



**REPUBLIC OF KENYA**

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

**HCCRA NO. 116 OF 2019**

**KIMEU NDAMBUKI.....APPELLANT**

**-VERSUS-**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the sentence of the Senior Resident Magistrate***

***Hon. T. Ole Nchoe dated 24/09/2015 in Makueni SPMCR No. 615 of 2015.)***

**JUDGMENT**

1. **Kimeu Ndambuki** the Appellant herein was arraigned before the Makueni Senior Principal Magistrate's court on account of the following offences:

**Count I:** Attempted defilement contrary to section 9(1)(2) of Sexual Offences Act No. 3 of 2006. The particulars were that the Appellant on the 2<sup>nd</sup> day of September 2015, at [Particulars Withheld] village, [Particulars Withheld] sub-location, kwakavisi location, Kathonzweni district within Makueni county intentionally attempted to cause his penis to penetrate the vagina of **MK** a child aged 13 years.

**Count II:** Committing an indecent act with a child contrary to section 11(1) of the Sexual Offence Act No. 3 of 2006. The particulars were that the Appellant on the 2<sup>nd</sup> day of September 2015 at [Particulars Withheld] village, [Particulars Withheld] sub location, kwakavisi location Kathonzweni district within Makueni county intentionally touched the vagina of **MK** a child aged 13 years with his penis.

2. He appeared for plea and was convicted on his own admission of the offence in count 2 and sentenced to ten (10) years imprisonment. He was discharged of count I under section 87(a) Criminal Procedure Code for lack of evidence.

3. His appeal is basically on sentence. In his written submissions and grounds of appeal, he asks the court to consider the facts, circumstances and any other mitigating factor of the case and reduce the sentence for him. He has referred to some training he has undertaken while in prison plus the certificates obtained.

4. The appeal has been opposed by the Respondent. Learned counsel Mr. Kihara for the Respondent submitted that the Appellant was properly convicted for the offence of attempted defilement. He further submitted that this offence is prevalent in this region hence the need for a deterrent sentence.

5. This is a first appeal and this court has a duty to re-analyze and re-consider all the evidence on record and arrive at its own conclusion. See **Okeno –vs- R (1972) E.A 32, Kiilu & Anor (2005) IKLR 174.**

6. Before dealing with the issue of sentence, I must satisfy myself that the plea is unequivocal. I have perused the record and do note that the Appellant was first arraigned in court on 23<sup>rd</sup> September, 2015 on account of 2 counts. He pleaded guilty to count I. Plea was never taken on count II. Facts were read the next day without him being reminded of the charge. His response to the facts was this ***“I touched her breast with her consent. She is the one who called me to the bush.”***

7. In spite of this, the court went ahead to convict him not on count **I** which was read to him but on count **II** which was never read to him. This is further fortified by the withdrawal of count I by the DPP under section 87A Criminal Procedure Code on 6<sup>th</sup> October, 2015 for lack of sufficient evidence.

8. To make the record clear, the Appellant was charged with two offences under two distinct counts, under the Sexual Offences Act. None of them was an alternative count and the trial Magistrate ought to have taken plea on both counts and not one as he did.

9. We are courts of record and as far as the record here is concerned it is only the charge and facts in count **I** which were read to the Appellant. The charge and facts in count **II** for which the Appellant was convicted were never read to him. I therefore find the conviction to be unsafe and cannot be left to stand. Can this court order for a retrial?

10. The Appellant has served sentence since 24<sup>th</sup> September 2015, a period of four (4) years, (5) five months. It would be prejudicial and against the interests of justice to order for a retrial in the circumstances. See **Bernard Lolimo Ekimat –vs- R (2005) eKLR**.

11. I therefore allow the appeal. The conviction is quashed and sentence set aside. The Appellant to be released forthwith unless otherwise lawfully held under a separate warrant.

Orders accordingly.

**Delivered, signed & dated this 20<sup>th</sup> day of February, 2020, in open court at Makueni.**

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**Hon. H. I. Ong’udi**

**Judge**