



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 179 OF 2013

BENJAMIN MUSYOKI KIARIE.....APPELLANT

VERSUS

DIRECTOR OF PUBLIC PROSECUTIONS.....RESPONDENT

(An appeal from the Judgment of Hon. Odenyo, Senior Principal Magistrate delivered on 23rd October, 2013 in Mombasa Chief Magistrate's Court Criminal Case No. 2514 of 2011).

JUDGMENT

1. The appellant Benjamin Musyoki Kiarie was on the 9th of August, 2011 arraigned in court and charged with the offence of defilement of a girl contrary to Section 8(1)(3) of the Sexual Offences Act, No 3 of 2006.
2. The particulars of the charge were that on the 2nd day of August, 2011 at Tudor area within Mombasa District of the Coast Province, unlawfully and intentionally caused his penis to penetrate into (sic) the vagina of TN [name withheld] a girl aged 8 years.
3. The appellant faced an alternative charge of indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.
4. The particulars of the charge were that on the 2nd day of August, 2011 at Tudor area within Mombasa District of the Coast Province unlawfully and intentionally caused his penis to touch the vagina of TN [name withheld] a girl aged 8 years.
5. The appellant was convicted of the alternative charge of indecent act with a child and sentenced to 10 years imprisonment. He thereafter filed his petition of appeal and grounds of appeal.
6. On 26th September, 2018, he filed an application seeking leave of the court to amend his grounds of appeal to substitute them with mitigation grounds of appeal. This court deemed the said grounds to properly on record.
7. In his mitigation grounds of appeal, the appellant stated that he is a widower who left young children in the hands of his elderly parents. He also indicated that he was remorseful for having committed the offence and felt sorry for the inhuman act he did to the complainant.
8. He submitted that he had acquired skills and knowledge in prison that had taught him that crime does not pay. He stated that he had studied up to High School where he sat of his KCSE Examinations in the year 2017 and had done a tertiary course in healthy living.
9. The appellant further submitted that he was about to complete serving his sentence of 10 years. He urged this court to consider the period he has served in prison and set him free.
10. On her part, Ms Marindah, Learned Counsel for the respondent submitted that the appellant was convicted for the offence of indecent act with a child which carries a maximum sentence of 10 years. She prayed for the sentence not to be interfered with.
11. The appeal herein is against sentence only, which means that the appellant admits having committed the offence he was convicted of but prays for this court to reduce the sentence meted out against him.
12. Section 11(1) of the Sexual Offences Act provides as follows:-

“Any person who commits an indecent act with a child is guilty of the offence of committing an indecent act with a child and is liable upon conviction to imprisonment for a term not less than 10 years.”

13. The above provisions leave no room for doubt that the minimum sentence that any court can impose against a person charged and convicted of the offence of indecent act with a child is 10 years imprisonment. In the present case, the Hon. Magistrate imposed the minimum sentence provided by law against the appellant.

14. In light of the foregoing, this court has no discretion to reduce the sentence that was meted out against the appellant. The appellant's appeal against sentence is therefore dismissed.

DELIVERED, DATED and SIGNED at MOMBASA on this 18th day of January, 2019.

NJOKI MWANGI

JUDGE

In the presence of:-

Appellant present in person

Ms Ogwen for the respondent

Mr. Oliver Musundi - Court Assistant