



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 242 of 2011

(From Original Conviction and Sentence in Criminal Case No. 752 of 2010 of the Senior Resident Magistrate's Court at Wundanyi – Orege K. I. (RM))

DMM..... APPELLANT
- Versus -
REPUBLIC RESPONDENT

JUDGMENT

The Appellant was convicted and sentenced to ten years imprisonment for the offence of attempted Incest contrary to Section 20(2) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 11th day of December 2010 at (Particulars withheld) Village, Mwatate Taita Taveta County, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of LM a girl aged 4 years who was to his knowledge his niece.

It is noted in this case that the age of the complainant in the particulars of the charge is shown as 4 years. The facts given by the prosecutor to the Court at page 1 line 19 of the record of proceedings reads that the complainant was aged 14 years.

The Appellant is charged under Section 20(2) of the Sexual Offences Act which provides-

“If any male person attempts to commit the offence specified in subsection (1) he is guilty of an offence of attempted Incest and is liable upon conviction to a term of imprisonment of not less than ten years.”

The issue of the age of the complainant does not come into play as opposed to the proviso under Section 20(1) of the Act. It is therefore immaterial whether the age of the complainant was 4 or 14 years, the imprisonment term is the same.

The Appellant pleaded guilty to the charge. The facts were read to him in Swahili language which as per record of proceedings he understood.

However, nowhere is it shown that he admitted the facts to be true. After the facts were read by the prosecutor he proceeded to pray to the Court to treat the Accused as a first offender. The Accused then was called upon to mitigate to which he stated-

“I pray for forgiveness and leniency as I had not intended to commit the offence.”

This plea was not unequivocal. When the file was sent to the Resident Magistrate the facts were not re-read to the Accused but the prosecutor proceeded to state that the facts were read to the Accused as he had pleaded guilty and the court promptly without much ado proceeded to sentence the Accused to ten years imprisonment.

In accordance with Section 354(2) (i) of the Criminal Procedure Code the conviction and sentence are reversed and it is ordered that he be re-tried by a Court of competent jurisdiction.

Judgement read and delivered in open Court this 29th day of May, 2013.

M. MUYA
JUDGE

In the presence of:-

Miss Ogwenko for the State

Appellant - present

Court clerk – Mr. Musundi