



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION
CRIMINAL APPEAL NO.200 OF 2013

KISIA ANGUI ASENA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence in the judgment in the Chief Magistrate's Court

at Kibera, Cr. Case No. 3185 of 2012 delivered by Hon. Opande, Ag. SRM, on 25th September, 2013)

JUDGMENT

Kisia Angui Asena, the Appellant herein was in the main count charged with attempted defilement contrary to **Section 9(1)(3) of the Sexual Offences Act No. 3 of 2006**. The particulars of the offence were that on 15th June, 2012, in Kajiado North District within Kajiado County intentionally and unlawfully attempted to commit an act by trying to insert his male genital organ (penis) into a female genital organ (vagina) of MW a child aged 14 years. In the alternative, he was charged with committing indecent act with a child contrary to **Section 11(1) of the Sexual Offences Act No. 3 of 2006** in that on the same date and place, he touched the vagina and breast of MW a child aged 14 years.

The Appellant was convicted for the main offence and was sentenced to 10 years imprisonment. He was dissatisfied with both the sentence and the conviction and preferred the appeal herein. Initially, he appealed both against the conviction and the sentence but at the hearing of the appeal on 30th March, 2016, submitted that he would proceed with the appeal only against the sentence. His plea was that he needed to go back home so that he could continue with his education. He submitted that he had studied up to standard 8 and had continued with learning while in prison.

Learned state counsel M/s Wario opposed the appeal. She submitted that the Appellant was sentenced to the minimum sentence which was lenient in the circumstances. She urged the court to take into account that after the offence, the complainant became distressed and traumatized to an extent that she was suicidal.

Under **Section 9(1) of the Sexual offence Act No. 3 of 2006**, a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement. Under Sub-section (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 years.

From the evidence of PW2, the Appellant accosted the complainant who testified as PW1. He pulled her to the bush where he gagged her mouth and attempted to defile her. From her evidence however, it is that the Appellant actually defiled her. She got traumatized and had to run away to her uncle's place in Ngong so that she could not see the Appellant who was her neighbor. Her teacher had however noticed her walking with difficulty and after persistent interrogation, opened up and spoke the truth. The court believes that the actual evidence of defilement could not be collated as by the time PW1 told the story several days had passed. It is a case the court thinks is deserving of a deterrent sentence. Whereas under Section 354 (3)(b) of the Criminal Procedure Code this court is conferred with powers to increase the sentence, it is the view of the court that the 10 years imposed on the Appellant shall be sufficient punishment to enable him change his behaviour. He was sentenced to the minimum penalty which this court cannot vary as the same is mandatory. The Appellant must serve the entire term.

In the result, I find the appeal without merit and the same is accordingly dismissed.

DATED and DELIVERED this 27th day of April, 2016

G.W. NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. Appellant in person.***
- 2. M/s Aluda for the Respondent.***