



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO. 29 OF 2017

MICHAEL ATEKA KAMAU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal arising from the original Sentence in Sexual Offence Case No. 101 of 2014 at the Chief Magistrate's Court Kibera by Hon. B. Ojoo – PM on 16/2/2017)

JUDGEMENT

1. **Michael Ateka Kamau**, the Appellant, was charged with the offence of Committing an Indecent Act with a child contrary to **section 11(1)** of the Sexual Offences Act. Particulars of the offence being that on the 26th day of August, 2014, at [Particulars Withheld] in Langata District within Nairobi County, intentionally and unlawfully touched the vagina of **VHO** a child aged 5 years with his penis.
2. Having been taken through full trial, he was convicted and sentenced to serve ten (10) years imprisonment.
3. Aggrieved, the appellant appealed against both the conviction and sentence. However, during hearing of the appeal, he admitted having committed the act of indecency with a child and asked the court to consider taking into account time spent in custody. He stated that during pendency of trial he was in custody for two (2) years, four (4) months.
4. Ms. Akunja, learned Counsel for the State opposed the appeal and urged the court not to interfere with the sentence meted out.
5. As a first appellate court, I have the responsibility of re-considering what transpired at trial and come to my independent conclusions bearing in mind that I did not have the opportunity of hearing what was stated at trial. (Also see **Okeno -vs- Republic (1972) EA 32.**)
6. I have been called upon to interfere with the sentence passed by the trial court. Principles of interfering with such a sentence have been clarified. An appellate court will normally not interfere with exercise of discretion by the trial court unless it is demonstrated that the court acted on wrong principles, ignored material factors, took into account irrelevant considerations, or if the sentence is manifestly excessive. In the case of **Bernard Kimani Gacheru -v- Republic, Cr App. No. 188 of 2000** the Court of Appeal stated thus:

“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...”

7. The Judiciary Sentencing Policy Guidelines further provides that: -

“The proviso to section 333 (2) of the Criminal Procedure Code obligates the court to take into account the time already served in custody if the convicted person had been in custody during the trial. Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed. In determining the period of imprisonment that should be served by an offender, the court must take into account the period in which the offender was held in

custody during the trial.”

8. The appellant contravened **Section 11(1)** of the Sexual Offences Act that provides thus:

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.

9. The appellant having been sentenced to the minimum prescribed sentence for the offence, and taking into consideration the age of the complainant, the trial court did not misdirect Itself.

10. In the result, the appeal is bereft for merit, accordingly, it is dismissed.

11. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 16TH DAY OF DECEMBER, 2021.

L. N. MUTENDE

JUDGE

IN THE PRESENCE OF:

Court Assistant – Mutai

Ms. Ndombi – ODPP

Appellant.