



IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 137 OF 2009

SAMUEL KIRUGUMI WAGURAAPPELLANT

versus

REPUBLICRESPONDENT

(arising from the judgment of Hon.E.J. Osoro Senior Resident

Magistrate Nyeri in Sexual Offence No. 14 of 2008)

JUDGMENT

1. The appellant was charged with the offence of defilement of a girl contrary to section 8(1)(3) of the Sexual Offences Act No. 3 of 2006 the particulars of which were that on 14th October 2008 in Nyeri District within Central province intentionally and unlawfully did an act of penetration to JW a girl between the age of twelve and fifteen years.
2. He faced an alternative charge of sexual assault contrary to section 5(2) of the sexual offences Act No. 3 of 2006 the particulars of which was that on the 14th day of October 2008 in Nyeri District within Central province unlawfully manipulated the genital organs of JW so as to cause penetration with his genital organ.
3. He pleaded not guilty, was charged convicted and sentenced to serve 20 years imprisonment. Being dissatisfied with the said conviction and sentence he filed this appeal and raised the following grounds in his home grown grounds of appeal:

a. The trial court disregarded the material discrepancies.

b. The trial magistrate imposed a harsh sentence without discussing that a lesser severe sentence was equally capable to rehabilitate or retribute a person who had been of good character throughout the last 72 days.

c. The trial court erred in shifting the burden of proof to the appellant and rejected his defence.

i.

1. By a letter received at the criminal registry on 16th June 2014 the appellant notified the court that he did not intend to appeal on the conviction but on sentence which he called “mitigation”.
2. When the appeal came up for hearing before me, the appellant who was unrepresented submitted that he had abandoned his appeal on conviction and was only appealing on sentence on the basis that he was aged 75 years old and from 2009 he had reformed. Mr. Cheboi for the state submitted that upon looking at the age of the appellant and his mitigation the state was not opposed to a lesser sentence.

3. The principles upon which an appellate court may interfere with sentence were stated by the court of appeal for Eastern Africa in REX v MOHAMEDALI JAMAL (1946)15 EACA 126 as follows:
4. ***“It is well established that an appellate court should not interfere with the discretion exercised by a trial judge or magistrate except in such cases where it appears that in assessing sentence the judge has acted upon some wrong principles or has imposed a sentence which is either patently inadequate or manifestly excessive.***
5. In sentencing the appellant the trial court had this to say.
6. “The accused is a first offender. I have considered his mitigation which is moving considering that he has his peers before court. However the court as an elderly man his action were terrible and the complainant suffered trauma and is likely to suffer the rest of her life.
- 7.
8. ***The accused ought to be kept away from society.”***
- 9.
10. Under Sexual Offences Act No. 3 of 2006 section 8(2) a person who commits an offence of defilement with a child between the age of twelve and fifteen years is liable upon conviction to imprisonment for a term of not less than twenty years.
11. It is therefore clear that the sentence given to the appellant was the minimum lawful sentence and can therefore not be said to be excessive and would therefore decline to interfere with the sentence meted herein.
12. I am however of the considered opinion that the appellant ought to benefit from the Revision Jurisdiction of this court now that this appeal has been dismissed. I would therefore direct the probation officer to prepare a report on the suitability of the appellant being subjected to the revision exercise and direct the Deputy Registrar of this court to take the necessary steps in opening a revision file taking into account the fact that the appellant is now almost 67 years.
13. Dated, signed and delivered at Nyeri this 26th day of September 2014.

J. WAKIAGA

JUDGE

1. Read in open court by Justice J. Abuodha on behalf of Justice J. Wakiaga.
- 2.
3. J. ABUODHA
4. JUDGE