



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 192 OF 2012

ELIUD MATHU GITAU.....APELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

FACTS

1. The Appeal arises from the judgment delivered on 31st October, 2012 by the Hon. W.Kagendo SPM, Mukurweini, in CMCR No.3 of 2012. The appellant had been charged on a main charge of defilement contrary to Section 8(1) as read with 8(2) of the Sexual Offences Act and an alternate charge of Committing an Indecent Act with a child contrary to Section 11(1) of the same Act.
2. The appellant was convicted on the alternate count and sentenced to a term of fifteen (15) years imprisonment.
3. The appellant being aggrieved with the decision preferred this appeal both on conviction and sentence and listed four (4) Grounds of Appeal in his Petition of Appeal. The grounds are as listed hereunder;
 - i. **I pleaded not guilty to the charges.**
 - ii. **The learned magistrate erred in law and in fact in not finding that essential witnesses were not called.**
 - iii. **The learned magistrate erred in law and in fact by not considering that the mode of arrest was not consistent with the guilt of the appellant.**
 - iv. **The learned magistrate erred in law and in fact and took a very narrow approach of appellants defence.**
4. At the hearing hereof the appellant made oral submissions and abandoned all the grounds of appeal relating to conviction and stated that he only wished to appeal against sentence.
5. The Appellant stated that his health had deteriorated and requested that his sentence be reduced to enable him go back to society and continue with his life.
6. In essence his submissions can be considered as further mitigation.
7. The appeal was opposed by Prosecuting Counsel for the State and he submitted that the appeal was not tenable in law as the sentence was the minimum prescribed by law and it was not possible to have it

reviewed downwards.

8. After taking into consideration the submissions of both sides this court has framed only one issue for determination, as set out hereunder;

(i) whether the sentence is harsh and excessive in the circumstances of the case;

9. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The appellate court must satisfy itself that the trial court overlooked some material factors, or did not take into account relevant factors or in the circumstances of the case the sentence is harsh and excessive.

10. The sentence for the offence of Indecent act with a child is prescribed under Section 11(1) of the Act which is a term of imprisonment of not less than ten years.

11. The court record shows that trial magistrate allowed the appellant to mitigate before sentencing and she noted that the appellant was a first offender but that notwithstanding the trial court noted that there was need for a deterrent sentence as there was an increase of sexual offenders in the jurisdiction.

12. From the reading of the record I am satisfied that the trial court took into consideration the important factors in mitigation before passing sentence. The minimum sentence prescribed by the law is not less than ten (10) years and in exercising her discretion the trial magistrate took into account the prevalence of the offence in the jurisdiction and opted to mete out a sentence that would serve as a deterrent to others.

13. I can only add that the discretion when passing sentence must be exercised judiciously and the circumstances of each case taken into account in totality.

14. In this instance I have taken into account the age of the child which was six years and the serious injuries inflicted upon such a child of tender age. The gravity of the offence has also been taken into consideration in that the appellant inserted his finger into the minors' private parts and inflicted serious injuries to the minor. The penetration led to her hymen being broken and she also sustained lacerations. Indeed the crime is heinous and requires a deterrent sentence.

15. I have also considered the mitigation of the appellant on record in that he was a first offender and he asked for leniency and his further mitigation of his ill health and suffering has also been taken into account but is unsupported by any medical documentation. In the circumstances there are no reasons that warrant interference with the order for sentence.

16. This court is therefore satisfied that the deterrent sentence imposed of fifteen (15) years for the offence is within the law.

FINDINGS AND DETERMINATION

17. For the forgoing reasons I find no reason that warrants interference with the order for sentence as it was within the magistrates discretion and it is found to be within the law and is not harsh and excessive in the circumstances of the case.

18. The appeal is found lacking in merit and is hereby dismissed.

19. The conviction and sentence are both upheld.

Orders Accordingly.

Dated, Signed and Delivered at Nyeri this 29th day of October 2015.

A. MSHILA

JUDGE

29/10/2015