

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NUMBER 110 of 2013

CALEB ODHETHU OCHIENG.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the original conviction and sentence in the Chief Magistrate's Court at Kibera Cr. Case No.6333 of 2011 delivered by Hon. Opande, SRM on 5th July, 2013).

JUDGEMENT

The Appellant was charged with offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of the Sexual offence Act No. 2 of 2006. It was alleged that on 29th December, 2011 in Lang'ata District within Nairobi County unlawfully attempted to commit an act which would cause penetration of male genital organ (penis) into the female genital organ (vagina) of V.A., a child aged nine years. In the alternative, he was charged with indecent act with a child contrary to section 11(1) of the Sexual offences Act No. 3 of 2006 in that he intentionally and unlawfully committed an indecent act by touching the genital organ of a female (vagina) of a girl namely V.A. aged nine years.

The Appellant was convicted of the alternative charge and sentenced to serve minimum mandatory ten years imprisonment.

He has preferred the instant appeal only against the sentence. He pleads that the period of one year and seven months he was in custody before the sentence was passed be taken into account to constitute part of the sentence. He also prays for leniency adding that he was the sole bread-winner of his three children. He urged the court to take into account that his wife ran away after he was imprisoned. He added that he had learnt some life support skills in prison which included spray painting and HIV counseling which would help him gainfully earn a living after he left prison. He hopes to be a better person to both the family and society.

Learned State Counsel, Ms. Akunja opposed the appeal on ground that under Section 11(1) of the Sexual offences Act, a minimum sentence of ten years is provided which is what was imposed against the Appellant. She submitted that the court had no powers to vary the mandatory sentence.

I entirely concur with the learned State Counsel that Section 11(1) of the Sexual Offences Act is couched in mandatory terms. Court's hands are tied in that it cannot vary a minimum mandatory sentence. The best that this court can do is to credit the period the Appellant was in remand of one year seven months before the sentence was passed to his sentence. I order accordingly.

In sum, the appeal fails and the same is dismissed save for the orders that the period that the Appellant spent in custody before sentencing shall be deducted from his sentence. It is so ordered.

Dated and delivered at Nairobi This 11th Day of December, 2017.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant present in person.***
- 2. Miss Sigei for the Respondent.***