



**Hassan alias Leli v Republic (Criminal Appeal E047 of 2023)
[2024] KEHC 16229 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16229 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CRIMINAL APPEAL E047 OF 2023
REA OUGO, J
NOVEMBER 21, 2024**

BETWEEN

IDD MAKOKHA HASSAN ALIAS LELEI APPELLANT

AND

REPUBLIC RESPONDENT

(An appeal arising from the Ruling of M.Munyekenye (SPM) at the Senior Principal Magistrate's Court at Webuye SO Case No 23 of 2019 delivered on 25/07/2023)

JUDGMENT

1. The appellant, Idd Makokha Alias Leli was charged with the offence of attempted defilement contrary to section 9(1) as read with section 9(2) of the *Sexual Offences Act* No 3 of 2016. The particulars were that on 19th July 2019 at [particulars withheld] within Bungoma County he intentionally attempted to cause his penis to penetrate the anus of SS a child aged 7 years.
2. The facts at the lower court can be summarised as follows: according to the prosecution case, the appellant took SS home and removed his clothing. The appellant also removed his clothes, applied body oil on SS's buttocks and lay on him. Fortunately, the victim's father opened the door, caught the appellant red-handedly attempting to defile his son and rescued him. The appellant in his defence testified that he was with SS at his home but there was an insect on his clothes therefore the child removed his clothes and ran from his house naked.
3. The appellant was convicted of the offence and sentenced to 15 years imprisonment.
4. The appellant now appeals against the sentence meted out by the trial court on the following grounds:
 - a. That he is a first offender and is remorseful for the offence committed.



- b. That this appeal isn't against the sentence imposed, but merely requests the honourable court to reduce the sentence on humanitarian grounds.
 - c. That the appellant is poor and the sole breadwinner of his family and his prolonged sentence subjects them to severe suffering.
 - d. The sentence imposed should be reduced and fall under the probative terms so that the appellant can serve the sentence under probation.
5. The appeal was canvassed through written submissions, and both parties have filed their respective submissions.
 6. In his submissions, the appellant maintains that he is a first offender and is remorseful for committing the offence. He points out that he is the sole breadwinner in his family and asks the court for a reduced sentence on humanitarian grounds. He urged the court to reduce the sentence of 15 years to one of community service.
 7. In opposing the appeal, the respondent submits that the victim in this case was a 7-year-old child, making the sentence imposed by the subordinate court proportionate to the gravity of the offence. They relied on the case of Miscellaneous Criminal Application No E014 of 2021 – Rotike v Republic which held that the law prescribes aggravating factors such as the age of the child and the manner of commission of the offence. It was submitted that the trial court had the discretion to impose the sentence. In *Bernard Kimani Gacheru v Republic* [2002] eKLR the court held that an appellate court may only interfere with the sentence of the lower court where the sentence is manifestly excessive or the trial court overlooked material factors or took into account wrong material or acted on a wrong principle.

Analysis And Determination

8. This appeal is only on sentence and this court has duly considered that an appellate court should not alter a sentence unless the trial judge has acted upon wrong principles or overlooked some material factors. (See *Ogolla s/o Owuor v Republic* [1954] EACA 270 the East Africa Court of Appeal).
9. The appellant in this case was charged with the offence of attempted defilement contrary to section 9(1) (2) of the *sexual offences Act*. The section provides
 - “9(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”
10. The section provides for a minimum sentence of 10 years. Therefore, the subordinate court has the discretion to give a higher sentence depending on the circumstances of the case. While the appellant was a first offender and the breadwinner of his family, the court cannot overlook the fact that the child was of tender years, 7 years old at the time of the offence.
11. The prosecution evidence led at the trial court was that the appellant lured him by promising to escort him home. On their way home, the appellant tied a cloth around the child's mouth, took him to his home and undressed him. He threatened to kill the victim and put a knife and club beside the bedding. The psychological impact of the offence on the seven-year-old complainant cannot be disregarded. Consequently, the 15-year sentence meted by the trial magistrate is hereby affirmed.



DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF NOVEMBER 2024

R.E. OUGO

JUDGE

In the presence of:

Appellant in person - Present

Miss Matere - For the Respondent

Wilkister -C/A

