



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT CHUKA
HCCRA NO. 30 OF 2015
(FORMERLY MERU HCCRA 13 OF 2014)
CONSOLIDATED WITH HCCRA NO. 36 OF 2015
PETER NYAMU.....APPELLANT
VERSUS
REPUBLIC.....PROSECUTOR
(From the original conviction and sentence in Criminal Case No.224 of 2010
in the Principal Magistrate's Court at Marimanti made on 19/5/2011)

JUDGMENT

1. On 15th June, 2010, Peter Nyamu, the Appellant, was arraigned before the Resident Magistrate's Court, Marimanti for the offence of committing an indecent act with a child contrary to Section 11 (i) of the Sexual Offences Act No. 3 of 2006. It was alleged that on the 30th day of May, 2010 at Kanyoro sub-location, Tharaka South District within Eastern Province, the Appellant intentionally touched the vagina of "A N" a child aged 4 years with his finger. He denied the offence. After trial, the Appellant was found guilty convicted of the offence and sentenced to 10 years imprisonment.

2. Aggrieved by the conviction and sentence, the Appellant preferred this appeal to this Court. However, before then, the Appellant had filed Meru Criminal Appeal Nos.13 and 78 of 2014 which were registered in this court as Chuka HCCRA No. 30 of 2015. In both the said appeals, the Appellant filed what he christened "**Mitigating Appeal**" wherein he set out several grounds. These were that; he had pleaded not guilty; that he has spent (1) year and (2) months in custody during the trial; that he is the sole bread winner of his family and the long incarceration has affected his family financially and morally; that the time he has spent in jail has transformed him; that he had undertaken various courses while in jail; that he had now discovered where he had gone wrong and was remorseful. He urged in the Petition of Appeal that he be forgiven, the conviction be quashed and the sentence be set aside.

3. Then, on 14th September, 2015, the Appellant filed Misc Criminal Application No. 2 of 2015 before this court seeking leave to file an appeal out of time. That application was heard and allowed on 1st October, 2015. On 19th October, 2015, the Appellant filed Chuka High Court Criminal Appeal No. 36 of 2015, which is this Appeal. In his Petition of Appeal, he contended that the prosecution did not call vital witnesses; that the trial court failed to appreciate that there was a grudge between the Appellant and the

complainant; that the trial Court failed to appreciate that the evidence tendered was insufficient, inconsistent and uncolloaborated and too week to find a conviction; and that the medical evidence was inconclusive as the minor was presented before the Clinical Officer for examination ,after 12 days. He prayed that the conviction be quashed and sentence be set aside.

4. When the matter came up for the hearing of the appeal on 22nd February, 2016, the Appellant told the court that he did not want to tire the court with any appeal, that he wished to withdraw the same End urged the court to reduce his sentence. Unfortunately, although all the files for all the foregoing "**Appeals**" were together, the said proceedings were only recorded in the Meru Criminal Appeal No. 13 of 2014. The Appeals had not been consolidated. When the Court retired to write its judgment on the Appellants submission, i.e for the reduction of the sentence, the court discovered this anomaly. The court arrested or withheld writing the judgment pending clarification by the Appellant on 17th March, 2016. On that day when the matter came up, the court clarified the foregoing to the Appellant. He admitted knowing that he had filed three (3) Appeals and he indicated that he had no objection in having all of them consolidated under one Appeal. He proceeded to withdraw his consolidated appeal and still insisted that what he needed was a reduction of his sentence to the time already served. Those proceedings were therefore undertaken in this file of Criminal Appeal No. 36 of 2015.

5. The Appellant having withdrawn his appeal, I doubt if I need evaluate the evidence tendered before the trial court or the grounds of his appeal. I have looked at the powers of this court to interfere with conviction and sentence under the Criminal Procedure Code. Such powers are derived under Section 354. They are exercisable only on appeal. It is when this court is considering an appeal that it can either:

" (i) reverse the finding and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding, reduce or increase sentence ; or

(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence; or

(b) in an appeal against sentence, increase or ,reduce the sentence or alter the nature of the sentence;

6. As I have already noted above, there is no appeal pending before me, the Appellant having withdrawn the same when the matter came up for hearing. As such, this court cannot purport to exercise that jurisdiction when there is no appeal before it.

7. The other piece of legislation that allows this court to interfere with a conviction and sentence is under the Community Service Order Act No. 10 of 1998. Under the said Act, a criteria has been set or those cases which this court can intervene and order a convicted person serve community Service instead of imprisonment. To my mind, such cases include where an offender has been sentenced to a term of imprisonment of three (3) years and below, where a prisoner has a sentence balance of less than three (3) years and his conduct is good; very old prisoners or terminally ill prisoners amongst others. The Act however, does not apply in cases of capital offences, Sexual Offences, corruption and economic crimes, possession of fire arms, terrorism or related offences and such like serious offences.

8. I have looked at the Mitigating grounds of Appeal lodged by the Appellant and his able submissions in Court. Although they look genuine, the Appellant was sentenced to ten (10) years imprisonment on 19th May, 2011. He has a balance of about five (5) years which exceeds the three (3) years stipulated under the CSO Act aforesaid. In any event, the Appellant was convicted of an offence that is excluded by the said Act, that is a Sexual Offence.

9. In this regard, I find that there is no basis that has been laid for this court to interfere with the sentence metted to the Appellant. His request for reduction or suspension of the sentence is hereby declined.

Dated and Delivered at Chuka this 23rd day of March 2016.

A.MABEYA

JUDGE

Court:

Judgment is read and delivered in open court in the presence of all the parties

A.MABEYA

JUDGE

23/3/2016