REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CRIMINAL APPEAL NO. 32 OF 2019

SAMUEL NYONGESA.....APPELLANT

=VRS=

THE REPUBLIC.....RESPONDENT

{Being an Appeal against the Conviction and Sentence of Hon. H. Barasa – PM Eldoret dated and

delivered on the 11th day of November 2015 in the original Eldoret Chief Magistrate's Court Criminal Case No. 761 of 2015}

JUDGEMENT

The appellant was charged with attempted defilement contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act and in the alternative committing an indecent act with a child contrary to Section 11 of the Sexual Offences Act.

In the main charge the particulars of the offence were that on 10th February 2015 at [particulars withheld] Estate in Eldoret West District within Uasin Gishu County the appellant intentionally and unlawfully attempted to cause his genital organ (penis) to penetrate the genital organ (vagina) of FS a girl aged 10 years.

In the alternative charge it was alleged that on 10th February 2015 at [particulars withheld] Estate in Eldoret West District within Uasin Gishu County, the appellant intentionally and unlawfully caused his genital organ to come into contact with the genital organ of FS a girl aged 10 years.

The appellant pleaded not guilty to both charges but upon hearing and evaluating the evidence before him, the trial Magistrate was convinced the prosecution had proved the guilt of the appellant in the main charge beyond reasonable doubt. He therefore convicted him and sentenced him to imprisonment for ten (10) years.

This appeal is against the conviction and the sentence. The grounds of appeal as stated in the petition of appeal filed herein on 1st March 2019 are: -

> **"1. That I pleaded not guilty.**
>
> **2. That I am a first offender.**
>
> **3. That may this honourable court consider the time I had spent in remand and reduce my sentence with the same in accordance with Section 333 (2) of the cpc.**
>
> **4. That I am remorseful, reformed and rehabilitated hence I pray for leniency and even for non custodial sentence for the remaining sentence.**
>
> **5. That the offence committed was not deliberate but was caused by circumstances that will be adduced during the hearing of the application.**
>
> **6. That my family is young with nobody to cater for them hence badly need my help.**
>
> **7. That I humbly pray that my appeal be allowed."**

In the written submissions upon which he relied at the hearing of the appeal the appellant oscillates between maintaining he was innocent and

a plea for clemency that his sentence be reduced by the time spent in remand custody or he be given a non-custodial sentence. He ends up his submissions with a plea for leniency stating that he has since his conviction and sentence learned his lesson and is willing, if released, to serve as a role model and mentor in the society as a result of the biblical and spiritual instruction he has received in prison. He urges this court to grant him a second chance by setting him free.

On her part, Miss Busienei, Learned Prosecution Counsel submitted that the appeal has no merit, the charge against the appellant having been proved beyond reasonable doubt and the appeal should be dismissed.

In his reply the appellant reiterated his earlier defence that he was arrested as he was trying to save the child from another boy.

As is my duty as the first appellate I have not only considered the submissions by both sides carefully but also reconsidered and evaluated the evidence before the trial court so as to arrive at my own independent conclusion. In so doing I have been careful to make provision for the fact that I did not personally see or hear the witnesses. It is my finding that the charge against the appellant was proved beyond reasonable doubt; that the evidence was overwhelming and watertight. The complainant, a child then aged 10 years vividly narrated how the appellant who was well known to her led her to a quarry, removed her clothes then his and lay on top of her and was just about to insert his genital organ into hers when a man she referred to as Ingosi saw them and went to her rescue. This evidence was corroborated by the said Ingosi who testified as Pw2 and told the court that when he saw the appellant and the child leave the road he decided to go and find out what the matter was only to find the appellant without his trousers lying on top of the girl. He raised the alarm to which villagers responded and arrested the appellant. The complainant's testimony that her mother was not at home and the reason she was away was also corroborated by the mother (Pw3). The complainant gave a very consistent account to the doctor (Pw4) and to the police officer assigned to investigate the case (Pw5) and as I have stated that account was corroborated by Pw2 although in sexual offences the victim's evidence does not require corroboration. It is my finding therefore that the defence however well it was choreographed could not resist the weight of this very credible and cogent evidence and the appeal has no merit.

In regard to the sentence, **Section 9 (2) of the Sexual Offences Act** provides for a minimum sentence of ten (10) years which is what the trial Magistrate imposed. Since the decision of the Supreme Court in the **Francis Karioko Muruatetu & another v Republic [2017] eKLR** the courts have shunned minimum sentences and in **Jared Koita Injiri v Republic [2019] eKLR**, the Court of Appeal stated: -

> ***"…… In this case the appellant was sentenced to life imprisonment on the basis of the mandatory sentence stipulated by Section 8 (1) of the Sexual Offences Act, and if the reasoning in Supreme Court case was applied to this provision, it too should be considered unconstitutional on the same basis……..***
>
> ***Needless to say, pursuant to the Supreme Court decision in Francis Karioko Muruatetu & Another v Republic (supra), we would set aside the sentence for life imposed and substitute it therefore with a sentence of 30 years from the date of sentence by the trial court."***

From the record, the appellant in this case was thirty-eight years old when he committed this offence and has so far served five years of his ten (10) year term. Before that he spent about nine months in remand custody. In his submissions he mounted a spirited plea for leniency in which he stated he has learnt his lesson and promised to become a good citizen and to mentor other would be offenders if released. I have considered that plea and accordingly I set aside the sentence of imprisonment for ten (10) years and substitute it with one for the period served. He should be set at liberty forthwith unless otherwise lawfully held. It is so ordered.

Signed and dated this 15th day of January 2020.

E. N. MAINA

JUDGE

Dated and delivered in Eldoret this 21st day of January 2020.

H. A. OMONDI

JUDGE