



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KABARNET

HCCRA NO. 220 OF 2017

FARAJ ABDULAI ALIAS FERRO.....APPELLANT

=VERSUS=

REPUBLIC.....RESPONDENT

[An appeal from the original conviction and sentence of the Principal

Magistrate's Court at Eldama Ravine Cr. Case no. 657 of 2016

delivered on the 11th day of April, 2017 by Hon. J. Tamar PM]

JUDGMENT

1. The appellant was convicted and sentenced to imprisonment for ten (10) years for the offence of attempted defilement on 11/4/2017 as the particulars of which were that he had “on the 2nd day of July 2016 at Mogotio Township in Mogotio Sub-County within Baringo County intentionally attempted to cause his penis to penetrate the anus of OMA. a child aged 7 years.”

2. By his Petition of Appeal dated 06 December 2017, the appellant challenged his sentence on the principal ground that “the offence given was harsh and I pray that the Honourable Court may quash, reduce or given non-custodial sentence,” and that “the Court may reconsider the duration that I served while in remand.” He reiterated his plea in submissions of 3/10/18.

3. The DPP opposed the appeal urging that the sentence of 10 years is the minimal sentence for the offence of attempted defilement, and the evidence against the appellant overwhelming.

4. I have considered the evidence before the trial Court and find that the evidence of the two minor children, the complainant and the eye-witness, Pw1 and Pw2 respectively, was corroborated by that of the Clinical Officer, Pw3 who on anal examination of the complainant found “it inflamed with no tears or bruises....no discharge [and] no spermatozoa.” It, indeed appeared that the case was one of defilement rather than attempted defilement but the lack of conclusive medical evidence of penetration to support the unsworn statements of the complainant and eye-witness may have informed the decision to change from attempted defilement despite the complainant’s and the witness evidence that there was actually penetration. The appellant’s unsworn statement merely testified of his arrest.

5. As the appellant did not appeal from the conviction, and the DPP did not appeal and seek enhancement of the charge so that the appellant is convicted for the offence of defilement, this Court has no basis for changing the offence from which he was convicted. The trial Court was impressed with the honesty and truthfulness of the two minors. See page 18 Record.

6. I agree with the DPP that as the sentence of ten (10) years imprisonment is a minimum sentence, the Court has no discretion as regards the sentence.

Orders

7. Accordingly, the appellant’s appeal is without merit and is dismissed.

8. The sentence, however, shall run from the date of arrest on 3/7/2016.

Order accordingly.

DATED AND DELIVERED THIS 10TH DAY OF APRIL 2019

EDWARD M. MURIITHI

JUDGE

Appearances:

Appellant in person.

Ms. Macharia, Ass. DPP for the Respondent.