REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Criminal Appeal 3 of 2007

WASHINGTON OUMA OKETCH ……. APPELLANT

VERSUS

REPUBLIC ……..…….. RESPONDENT

[From original conviction and sentence in Criminal Case number 7 of 2007 of the Principal Magistrate's Court at Siaya]

JUDGMENT

Washington Ouma Oketch, the appellant, appeared before the Resident Magistrate at Siaya charged with the following counts viz:-

(i) Attempted defilement contrary to Section 9(1) of the Sexual Offences Act No. 3 of 2006, in that on the 27th December 2006, at Nyandiwa Sub-location Siaya District Nyanza Province attempted to have carnal knowledge of DAO a girl under the age of sixteen years.

Alternatively, the appellant was charged with sexual assault contrary to Section 5 (1) of the Sexual Offences Act No. 3 of 2006 in that on the 27th December 2006 at Nyandiwa Sub-location Siaya District Nyanza Province unlawfully and indecently assaulted DA O, a girl of the age of twelve years by touching her private parts.

(ii) Malicious damage to property contrary to Section 339(1) of the Penal Code in that on the 26th December 2006, at Nyandiwa Siaya District Nyanza Province, wilfully and lawfully damaged one radio cassette make National, one padlock and two plastic plates all valued at Kshs. 3,724/= the property of Willis Oketch Ogao.

(iii) Creating disturbance in a manner likely to cause a breach of the peace contrary to Section 95(1) (b) of the Penal Code in that on the 26th December 2006, at Nyandiwa Siaya District Nyanza Province, created disturbance in a manner likely to cause a breach of the peace by removing two sacks of maize valued at Kshs. 2,400/=, from Mr. Willis Oketch Ogao's house and scattering them outside, while armed with a panga and threatening to kill him.

The appellant pleaded guilty to all the three counts and was convicted in respect thereof after admitting the truthfulness of the facts read to him. He was thereafter sentenced to serve nine (9) years imprisonment for count one, five (5) years imprisonment for count two and six (6) months imprisonment for count three.

The sentences are to run consecutively. Being dissatisfied with the sentences, the appellant has appealed against the same on the basis of the grounds contained in the petition of appeal filed herein on 18th January 2007. The grounds are that:-

(i) That the appellant pleaded guilty due to ignorance

(ii) That the matter arose from a domestic row and that the charges were fabricated

(iii) That the trial magistrate did not give the appellant prior warning on the consequences of his plea

(iv) That the sentence passed is excessive

This being an appeal against sentence only, the first, second and third grounds are irrelevant.

The third ground would apply to a capital offence, which neither of the offences herein qualify.

Be that as it may, the appellant appeared in person at the hearing of the appeal and confirmed that the appeal is on sentence only. He said that he wants the case re-tried because he was assaulted while in police custody and was taken to court without knowing what was happening. He said that he has not fully recovered.

The State, represented by the learned Senior State Counsel, Mr. Mutai, opposed the appeal. He said that the minimum sentence provided for by Section 9(1) of the Sexual Offences Act is ten (10) years yet the appellant was given only nine years. He asked the court to impose the minimum sentence and continued to state that although it was the trial court's discretion to order that the sentences do run consecutively, the circumstances of the case called for concurrent sentences.

The principles upon which an appellate court can interfere with the discretion of a trial court regarding sentence are well settled. The appellate court can only interfere where the trial court in assessing the sentence has acted on wrong principles or has imposed a sentence, which is manifestly inadequate or manifestly excessive (**See Diego =vs= Republic 1985 KLR 621)**. This court on perusal of the lower court record is satisfied that the plea was taken in accordance with the guidelines set out in the case of **Adan =vs= Republic [1973] E. A. 445**. The charges and all the essential ingredients of the offences were explained to the appellant in his dholuo language, which he understood. He argued this appeal using the same language.

As to the sentences imposed by the trial court, the sentence of nine years imprisonment for count one was an error. Instead, the trial court should have imposed the minimum sentence of ten (10) years imprisonment provided for by Section 9(2) of the Sexual Offences Act (No. 3 of 2006). The sentence of five (5) years imprisonment for the second count is the maximum provided under Section 339(1) of the Penal Code. It is therefore proper and lawful and so is the sentence of six months imprisonment for the third count. Section 95(1) of the Penal Code provides for a maximum sentence of six months imprisonment.

However, considering that the offences were committed concurrently and arose more or less from the same criminal transaction, the sentences ought to run concurrently rather than consecutively.

The appeal, save for how the sentences are to be served, lacks merit and is disallowed.

Consequently, the appellant shall serve ten (10) years imprisonment rather than nine (9) years for count one. He shall continue to serve five (5) years imprisonment and six (6) months imprisonment for counts two and three respectively.

The sentences shall however run concurrently.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 30th day of July 2008.

J. R. KARANJA

JUDGE

JRK/aao