



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

CRIMINAL APPEAL NO.62 OF 2015

ROBERT WEKESA MAHUYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

*(Being an appeal from the original sentence in Criminal Case*

*No. 1558 of 2013 at the Senior Principal Magistrate Court at*

*Kimilili by Hon. M. A. Nanzushi – SRM on 31<sup>st</sup> March 2015)*

J U D G M E N T

1. Upon arraignment, **Robert Wekesa Mahuyo**, the Appellant, was charged with the offence of sexual assault contrary to **Section 5(1)(a)(i)** as read with **Section 5(2)** of the Sexual Offences Act, No. 3 of 2006. Particulars were that on the 21<sup>st</sup> day of November, 2013 at [Particulars withheld] Village in Kimilili, in Bungoma County, unlawfully and intentionally caused his penis to penetrate the anus of **ESS** a child aged 15 years.
2. In the alternative he faced a charge of committing an indecent act with a child contrary to **Section 11(1)** of the Sexual Offences Act. Particulars being that on 21<sup>st</sup> day of November, 2013 at [Particulars withheld] Village in Kimilili, in Bungoma County, unlawfully and intentionally caused his penis to touch the anus of **ESS** a child aged 15 years.
3. The prosecution's case was that **ESS** a minor, was at the river washing clothes when the Appellant who was also at the river dragged him into the nappier grass and molested him. Seeing the danger he was in, he raised a call of distress that was answered by people who arrested the Appellant. By the time, **PW3, TNS**, his mother reached the scene people were about to lynch the Appellant. He was taken to the police station and re-arrested by **PW4 No. 57811 P.C Charles Krop**. The complainant was examined by **PW1 Beatrice Akosa**, a clinical officer who found him having sustained anal cuts. She also examined the appellant who had faecal matter in the end of his penile shaft. Hence the charges.
4. Upon being put on his defence the appellant denied having committed the offence. He alluded to having encountered two (2) people who arrested and took him to hospital for examination, then, he was charged.
5. Having been subjected to full trial, he was found guilty, convicted and sentenced to serve ten (10) years imprisonment for sexual assault.
6. Aggrieved he appealed against the sentence. However, on the grounds of appeal it was stated that proceedings were conducted in a manner that violated his rights as the evidence was full of contradictions and the decision was not analyzed and that, extraneous matters were considered.
7. The appeal was canvassed by way of written submissions. It was urged by the appellant that in meting out the sentence, the court did not take into account **Section 333 (2)** of the Penal Code. He mitigated that he was 51 years old at the time of his arrest, he has been in custody for eight (8) years and being 59 years old he sought to be granted the opportunity of shaping his future; that he is a first offender, is remorseful and he has maintained good behaviour and undergone various transformation programmes including a certificate in theological Bible courses.
8. In response, the State/Respondent argued that the act of penetration and identification of the appellant as the perpetrator were sufficiently proved. That taking into consideration the age of the complainant, circumstances under which the offence was committed the sentence meted out was proper.

9. During oral submissions, the appellant did not fault the court for reaching a correct decision on conviction, hence confined himself to what the petition of appeal was in respect of, namely, the appeal against the sentence meted out.

10. Being a first appellate court, I am mandated to re-consider and re-evaluate what transpired at trial and reach my own conclusions.

11. **Section 5 (2)** of the Sexual Offences Act provides as follows:

***(2) A person guilty of an offence under this section is liable upon conviction to imprisonment for a term of not less than ten years but which may be enhanced to imprisonment for life.***

12. In passing the sentence, the court considered the appellant's mitigation. It imposed the minimum prescribed sentence for the offence. In the case of ***Bernard Kimani Gacheru -vs- Republic (2002) eKLR*** the Court of Appeal stated that:

***"...It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.***

***The position was stated succinctly by the Court of Appeal for East Africa in the case of Ogola s/o Owoura v. Reginum (1954) 21 270 as follows:-***

***"The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James v. R., (1950) 18 E.A.C.A 147:"***

13. The complainant was a minor when the appellant committed the heinous offence against the order of nature. The trial court having acted on proper principles and even having passed a lenient sentence in the circumstances, this court cannot interfere with it.

14. The upshot of above is that the appeal against sentence is devoid of merit. Accordingly, it is dismissed.

15. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 15<sup>TH</sup> DAY OF OCTOBER, 2021.**

**L. N. MUTENDE**

**JUDGE**

**IN THE PRESENCE OF:**

*Court Assistant – Brenda*

*Ms. Mukangu – ODPP*

*Appellant*