



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CRIMINAL APPEAL NO. 40 OF 2019**

**LYAN GIKARIA NDIRANGU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against conviction and sentence from the judgment of the Hon. W. Kagendo Chief Magistrate, Nyeri delivered on 30/05/2019 in CM.SO.Case No.15 of 2018)**

**JUDGMENT**

1. The Appellant **Lyan Gikaria Ndirangu**, was charged with the offence of attempted defilement contrary to **Section 9 (1)** as read with **9(2)** of the **Sexual Offences Act**. The particulars of the offence being on 6/06/2018 within Kieni West sub County within Nyeri County the appellant caused his genitalia to intentionally and unlawfully penetrate that of **MM** a child aged 17 years.
2. The alternative charge was the offence of Indecent Act with a child contrary to Section 11(1) of the Sexual Offences Act; the particulars are that on the above date the appellant intentionally committed an indecent act by touching the private parts of **MM** a child aged 17 years.
3. After the trial, the Appellant was found guilty and was convicted on the alternative charge and was sentenced to fifteen (15) years imprisonment.
4. Being aggrieved by the sentence, the Appellant filed a Petition of Appeal and listed three (3) grounds of appeal which can be summarized as the sentence imposed was harsh and excessive and mitigation for leniency on sentence;
5. At the hearing of the appeal the appellant was unrepresented whereas Ms. Gicheha appeared for the State; both parties relied on their written submissions which were filed and exchanged; hereunder is a brief summary of the submissions.

**APPELLANT'S SUBMISSIONS**

6. The appellant submitted that the appeal was just on the sentence; the sentence imposed of fifteen (15) years imprisonment was harsh and excessive due to his health status; his plea on mitigation was that he was a family man and their sole bread winner;
7. He prayed that the appeal be allowed and prayed for a less severe sentence or a non-custodial sentence so that he could rejoin his family and community.

**RESPONDENT'S SUBMISSIONS**

8. The appeal was opposed by the respondent's counsel who submitted that the appellant was sentenced on 30/06/2019 and had spent only one year in prison which was not sufficient for him to have reformed; counsel pointed out that the sentence imposed was lawful, reasonable and adequate; the prayer for a non-custodial sentence was also opposed.
9. Counsel prayed that the appeal be dismissed and the sentence imposed be upheld.

**ISSUES FOR DETERMINATION**

10. The only issue framed by this court for determination is whether the sentence was harsh and excessive in the circumstances;

**ANALYSIS**

11. The appellant submitted that the instant appeal was only on sentence; his contention was that the sentence imposed of fifteen (15) years imprisonment was harsh, oppressive and excessive in the circumstances;

12. An appellate court will only interfere with the sentence imposed where it is demonstrated that sentence was either illegal or is either too harsh or too lenient in the circumstances; therefore, the scope of this courts appellate power is to examine the court record so as to satisfy itself as to the propriety and legality of the sentence and that it has been made in accordance with the law; Refer to the case of **Wanjema v Republic (1971) EA 493**

13. The applicable section in this instance is found at Section 11(1) of the **Sexual Offences Act Penal Code; which section reads as follows;**

***“Section 11(1) Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term of not less than ten years.***

14. This court has interrogated the relevant provision of the law and is guided by the above authority; the minimum sentence provided by the above section is ten (10) years imprisonment; the record reflects that the trial court invited the appellant to mitigation and took into consideration the fact that the appellant was a family man and had a wife and children and also took care of his mother; it is noted that in order to support the reasonableness of its determination of the sentence imposed the trial court then took into consideration the circumstances of the case; and the trial court observed that ***‘the accused attempted to defile a mentally retarded child. The court will not be lenient’***.

15. The court record reflects that the complainant was mentally challenged and the appellant took advantage of; that he must have been privy to her mental status as he was working in the same locality as the complainant; secondly, the age of the complainant was ascertained and the Age Assessment Report produced in court showed that she was aged between 17-18 years and therefore had not attained the age of majority to consent to the appellant’s actions;

16. The offence would have been grave had the appellant not been interrupted; taking into consideration the above facts and the circumstances in which the offence was committed it can therefore be validly concluded that the appellant was indeed undeserving of any leniency; he needs to bear the responsibility and consequences of his actions by serving a custodial sentence;

17. This court is satisfied that the trial court did not apply wrong principles of law when sentencing the appellant; the sentence imposed by the trial court is found to be within the law and it is therefore, legal and also finds no good reason that justifies interference with the sentence.

18. This ground of appeal lacks merit and it is hereby disallowed;

#### **FINDINGS & DETERMINATION**

19. For those reasons stated above this court makes the following findings and determinations;

(i) The appeal on sentence is found to be lacking in merit;

(ii) The sentence imposed is found to be legal and is not manifestly harsh and excessive in the circumstances;

(iii) The sentence imposed of fifteen (15) years is hereby upheld; the sentence to run from the date of arrest which is indicated on the Charge Sheet as being 6/06/2018.

Orders accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NYERI THIS 22ND DAY APRIL, 2021.**

**HON.A. MSHILA**

**JUDGE.**