



## IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E.M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CRIMINAL APPEAL NO. 133 OF 2014

BETWEEN

T W W..... APPELLANT

AND

REPUBLIC.....RESPONDENT

*(Being an Appeal from the judgment of the High Court of Kenya at Bungoma, (Mutungi, J.) dated 14<sup>th</sup> day of November, 2013*

in

H.C.C.R.A. NO. 88 OF 2013)

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### JUDGMENT OF THE COURT

[1] The appellant was convicted by the Acting Principal Magistrate at Sirisia on his own plea of guilty for the offence of incest contrary to **section 20 (1)** of the **Sexual Offences Act** and sentenced to life imprisonment.

[2] The particulars of the offence alleged among other things, that, the appellant on the material day caused penetration into the female organ of a child aged 8 years who is his niece by inserting his genital organ into the genital organ of the said child. Upon the appellant admitting the offence, the facts constituting the offence were read to him which he admitted. Thereupon the trial magistrate convicted the appellant and upon considering the appellant's mitigation, sentenced the appellant to life imprisonment.

[3] The appellant appealed to the High Court at Bungoma against the conviction and sentence mainly on the grounds that the charges were not explained to him in a language that he understood and that the sentence was manifestly excessive. He asked the High Court to order a re-trial.

[4] The appeal was heard by **Mutungi, J.**, who by a judgment delivered on 14<sup>th</sup> November, 2013 dismissed the appeal in its entirety.

[5] The appellant appealed to this Court contending that the High Court erroneously dismissed his appeal and that a re-trial should be ordered. The appellant was not represented by a counsel at the hearing of the appeal.

**Ms. Tumaini Wafula**, the Assistant Director of Public Prosecutions for the respondent has filed written submissions. The learned counsel contends in the written submissions in essence that the decision of the Supreme Court in **Francis Karioko Muruatetu & another v. Republic [2017] eKLR** should be applied to the mandatory sentences under the Sexual Offences Act and that the sentence of life imprisonment should be set aside and replaced with an appropriate sentence.

[6] At the hearing of the appeal, it came to the attention of the Court that J.M. Mutungi, J. who heard and wrote the impugned judgment is a judge of the Environment and Land Court and not a judge of the High Court. Pursuant to the decision of the Supreme Court in **Republic v. Karisa Chengo & 2 others – Petition No. 5 of 2015**, we find that the learned judge had no jurisdiction to determine the appeal and the impugned judgment is therefore a nullity *ab initio*.

[7] For that reason, the appeal is allowed, the judgment of the High Court is set aside. In the interest of justice, the appeal is remitted to the High Court at Bungoma for re-hearing by a judge with jurisdiction.

We so order.

**DATED and Delivered at Kisumu this 22<sup>nd</sup> day of October, 2018.**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**