



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CRIMINAL APPEAL NO. 64 OF 2015

SAN PAULO SIMBI..... APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Appeal from the original conviction in Criminal Case No. 723 of 2014 in the Resident Magistrate's Court at Iten by N. C. Adalo, Resident Magistrate, dated 30th April 2015]

JUDGMENT

1. The appellant was adjudged guilty on the alternative charge of committing an *indecent act* with a girl under the age of three years contrary to section 11 (1) of the Sexual Offences Act. The particulars were that on 3rd May 2014, he touched the anus of A. J. *[particulars withheld]*, a girl age *one year and three months*. He was acquitted on the main charge of defilement. He was sentenced to *ten years* imprisonment on the alternative charge.
2. This appeal is only on *sentence*. The original petition was filed on 11th May 2015. It was a plea for *clemency*. On 26th January 2017, the appellant was granted leave to amend the grounds of appeal. The *amended grounds* went to the root of his *conviction*. However, on 16th March 2017, the appellant *abandoned* the appeal on *conviction* and reverted to his *original petition*. At the hearing of the appeal, the appellant *confirmed* that he was challenging his *sentence* only.
3. The appellant pleaded for *leniency*. He said he is *remorseful* for his actions. He stated that he is a *first offender*. He also claimed that he was not granted *remission* by the prison authorities. In a synopsis, the entire appeal is a plea for *mercy*.
4. The appeal is contested by the Republic. The case for the State is that the sentence was well within the law. I was implored to dismiss the appeal.
5. This is a first appeal to the High Court. I have re-evaluated all the evidence on record and drawn my own conclusions. *Njoroge v Republic* [1987] KLR 19, *Okeno v Republic* [1972] EA 32, *Kariuki Karanja v Republic* [1986] KLR 190.
6. Section 354 (3) of Criminal Procedure Code provides that at the hearing of an appeal-

“The court may then, if it considers that there is no sufficient ground for interfering, dismiss the appeal or may.....(ii) alter the finding, maintain the sentence, or with or without altering the finding reduce or increase the sentence; or..... ”

7. In *Macharia v Republic* [2003] 2 E.A 559 the Court of Appeal had this to say on sentencing-

“The Court would not alter a sentence on the mere ground that if the members of the court had been trying the appellant they might have passed a somewhat different sentence and it would not ordinarily interfere with that discretion exercised by a trial judge, unless it was evident that the judge acted upon some wrong principles or overlooked some material factors. ...The sentence imposed on an accused person must be commensurate to the moral blameworthiness of the offender and it was thus not proper exercise of discretion in sentencing for the Court to have failed to look at the facts and circumstances of the case in their entirety before settling for any given sentence.”

8. The learned trial Magistrate considered that the appellant was a *first offender*. The appellant in mitigation said: *“I was framed because they refused to pay me”*. The plea for mercy before this court must be looked at through those lenses.

9. Despite the fresh clamour for leniency, this was a serious offence. Section 11 (1) of the Sexual Offences Act provides for a *minimum* sentence of *ten years*. That was the sentence given. I am thus *unable to disturb* the sentence. The appeal is *dismissed*.

It is so ordered.

DATED, SIGNED and DELIVERED at **ELDORET** this 29th day of May 2017

KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant.

Mr. Muchiri for Ms. Kagehi for the Republic.

Mr. J. Kemboi, Court Clerk.