IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, O'KUBASU & NYAMU, JJ.A.)

CRIMINAL APPEAL NO. 322 OF 2010

BETWEEN

JOSEPH NDAI MUSYOKI ……..…..… APPELLANT

AND

REPUBLIC …….……..….. RESPONDENT

(Appeal from a judgment of the High Court of Kenya at MACHAKOS (Lenaola, J.) dated 18th September, 2009

in

(H.C.CR.A. NO. 14 OF 2007)

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JUDGMENT OF THE COURT

The appellant, ***JOSEPH NDAI MUSYOKI***, was charged with attempted defilement of a girl under the age of sixteen years contrary to ***section 145(2)*** of the Penal Code with an alternative charge of indecent assault on female contrary to ***section 144(1)*** of the Penal Code. The appellant denied the charges but after a full trial before the learned Resident Magistrate at Kitui (T.M. Mwangi), he was found guilty on the main charge, convicted and sentenced to eighteen (18) years imprisonment. His appeal to the High Court was dismissed and hence this appeal before us.

The facts as accepted by both the trial court and the High Court were that the complainant who was a girl aged 12 years came back home from school on the material day to collect a Science book. The appellant was a labourer in the complainant's home and on the material day (*13th March, 2006*) there was

nobody else at home except the appellant who then lured the complainant to his house, locked the door and proceeded to defile the complainant. The incident was later reported to the parents of the complainant who took the complainant for medical examination and treatment. The appellant was arrested and charged.

In concluding his judgment delivered on *9th January, 2007,* the trial magistrate said:-

"I had the occasion to see and hear the prosecution witness (sic) and they were all credible in their sworn statement. I find that the prosecution has proved its case on the first count beyond reasonable doubt. I shall make no finding on the alternative count.

Consequently Joseph Ndai Musyoki is convicted of the offence of attempted defilement of a girl under age of 16 years contrary to *section 145 (2)* ***of the Penal Code or in the alternative and if necessary to do so, I convict Joseph Ndai Musyoki of the offence of attempted defilement for attempting to commit an act, which would cause penetration with a child contrary to*** *section 9(1) (2)* ***of the Act."***

After mitigation by the appellant, the learned trial magistrate proceeded to sentence the appellant as follows:-

"Having considered the gravity of offence, Mitigation by accused and that he is a first offender, I am inclined to say that incidences of defilement around this country have increased manifold to crisis proportions. This mostly is done by adult male who have no fear to prey on innocent school going children. The psychological trauma upon the complainant may take time to heal or it is possible she may never recover from the unlawful attempted defilement by the accused person.

As a punishment for accused person and to set an example to other like-minded members of the public I do sentence the accused to serve eighteen years (18) imprisonment."

In dismissing the appellant's appeal in the High Court, Lenaola, J. in his judgment delivered on *18th September, 2009* expressed himself thus:-

"9. In this case, the Appellant admitted that on the material day, he was with the complainant but PW1 stated that the Appellant then locked his house and went on to remove his underwear and her underwear and actually had carnal knowledge of PW1. It is the law as I understand it that there was no need for corroboration of PW1's evidence as is the law in Section 124 of the Evidence Act. I am convinced that PW1 and the Appellant had sexual contact and the appellant had at the very least the intention which was not merely preparatory and in this case he may have gone further than merely preparing himself. There is evidence beyond reasonable doubt that he did so and the attempt was proved even if the actual (sic) may have been committed.

10. As for his defence, it was a bare denial which was properly disregarded.

11. Turning to sentence, the maximum sentence under Section 145 of the Penal Code was life in prison and so eighteen (18) years was more than lenient.

12. This appeal has no merit and is dismissed."

When the appeal came up for hearing before us on *22nd November, 2011,* the appellant appeared in person, while the State was represented by Mr. V.S. Monda, (Principal State Counsel).

When asked to address us the appellant handed over his written submissions and said that he had nothing to add. The appellant concluded his written submission thus:-

"Not forgetting to state that I have abandoned my appeal against conviction *and merely challenges the*

*legality of the sentence only**.***

*Reasons wherefore**, I pray that may this Court set aside the sentence of 18 years imprisonment and in its place, substitute a sentence of imprisonment not exceeding seven years."***

On his part, Mr. Monda agreed with the appellant that the sentence of 18 years imprisonment should be substituted with a sentence of not more than 7 years as per ***section 145(2)*** of the Penal Code as read with ***section 389*** of the Penal Code.

From the appellant's written submissions, it is clear that this appeal is against sentence only.

The appellant was convicted of attempted defilement contrary to ***section 145(2)*** of the Penal Code which provides:-

"Any person who attempts to have unlawful carnal knowledge of a girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life."

The foregoing has since been repealed by the ***Sexual Offences Act*** of ***2006***. And ***section 389*** of the Penal Code provides:-

"Any person who attempts to commit a felony or a misdemeanour is guilty of an offence and is liable, if no other punishment is provided to one-half of such punishment as may be provided for the offence attempted, but so that if that offence is one punishable by death or life imprisonment he shall not be liable to imprisonment for a term exceeding seven years."

In view of the foregoing, we agree with both the appellant and Mr. Monda that the sentence of 18 years imprisonment was inappropriate, nay, illegal. The appellant should have been sentenced to imprisonment for a term not exceeding seven years. We note that the appellant was convicted and sentenced on *9th January, 2007*. We therefore allow this appeal against sentence, set aside the sentence of 18 years imprisonment and substitute therefore a sentence which will result in the appellant being released from prison forthwith unless otherwise lawfully held. Those shall be our orders.

Dated and delivered at NAIROBI this 9th day of December, 2011.

S.E.O. BOSIRE

……
JUDGE OF APPEAL

E.O. O'KUBASU

……
JUDGE OF APPEAL

J.G. NYAMU

…….
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR