REPUBLIC OF KENYA

High Court of Kisii

Criminal Appeal 189 of 2009

SAMUEL OTIENO GINDA …….……..……. APEPLLLANT

AND

REPUBLIC …….. RESPONDENT

(Being an appeal from original conviction and sentence in Oyugis

PMCRC No.3 of 2008 dated and delivered on 7th August, 2008)

JUDGMENT

1. The appellant herein, Samuel Otieno Ginda was arraigned before the Principal Magistrate's Court at Oyugis on a charge of attempted defilement contrary to **section 9 (1)** of the **Sexual Offences Act, No. 3 of 2006, (the Act)**. The particulars of the offence were that on the 27th day of May 2008 at around 12.00 noon at Rachuonyo District within Nyanza Province, he attempted to defile A.A.S. the complainant herein a girl aged 12 years. A.A.S. is hereinafter referred to as the complainant.

2. The appellant was charged in the alternative with the offence of

indecent assault contrary to **section 6(1)** of the **Act**. The particulars of the offence were that on the 27th day of May 2008 at around 12.00 noon at Kanam Location in Rachuonyo District within Nyanza Province, he intentionally and unlawfully indecently induced the complainant a girl aged 12 years by touching her private parts and removing all her clothes.

3. The appellant pleaded not guilty. During the trial, the prosecution called 4 witnesses. After the evidence of the 4 prosecution witnesses had been taken, the appellant changed his plea from one of not guilty to one of guilty on the main count. The facts to which the appellant pleaded guilty were that on 27th May 2008 at around 12.00 p.m., the complainant went to Doho beach to sell some firewood. The complainant's sister took her to the house of one M.O to wait for her there. While the complainant was waiting for her sister, the appellant went to M.O's house and offered Kshs.30/= to M to go and buy some foodstuffs. Once M left, the appellant asked the complainant to accompany him to his house and it was while the two were in

the appellant's house that the appellant locked the house from inside and demanded to have sex with her. The complainant declined the request but the appellant removed her clothes by force.

4. When the appellant removed the complainant's clothes by force, she raised an alarm. The appellant got scared and opened the door, and that is when the complainant managed to escape. Members of the public responded to the commotion, and there and then the appellant was arrested by the members of the public and later handed over to the police and subsequently charged with the offence of which he was found guilty as charged on the main count, convicted and sentenced to 10 (ten) years imprisonment.

5. The appellant was aggrieved by both conviction and sentence. He has come to this court on appeal against sentence only. He also contends in his home made petition of appeal that his constitutional rights were violated because after arrest, he was not taken to court within the stipulated time. The appellant therefore prays that his appeal be allowed, conviction quashed and sentence set aside.

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6. When this appeal came up for hearing the appellant made submissions, stating that he was convicted of an offence he knew nothing about. He submitted that he pleaded guilty to the charge under threats of being killed if he did not do so.

7. The appeal was opposed. Mr. Mutuku, Senior Principal Prosecuting counsel submitted that the appellant changed his plea from one of not guilty to one of guilty after he had heard the testimonies of 4 witnesses and that in the circumstances; he cannot be heard to say that he knew nothing about the offence of which he was convicted. Counsel submitted that the plea of guilty entered against the appellant was devoid of any error. Counsel asked court to dismiss the appeal.

8. Regarding the appellant's contention that his constitutional rights under **section 72 (3)** of the repealed

Constitution were violated, counsel submitted that this ground of appeal was an afterthought because at no other time between 30th May 2008 to the last appearance before the lower court, did the appellant raise such a complaint. That in any event, the appellant was taken to court on

30th May 2008, the day after his arrest. Counsel submitted that there was therefore no such violation as alleged by the appellant. He submitted further that even if there was such violation, the appellant's remedy lay in damages. On sentence, counsel submitted that the sentence imposed by the lower court was a minimum sentence and that in the circumstances this court has no jurisdiction to interfere with a minimum sentence imposed by a trial court.

9. This is a first appeal. On this appeal, this court is under a duty to reconsider and evaluate the evidence afresh with a view to reaching its own conclusions in the matter. See **Okeno –vs- Republic [1972] EA 32**. In the instant case, the court is under a duty to ensure that the plea of guilty was unequivocal in line with the principles laid down in the case of **Adan –vs- Republic [1973] EA 445**.

10. After carefully perusing the record of the lower court, and after considering submissions made and the law, I find that this appeal lacks merit. I am satisfied that the trial court followed the

steps set out in the **Adan case** (above) for taking of plea of guilty and the same cannot be faulted. Further, in this case, the appellant changed his plea to one guilty after he had heard the evidence of 4 prosecution witnesses and questioned them on the said evidence. The appellant in my view knew exactly what he was pleading guilty to and his contention before me that he was convicted of an offence he knew nothing about does not hold water. During mitigation, the appellant told the court:-

"This is my first offence. I pray for leniency. I shall not

repeat the offence".

11. The mitigation by the appellant was a clear indication that he was certain he had committed the offence. He wanted the court to treat him with leniency on the promise that he would not repeat such an offence. Such words cannot be said to have come out of the mouth of a person who knew nothing of the offence of which he had been convicted.

12. As for allegations of violation of constitutional rights, I agree with counsel for the respondent that

there was no such violation. The appellant was taken to court within the 24 hour period.

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13. Regarding the appeal on sentence, it is my humble view that the same cannot succeed. Sentence imposed by a trial court can only be interfered with by an appellate court if it is shown that the sentence is either inordinately harsh or based on wrong principles. See the case of **Diego –vs- Republic [1985] KLR 621**.

14. In the instant case, the sentence of 10 years imprisonment is what was provided by law and the same cannot be said to have been inordinately harsh or based on wrong principles.

15. In the premises and for the reasons above given, I find no merit in this appeal. The same is accordingly dismissed on both conviction and sentence. R/A within 14 days.

16. It is so ordered.

Dated and delivered at Kisii this 27th day of February, 2013

RUTH NEKOYE SITATI

JUDGE.

In the presence of:

Present in person for Appellant

Mr. Shabola for Respondent

Mr. Bibu - Court Clerk

RUTH NEKOYE SITATI

JUDGE.

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