



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO 66 OF 2017**

**(From original Conviction and Sentence in Nanyuki CM Sexual Offence Case No 12 of 2016 – W J Gichimu, PM)**

**GEORGE HUGI NYENGA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**J U D G M E N T**

1. The Appellant herein, **GEORGE HUGI NYENGA**, was charged in the main count with *defilement of a child* contrary to **section 8(1) & (2)** of the *Sexual Offences Act, 2006*. After trial however, he was convicted of *attempted defilement* contrary to **section 9(1) & (2)** of the same Act. On 02/05/2017 the Appellant was sentenced to fifteen (15) years imprisonment.

2. Inexplicably, the Appellant was also convicted of the alternative charge of *committing an indecent act with a child* contrary to **section 11(1)** of the *Sexual Offences Act*. For this offence he was also sentenced to fifteen (15) years imprisonment, to run concurrently with the sentence in the main count.

3. This conviction on the alternative charge is obviously unlawful and must be set aside. Having convicted the Appellant on the main charge, the trial court could not convict him also on the alternative charge for the simple reason that it was **alternative** to the main charge! The conviction and the sentence imposed are therefore set aside. It is so ordered.

4. Regarding the conviction and sentence in the main count, the Appellant appealed only against the sentence. I have considered his submissions (he was unrepresented) as well as those of the learned prosecution counsel.

5. There was obviously an aggravating factor in the commission of the attempted defilement – the very young age of the complainant (at 5 years!). The offence carried under the statute a minimum of ten (10) years imprisonment, with no upper limit. The Appellant got 15 years.

6. To the credit of the Appellant, he was a first offender, a fact that the trial court did not comment upon. The Appellant has also told this court that he was born in 1991. So, at the time that he was sentenced in 2017 he was about 26 years old, a relatively young age. This is also a factor that the trial court ought to have considered in favour of the Appellant as every person deserves a second chance.

7. I consider that the sentence of fifteen (15) years imprisonment meted out to the Appellant was manifestly harsh and excessive in the circumstances of the case. A shorter prison term would have served the ends of justice.

8. I will in the circumstances partially allow the appeal against the sentence by setting aside the fifteen (15) years imprisonment awarded and substituting therefor ten (10) years imprisonment from the date the Appellant was sentenced. To that limited extent only is the appeal against the sentence in the main count allowed. It is so ordered.

9. The conviction and sentence in respect to the alternative charge have already been set aside for illegality.

**DATED AND SIGNED AT NANYUKI THIS 3<sup>RD</sup> DAY OF DECEMBER 2020**

**H P G WAWERU**

**JUDGE**

**DELIVERED AT NANYUKI THIS 17<sup>TH</sup> DAY OF DECEMBER 2020**