



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUNGOMA**

**CRIMINAL APPEAL NO. 202 OF 2019**

**AMOS WANYAMA WAFULA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an appeal from the original sentence in Criminal Case No. 41 of 2018 at the

Senior Principal Magistrates Court at Kimilili by (Hon. G.A. Ollimo – RM

on 6<sup>th</sup> December 2019)

**JUDGMENT**

1. **Amos Wanyama Wafula**, the Appellant, was charged and convicted for the offence of attempted defilement contrary to section 9 (1) as read with section 9 (2) of the Sexual Offences Act. It was stated that he attempted to cause his penis to penetrate the vagina of **L.N.B.** a child aged 14 years.

2. Following the conviction, he was sentenced to serve ten (10) years imprisonment.

3. Aggrieved, he now mitigates on sentence. His argument is that he was a first offender, he is remorseful, he is a sole breadwinner of a small boy who is at home as he is an orphan; the sentence is harsh and if reduced he will adhere to the law.

4. In response thereto, the State/ Respondent opposed the Appeal. It was urged that in meting out the sentence the trial court took into account the minimum sentence for the offence, therefore, it was not harsh or excessive. That the sentence was lenient considering evidence adduced against the Appellant that was consistent.

5. This being a first appellate court it is called upon to re-consider what transpired at trial.

6. Section 9 (2) of the Sexual Offences Act (Act) provides thus :

**(2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.**

7. In passing the sentence the court took into consideration mitigating factors, the fact of the Appellant having been a first offender and the law as provided by statute. The sentence meted out was the minimum prescribed sentence for the offence.

8. In the case of **Bernard Kimani Gacheru -vs- Republic (2002)** the court of Appeal stated that:

**“...It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.**

The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owoura v. Reginum (1954) 21 270 as follows:-

"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R., (1950) 18 E.A.C.A 147 "

9. The trial court having acted on proper principles I have absolutely no reason to interfere with the sentence.

In the result the appeal against sentence is devoid of merit. Accordingly, it is dismissed.

10. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15<sup>TH</sup> DAY OF OCTOBER, 2021.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

Court Assistant – Brenda

Appellant

Ms. Mukangu - ODPP