



REPUBLIC OF KENYA



KENYA LAW
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**JGN v Republic (Criminal Appeal E017 of 2022)
[2023] KEHC 26442 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 26442 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CRIMINAL APPEAL E017 OF 2022
DO CHEPKWONY, J
SEPTEMBER 21, 2023**

BETWEEN

JGN APPELLANT

AND

REPUBLIC RESPONDENT

*(Being an Appeal against the sentence of the Trial Court in
Gatundu SO Case No 14 of 2020 delivered on 9th September, 2021)*

JUDGMENT

1. The appellant was charged, tried and convicted for the offence of attempted Defilement contrary to section 9(1) as read with section 9(2) of the [Sexual Offences Act](#) No 3 of 2006.
2. The appellant pleaded not guilty and the matter proceeded on full trial whereby the prosecution called four witnesses being among them being BN, the minor complainant who testified as PW1, CWG the mother of the minor as PW2, Dr Kaumba Nzioka as PW3 and lastly PC Fredina Kabuyesi, the Investigating Officer as PW4. Upon close of the prosecution case, the trial Court found the appellant had a case to answer and the accused gave unsworn statement in defence and did not call any witness.
3. The trial court held that the prosecution had proved their case, convicted the appellant under section 215 of the [Criminal Procedure Code](#) and sentenced the appellant to fifteen (15) years imprisonment. The trial court also took into consideration the period of one (1) year and three (3) months which the appellant spent in custody.
4. The appellant being aggrieved by the sentence meted by the trial Court lodged the present Appeal. In his Submissions filed on January 18, 2023, the appellant argues that the sentence was harsh and excessive due to his health status and he urges the court to grant him a noncustodial sentence.



5. In its Submissions filed on January 23, 2023, the prosecution argue that the sentence of fifteen (15) years was not harsh given that the penalty under section 9(2) of the [Sexual Offences Act](#) prescribes a sentence of not less than 10 years for the offence of attempted defilement of a child.
6. On August 25, 2023, the appellant has also filed Submissions in rebuttal, stating that he is sixty (60) years old and owing to his age, the court should be lenient and reduce his sentence to seven (7) years while taking into account the three (3) years that he has been in custody.
7. The law on the offence of attempted defilement, which the appellant the was charged with, is prescribed under section 9(1) and (2) of the [Sexual Offences Act](#) No 3 of 2006 which provides as follows:-
 - (1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.
 - (2) A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.
8. It is trite law that an appellate court should not interfere with the decision of the trial court unless it can be shown that the same was made based on wrong principles or an error of law. The court in the case of *Wanjema –vs- Republic* Criminal Appeal No 204 of 1970 (1971) EA 493, 494, where Trevelyan J held as follows:-

‘An appellate Court should not interfere with the discretion which a trial Court has exercised as to sentence unless it is evident that it overlooked some material factor, considered some immaterial factor, acted on a wrong principle or the sentence is manifestly excessive in the circumstances of the case.’
9. In the instant case, the appellant was found guilty and convicted for the offence of attempted defilement under section 9(1) of the [Sexual Offences Act](#), and sentenced to serve a period of fifteen (15) years imprisonment under section 9(2) of the same Act, which provides for a term of not less than ten (10) years imprisonment. This court finds the sentence of fifteen (15) years imprisonment which was meted against the appellant is well within the limits of the law, and thus cannot be said to be illegal. Furthermore, owing to the nature of the offence the appellant was convicted for, and the fact that he is grandfather to the minor complainant, the court has taken cognisance of the trauma the victim suffered and the implications of the whole ordeal on the family and community at large. It is the court’s humble view that it would not be in the interest of justice to reduce the sentence that was meted against the Appeal or even substitute the same with a non-custodial sentence.
10. Having found that the decision of the trial court in passing sentence term against the appellant was not erroneous or based on wrong principles of the law to warrant any interference, the court proceeds to uphold the said decision. The appeal is found lacking in merit and is thus dismissed.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21ST DAY OF SEPTEMBER, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Gacharia counsel for the State/Respondent



Applicant in person - present

Accused – present

Court Assistant - Martin

