



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 12 OF 2016**

**SAMUEL GITHUKU GITHUI.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(Appeal against conviction and sentence from the judgment of the Hon.Mburu (RM) Nyeri dated 02/02/ 2016 in Criminal Case No. 9 of 2014)**

**JUDGMENT**

1. The Appellant, **Samuel Githuku Githui**, was charged with the offence of attempted defilement a girl contrary to **Section 9(1) (3)** of the **Sexual Offences Act**. The particulars of the charge are that on the 18<sup>th</sup> February, 2014 within Nyeri County, the appellant intentionally attempted to defile **BW** a girl aged 4 ½ years.
2. After the trial, the Appellant was found guilty and was convicted at the Resident Magistrate's Court at Nyeri and was sentenced to ten (10) years imprisonment.
3. Being aggrieved by the sentence, the Appellant filed a Petition of Appeal and listed one ground of appeal that;

(i) The sentence was harsh and excessive:

4. When the appeal was heard the appellant appeared in person and Ms. Gicheha appeared for the State; the appellant and Prosecuting Counsel for the State made oral presentations;

**APPELLANTS SUBMISSIONS**

5. (i) That the sentence was harsh and excessive due to his health status; and that he also suffered a disability in one of his hands;

(ii) That he was the sole bread winner and had seven children dependant on him; that he was remorseful and had reconciled with the complainants family;

(iii) He humbly urged the court to reduce his sentence;

**RESPONDENTS SUBMISSIONS**

6. (i) In response Counsel submitted that that the prison institution provides medical services; that his

poor health was not a good ground to warrant reduction of sentence;

(ii) On reconciliation counsel submitted that the opportunity was overtaken by events; that the provisions of the Sexual Offences Act do not allow for reconciliation.

(iii) For attempted defilement of a child the Act provides that the sentence should not be less than 10 years; and the appellant was given the minimum sentence;

(iv) Counsel urged that the appeal be dismissed.

### **ISSUES FOR DETERMINATION**

7. After taking into consideration the submissions of both the Appellant and Respondent this court finds only one issue for determination; which is whether the sentence was harsh and excessive in the circumstances.

### **ANALYSIS**

8. The appellant proceeded only with the appeal against sentence; that he was sentenced to serve a term of ten (10) years; which he contends is harsh and excessive;

9. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The principles to be taken into consideration by the appellate court are that it must satisfy itself that the trial court overlooked material factors; or took into account immaterial factors; or acted on a wrong principle; or in the circumstances of the case the sentence was harsh and excessive.

10. In this instance the trial court convicted the appellant after finding him guilty of the offence; before sentencing the appellant was called to mitigate and he prayed that the trial court consider his medical condition in that he was ailing and had chest problems;

11. It is this court's considered view that the trial court did not overlook any material factor when passing sentence and took into consideration the circumstances of the case; that from the evidence adduced the appellant was the grandfather of the complainant and was in a position of trust and had a duty to his grandchild and breached this trust by attempting to defile her;

12. The provisions of Section 9(2) of the Sexual Offences Act provides for the punishment for the offence and reads as follows;

**“9(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 (10) years.”**

13. It is also noted that the trial court did take into consideration the fact that the appellant was a first time offender; the sentence is as provided by the law and is found to be legal and that there is no reason found that warrants interference with it as it is the minimum prescribed by law and it is found not to be harsh and excessive.

### **FINDINGS & DETERMINATION**

14. In the light of the foregoing this court finds no good reason that warrants interference with the sentence which is found to be legal;

15. The appeal on sentence is found to be lacking in merit and it is hereby disallowed; the sentence is hereby affirmed

16. This court has taken into consideration the time the appellant spent incarcerated before the matter was

heard and determined by the trial court; which is from the 20/02/2014 to 02/02/2016 and translates to two (2) and directs that this period be taken into consideration when computing the term served.

Orders accordingly.

**Dated, Signed and Delivered at Nyeri this 23<sup>rd</sup> day of February, 2017.**

**HON.A.MSHILA**

**JUDGE**