



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 168 OF 2009

KENNETH KIBIWOTT KIPCHUMA:.....:APPEALANT

VERSUS

REPUBLIC:.....:RESPONDENT

JUDGMENT

I. Procedure

1. Having filed this appeal against conviction and sentence on the 28th September 2009, this court notes that whereas the registry records reveals the appeal was filed on time, it was actually filed out of time. The sentence and conviction having been passed on 18th August 2009.
2. The appeal was admitted for hearing on the 23rd November 2009. after the lower records were prepared on 11th November 2009.
3. On 1st March 2010, the appeal was heard before Osiemo J. This Hon. Judge reserved judgment for 29th April 2010. Unfortunately, the Hon. Judge was transferred out of this Station before the judgment could be delivered.
4. The appellants opted, on being asked, to continue from where the appeal had reached, namely the writing of the judgment.

II. Appeal

5. The appellant was originally charged with the offence of:

A. Attempted Defilement:

Contrary to Section 9(1) as read with Section 9(2) of the Sexual Offences Act No. 3 of 2006.

The Particulars of Offence:

On the 21st day of November 2008 in Keiyo District within Rift Valley Province unlawfully and intentionally attempted to commit an act of defilement on S.J.K. aged 7 years old.

B. Alternative Charge:

Indecent act with a girl contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The Particulars of offences:

On the 21st November 2008 in Keiyo District within the Rift Valley Province unlawfully did an indecent act on S.J.K by touching the private parts

6. the appellants, pleaded not guilty to the charge. In brief the victim a 7 year old girl informed the court how the appellants led her into a passion field farm by way of deceitfully misleading her that she required to do some errands there. The appellants defiled her but when both of them were taken to the clinical officer (instead of a medical doctor) the said clinical officer found no evidence of penetration. The appellants were therefore charged with the offence of attempted defilement and an alternative charge of indecent assault.
7. After trial, he was found guilty, convicted and sentenced to 10 years imprisonment on the main charge. Being dissatisfied with this, he appealed to this High Court.

III. Appeal

8. The main grounds of appeal relied on by the appellants were:
 - i) ***That he pleaded not guilty to the offence.***
 - ii) ***That the trial magistrate erred in relying on the evidence of the sister and father whilst the victim herself never complained.***
 - iii) ***No evidence was presented to prove the allegation.***
 - iv) ***He was a 1st offender and prays for a non custodial sentence.***
9. When the appeal came for hearing, it appears the appellants abandoned his appeal on conviction. He prayed only on the aspect of sentencing. That this be reduced from the 10 years that was imposed.
10. In reply, the Republic argued that the minimum sentence was 10 years. The sentence was in order and lawful.

IV. Opinion

11. The appellants did not pursue the aspect of conviction.

I would accordingly not interfere with this. The issue before me is that of sentencing. Should this be reduced?
12. The appellants mitigating factor is that he wishes to complete his education. From the evidence before court, he was not a student but a headman. He prays that the sentence be reduced on the said given grounds.
13. I am of the opinion that the sentence is within the law.

(see Section 9(2) of the Sexual Offences Act). That the Trial Magistrate came to the correct conclusion as to sentence. I will not interfere with the decision.

14. The appeal against conviction and sentence is dismissed.

Dated this 29th day of September, 2010 at Eldoret

M.A. ANG'AWA
JUDGE

Advocate

Nil
Appellant in Person