REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 23 OF 2013

KIPLANGAT TUIMISING..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal from the judgment and Conviction of the Senior Principal Magistrate, Molo in Criminal Case No. 3315 of 2009 dated 26th April 2012**)**

JUDGMENT

1. The Appellant, **Kiplangat Tuimising,** was charged with the offence of attempted defilement contrary to **Section 9(1)(2)** of the **Sexual Offences Act,** No. 3 of 2006. The particulars of the charge were that on the 22nd day of December, 2009 at 1200 noon at [particulars withheld] Farm in Nakuru District within Rift Valley Province, intentionally attempted to cause his penis to penetrate to the vagina of DCL**(PW1)** a child aged 5 years.
2. The facts of the case as recorded by the trial court are that on 22nd December 2009, the Appellant, a casual laborer was splitting firewood at the Complainant's home. At around noon, the Complainant's mother **(PW2)** who was in the homestead undertaking other duties passed near one of the homes. She peeped through the window and saw the Complainant lying on the bed with the Appellant standing between her legs. She screamed and lost consciousness. When she came to be, she examined the Complainant and took her to Rongai Health Centre for further examination. Michael Odeke (**PW4)** examined the Complainant and issued a P3 form. He testified that there were no injuries on the Complainant's genitalia and it was intact. The incident was reported at Rongai Police Station and the Appellant was subsequently arrested.
3. The Appellant denied the offence and gave an unsworn statement. He stated that on 20th December, 2009 he was offered casual work at the Complainant's homestead to split firewood. However **PW2** did not pay him the agreed wages. He returned on 22nd December, 2009 and assaulted **PW2.** He was arrested and charged with the present offence. According to the Appellant the Complainant's mother has fabricated the story.
4. After the trial the Appellant was convicted at the Principal Magistrate's Court at Molo and was sentenced to 10 years imprisonment.
5. Being aggrieved by the sentence, the Appellant filed a Petition of Appeal on 18th February, 2013 raising the following summarized grounds

    a) That he is a first time offender;

    b) That he is remorseful of the offence committed;

c) That the court consider a lesser sentence to allow him fend for his aged parents as he is the sole bread winner;

6. The appeal was heard on 25th March, 2014 with **Mr. Chebii,** appearing as Prosecuting Counsel for the State and the Appellant was present in person. The Appellant made oral submissions to the effect that his children were suffering as he was the sole breadwinner. His wife was deceased. He prayed for a non-custodial sentence.
7. In one of the grounds of appeal the Appellant implores this court to be lenient and to consider reducing his sentence of 10 years to a lesser sentence and the Appellant's final prayer is for the appeal to be allowed and the sentence be reduced and that he be given an non-custodial sentence.
8. In opposing the appeal, **Mr. Chebii** submitted that the Appellant's submissions are in mitigation; the sentence imposed is appropriate and not harsh. He urged the court to uphold the conviction and the sentence.
9. Upon hearing the submissions of the Appellant and Prosecuting Counsel for the State and after perusing the grounds of appeal this court finds that the only issue for determination and that needs to be addressed relates to sentence.
10. **Section 9(2)** of the **Sexual Offences Act** provides the penalty for attempted rape and it reads as follows:

> **"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.**

11. This punitive section uses the words **'not less than'** which then means that the period specified of ten (10)years imprisonment is the minimum and mandatory sentence that can be meted out by a court of law.
12. The case of **Wanjema** V. **Republic** sets down the principle as to when an appellate court may interfere with the sentence imposed which are as set down hereunder:

    a) omission of facts that ought to have been considered;

    b) sentences is harsh and excessive in the circumstances.

13. This court finds that the sentence meted out by the trial court was, after the appellant was allowed to mitigate, that the sentence is the one prescribed by law and this court is satisfied that the sentence is not harsh and excessive in the circumstances, so as to warrant interference by this court.
14. This court finds that this case is not found to be a suitable case for the court to interfere with the sentence.
15. For the reasons set out above this court finds the appeal lacking in merit.
16. The appeal is hereby dismissed and the sentence is hereby upheld.

It is so ordered.

Dated, Signed and Delivered at Nakuru this 30th day June, 2014.

A. MSHILA

JUDGE