016 in H.C. CRA. No. 2 of 2016.)*

**JUDGMENT OF THE COURT**

1. The appellant, **Michael Lennox Odero**, was charged with the offence of defilement contrary to **section 8(1) and (2)** of the **Sexual Offences Act, 2006** in the Chief Magistrates' Court at Homa Bay. The particulars of the offence were that on 3rd March 2015 within Homa Bay County, the appellant wilfully and unlawfully caused his penis to penetrate the vagina of **VAO**, a child aged 7 years.
2. The appellant was convicted and sentenced to life imprisonment. Being aggrieved by the said conviction and sentence, the appellant preferred an appeal to the High Court, (**D. S. Majanja, J.**) The appeal against conviction was unsuccessful. As regards the sentence, it was established that the child was 11 years and 3 months old. Consequently, the learned judge reduced the sentence to 20 years' imprisonment.
3. Undeterred, the appellant preferred a second appeal to this Court, challenging both conviction and sentence.
4. This appeal was heard on 30th April 2020 by use of technology (skype video conference) pursuant to the practice directions for the protection of judges, judicial officers, judiciary staff, other court users and the general public from the risks associated with the global corona virus pandemic issued by the Chief Justice on 20th March, 2020 vide **Gazette Notice No. 3137** on 17th April 2020.
5. When the appeal was called out for hearing, the appellant, who was unrepresented, informed the Court that he was no longer challenging his conviction. He therefore abandoned the appeal against conviction.
6. Regarding sentence, the appellant basically advanced various mitigating factors, urging the Court to reduce the jail term. He told us that prior to his arraignment he was the sole bread winner for his family; that he was a young man when he committed the offence; that he was a first offender; and that he was remorseful.
7. **Mr. Kakoi**, Principal Prosecution Counsel, urged the Court not to interfere with the sentence. He submitted that there was no lawful reason for the Court to reduce the sentence.
8. Under **section 361(1) (a)** of the **Criminal Procedure Code**, severity of sentence is a matter of fact and in a second appeal this Court has no jurisdiction to consider matters of fact. Similarly, under **section 361 (1)(b)**, the Court cannot hear an appeal against sentence, except where the sentence has been enhanced by the High Court, unless the trial court had no power to pass the sentence in the first place. See **Njoroge v Republic [1982] KLR 388**.
9. In this case, the trial court had power to pass the sentence that it pronounced but the learned judge reduced it on account of the complainant's age. Therefore, we have no jurisdiction to interfere with the sentence. Consequently, this appeal fails and is hereby dismissed in its entirety.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of July, 2020.**

**HANNAH OKWENGU**

**JUDGE OF APPEAL**

**D.K. MUSINGA**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**