



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CRIMINAL APPEAL NO.99 OF 2013

YUSUF GITAUGITHANGA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the judgment of the Hon. C. N. Ondieki (Resident Magistrate)

in Kibera Chief Magistrate's Criminal Case No.3988 of 2012

delivered on 03rd June, 2013)

JUDGMENT

The appellant was charged with attempted defilement contrary to Section 9(1) as read with **Section 9(2) of the Sexual Offences Act No.3 of 2006**. Particulars of the offence were that on the 26th day of August, 2012 at Kibera [*particulars withheld*] in Langata District within Nairobi County unlawfully and intentionally attempted to commit an act which would have caused penetration of male genital organ (penis) into a female genital organ (vagina) of L A O a child aged 16 years old.

In the alternative he was charged with indecent act with a child contrary to Section 11(A) of the Sexual Offences Act No.3 of 2006 in that he unlawfully and intentionally touched the vagina of L A O a child aged 16 years with his penis.

He was convicted in the main charge of attempted defilement and was sentenced to serve 10 years imprisonment. In grounds of appeal filed on the 2nd of July, 2013 he appealed only against the sentence. In written submissions filed on 11th May, 2015, he stated that he is remorseful, is the breadwinner of his family and has reformed. He urged the court in giving a more lenient sentence to consider the period he spent in custody prior to the sentencing.

Learned State Counsel Miss Aluda submitted that the offence carries a minimum sentence which the court may not vary.

Under Section 9(2) of the Sexual Offences Act 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 10 years.

Sentencing is in the discretion of the court but where the minimum penalty is provided, the sentencing court cannot deviate from the provisions of the law. See the case of **David KunduSimiyu –Vs- Republic**

Criminal Appeal No.8 of 2008, Court of Appeal sitting in Eldoret in which it was held, with respect to the minimum sentences provided under the Sexual Offences Act, that:-

“Those are minimum sentences and parliament appears to give no discretion to the court’s to impose sentences below those specified as the minimum. The provisions accord the prime objectives of the act which is prevention and protection from harm, from unlawful sexual act.”

In the present case notwithstanding that the appellant is remorseful, is a family person and has since he was arraigned in court been in custody for about 2 years and nine months, the fidelity of the court in sentencing lies with the law. I am, in the circumstances, unable to vary the mandatory penalty provided by the law. Indeed, he should consider himself lucky since only the minimum sentence was imposed.

In the end, this appeal fails and is dismissed. The appellant shall continue to serve the sentence unless he is otherwise lawfully set free.

DATED and DELIVERED in NAIROBI this 18th day of MAY 2015.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:-

1. Appellant in person.
2. Miss Wario for the respondent.