REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 74 OF 2011

PETER KIPRONO MUTAI……….....…...…………………..APPELLANT

VERSUS

REPUBLIC……………………….…………………….....RESPONDENT

(Being an appeal from the original conviction and sentence in criminal case No. 3782 of 2010 Republic v Peter Kiprono Mutai in the Principal Magistrates Court at Eldoret by D. K. Kemei, Principal Magistrate dated 29th April 2011)

JUDGMENT

1. The appellant was convicted on a count of attempted defilement contrary to section 9 of the Sexual Offences Act. The offence was committed on the 1st July 2010 at Kapsiekwa village, Keiyo South District of the Rift Valley Province. The appellant was sentenced to *ten* years imprisonment.

2. The *present* petition of appeal is on *sentence* only. The *original* petition was filed on 5th May 2011. In that petition, the appellant had challenged his *conviction* and sentence. On 24th June 2014, the appellant presented a notice of motion to amend the petition. On 9th July 2015, leave was granted to the appellant to rely on what he styled as *Mitigation Grounds* filed on the same date. For the avoidance of doubt, the appellant informed the court that he had withdrawn his appeal against conviction.

3. The appellant prays for *leniency*. He states he is a first offender; that he is remorseful; that he had taken to drugs at the time of the offence; that he has young children who look up to him; and, that he needs to take care of his aging parents. He pleaded with the court to substitute the sentence with a non-custodial punishment. He undertook to the Court to be a law abiding citizen. In a synopsis, the entire appeal is a plea for *clemency.*

4. The appeal is contested by the State. The case for the State is that the sentence was well within the law. I was implored not to disturb the sentence.

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. I have carefully studied the records of the trial court. The complainant, a girl aged eight, testified that the appellant removed her clothes and touched her buttocks and private parts. The appellant removed his clothes. It is at that point that the appellant's wife PW2 returned to the house. She found the appellant kneeling down preparing to defile the complainant. She screamed.

7. I have found on the totality of the evidence of the complainant and PW2 that the charge was proved beyond any reasonable doubt. The defence proffered by the appellant was feeble and a sham. There was no clear-cut evidence of a plot by PW2 to fix him. The new claim in this appeal that the appellant had taken to drugs is a red herring. Self-induced intoxication would not have excused the offence. As I have stated, the appellant is no longer challenging his *conviction*.

8. That leaves the matter of the *sentence*. Sentencing is at the discretion of the trial court. But power still reposes in an appellate court to review the sentence if material factors were overlooked; or, the sentence was founded on erroneous principles. See *Amolo v Republic* [1991] KLR 392, *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559, *Simon Muge Kipketer v Republic* Eldoret, Criminal Appeal 25 of 2014 [2015] eKLR.

9. 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….. "*

10. 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 entirely before settling for any given sentence."*

11. The appellant is a *first* offender. That fact was taken into consideration by the trial court. The appellant offered some mitigation. He said he was the bread winner for his family. The learned trial Magistrate was of the opinion that a deterrent sentence was appropriate to *protect minors from sexual predators*. He sentenced the appellant to ten years imprisonment. The plea for mercy before this court must be looked at through those lenses.

12. Section 9 (2) of the Sexual Offences Act provides for a sentence of *not* less than *ten* years. The offence is a *felony*. The sentence meted out was the *minimum* punishment and well within the law. I cannot then say that the learned trial Magistrate *acted upon some wrong principles or overlooked some material factors*. The sentence in this case was *commensurate* with the *moral blameworthiness* of the offender. *Omuse v Republic* [1989] KLR 214, *Macharia v Republic* [2003] 2 E.A 559.

13. In the result, I find that the appeal is devoid of merit. I uphold the conviction and sentence handed down by the learned trial Magistrate. The entire appeal is dismissed.

It is so ordered.

DATED, SIGNED and **DELIVERED** at **ELDORET** this 22nd day of September 2015

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of-

Appellant (in person).

Ms……………………………….………for the State.

Mr. J. Kemboi, Court clerk.