



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL APPEAL 132 OF 2012

BENSON MUTI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From original conviction and sentencing in Criminal Case No. 4993 of 2009 of Chief Magistrate's Court at Kibera, Hon. Mrs. Nyakundi (P.M.) on 9th March 2011).

JUDGMENT

The appellant was charged with the offence of attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act No. 3 of 2006. It was alleged in the particulars of the charge that on 31st October 2009 at *[particulars withheld]* Village in Karen within Nairobi Area Province, he unlawfully attempted to have a carnal knowledge of one Y K a girl aged 14 years.

In the alternative he was charged with the offence of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No.3 of 2006. The particulars were that on 31st October 2009 at *[particulars withheld]* Village in Karen within Nairobi Area Province, committed an indecent act to Y K by touching her private parts.

He denied the offences but after the trial he was convicted of attempted defilement and sentenced to serve 15 years imprisonment. This is an appeal against both the conviction and sentence.

He filed a petition of appeal and submitted five grounds of appeal which I shall condense to two. In the first ground, he urged the court to indulge and show him leniency while considering his sentence. He had been incarcerated since 2009 and this was affecting his young family that depended on him. Secondly, he urged the court to consider that he had since reformed and was deeply remorseful for his offensive conduct towards the society and the complainant who he sincerely empathized with. He had since acquired various skills and competencies which he intended to use on being reintegrated back to the society. It was his submission that the court gives him another chance to redeem himself by either reducing his sentence or giving him an alternative non-custodial sentence or a community service order.

In response, Mrs. Wario, learned State Counsel opposed the appeal and submitted that the sentence imposed was lawful and deserved. She urged that the appellant was not remorseful during his mitigation. She found no merit in his appeal and urged that it be dismissed.

From his submission, it is clear that the appellant was not challenging his conviction, rather the issue of sentence only. It is also apparent on the record of the trial court that the appellant did not give the court any reason or justification during mitigation to mete out a lenient sentence. His defense was evasive and amounted to a mere denial. It is clear from his submissions that the he was aware of what he was doing.

This being a first appeal this court is mandated to reconsider the evidence adduced before the trial magistrate's court, re-evaluate the same and reach its own independent decision whether or not to uphold the conviction of the appellant.

Although the appellant in his petition of appeal challenged both his conviction and the sentence imposed, during the hearing of the appeal, he abandoned his appeal against conviction and entirely submitted on the sentence. He pleaded with the court to reduce the custodial sentence imposed on him.

Having carefully evaluated the evidence on record, the submission made by the appellant and the reply made thereto by the State, it is clear that although the appellant pleaded that he had since reformed and was deeply remorseful for his offensive conduct towards the society and the complainant, who he empathized with, there is no evidence upon which the court may weigh that statement. For all intents and purposes, the appellant was a married man who took advantage of an unsuspecting young girl by manipulating the situation to suit him and attempt to commit an indecent act upon her. Having got rid of PW2 from the house, he forcefully took the complainant and threw her on the sofa from where he attempted to defile her. Fortunately for her, PW2 came back in time and interrupted him before he ran and alerted the appellant's wife who came to PW1's rescue from the appellant. The appellant then ran away. He now pleads for the leniency of this court after his unsuccessful attempt to defile PW1.

In the first ground of appeal on sentence the appellant sought a more lenient sentence. The sentence provided for the type of offence for which the appellant was convicted is a minimum of 10 years imprisonment. **Section 9(1)& (2)** reads as follows:-

Attempted **defilement**
(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

(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.

The trial magistrate in an effort to deter the appellant from repeating the offence imposed a term of 15 years which was within the minimum limit prescribed under the law.

In passing the sentence, trial magistrate found that the offence required a deterrent sentence. Although I find no compelling reason to interfere with the sentence imposed by the trial magistrate, I appreciate that the appellant was a family man who fended for his family before he was convicted. He was a first offender, and had been sentenced to serve a term of fifteen years imprisonment well above the minimum limit provided by the law.

Whereas I don't find the sentence imposed herein to be excessive, being a first offender, a minimum of ten years would have been appropriate. This court therefore in response to the appellant's plea to be given another chance to redeem himself has considered reducing his sentence. I therefore set aside the sentence of fifteen years and substitute it with a sentence of ten years imprisonment with effect from the date of sentence. Except to that extent only, this appeal is dismissed.

SIGNED DATED and DELIVERED in court this 29th day of July, 2014.

A.MBOGHOLI MSAGHA

JUDGE