



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: O’KUBASU, GITHINJI & NYAMU, J.J.A.)**

**CRIMINAL APPEAL NO. 246 OF 2009**

**BETWEEN**

**REUBEN NDUMA.....APPELLANT**

**AND**

**REPUBLIC.....RESPONDENT**

*(Appeal from a judgment of the High Court of Kenya at Machakos (Lenaola, J.) dated 18<sup>th</sup> September, 2009*

*in*

***H.C.CR.C.NO. 100 OF 2008)***

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**JUDGMENT OF THE COURT**

The appellant **Reuben Nduma**, was in the Principal Magistrate Court, Makindu charged with the offence of defilement contrary to section 8 (1) of the Sexual Offences Act No.3 of 2006. It was alleged that on 17<sup>th</sup> April 2008 in Ndovoini Sub-location, Nguumo Location in Kibwezi District within the Eastern Province he committed an act which caused penetration with M.M, a child of 12 years. When plea was taken the appellant admitted the offence and was sentenced to serve twenty years in prison.

In his first appeal to the High Court the appellant contended that his plea was not taken and that the language used in court was not recorded and further that the complainant was his girlfriend. However, the superior court dismissed the appellant’s appeal.

In the second and final appeal to this Court the appellant has raised the following grounds:-

- 1) “That the learned High Court Judge erred in law in upholding the lower court’s decision and failed to appreciate that, conviction and sentence on my own plea of guilty was unsafe because my mitigation was a denial of the case.**
- 2) That the learned High Court Judge further erred in law and facts in supporting the lower court’s decision and failed to take note that as a first offender, the sentence was so harsh and excessive.**
- 3) That the learned High Court Judge also erred in law in dismissing my appeal whereas mitigation,**

***which is part (sic) of the trial was not considered at all.”***

In articulating his grounds of appeal, the appellant who appeared in person during the hearing, submitted that the sentence was harsh and excessive; that he did not understand the language used during the hearing in the trial court; and finally that the complainant was his girlfriend.

Mr Monda, learned Senior State Counsel submitted that the appellant had raised the same issues in the superior court and the court had addressed them adequately in that the language used was recorded including the presence of an interpreter. And as regards the alleged failure to accord an opportunity to mitigate it was clear from the record, when asked to mitigate, the appellant had responded that the complainant was his girlfriend.

The superior court observed that the alleged consent by the complainant as a girlfriend was irrelevant in law in that the complainant had no capacity to consent; that the plea of guilt was entered and finally that the sentence of twenty years imposed by the trial court was the minimum sentence for the offence. For these reasons and quite rightly in our view the first appellate court declined to interfere with the sentence.

In our view, the central point before us as second appellate court is that of the sentence imposed. It is not in dispute that the sentence was under the Sexual Offence Act, the minimum sentence for the offence and therefore a perfectly lawful sentence. As we have repeatedly stated severity of a sentence is a matter of fact and pursuant to section 361 of the Criminal Procedure Code, this is a matter outside the mandate of this Court as the second and final appeal Court.

In the result the appeal is dismissed.

It is so ordered.

***DATED and delivered at Nairobi this 4<sup>th</sup> Day of March, 2011.***

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**