

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.25 OF 2017

(An Appeal arising out of the conviction and sentence of Hon. Juma – CM delivered on 7th July 2015 in Kibera CM. CR. Case No.6426 of 2012)

DANIEL MUIRURI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Daniel Muiruri was charged with the offence of **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on 12th December 2012 at Kiserian Township in Kajiado County, the Appellant intentionally and unlawfully attempted to cause his male genital organ (penis) to penetrate the female genital organ (vagina) of LNN (the complainant), a child aged thirteen (13) years. He was alternatively charged with the offence of **committing an indecent act with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the same day and in the same place, the Appellant touched the female genital organ of the complainant with his male genital organ. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was found guilty of the main charge. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by his sentence only. He filed an appeal to this court.

In his petition of appeal, which was in form of mitigation, the Appellant told the court that he was a first offender. He prayed for the leniency of the court. He had reformed both spiritually and mentally. He was willing to abide by any terms that the court may impose should it favourably consider his plea either for reduction of his custodial sentence or the imposition of an alternative non-custodial sentence. In the submission that he presented before court, the Appellant told the court that he was in remand custody from the time of his arrest on 12th December 2012 to the time of his conviction on 7th July 2015. He prayed for the court to take into consideration this period under **Section 333(2)** of the **Criminal Procedure Code**. He reiterated that he was deeply remorseful and repentant for the offence that he committed. He urged the court to take into consideration his health situation especially the fact that he was suffering from acute ulcers which had made his living condition in prison intolerable. The Appellant stated that he had acquired skills in prison which will serve him well when he is released from prison. He had also embraced Christianity and acquired a diploma in theology. He pleaded with the court to consider his mitigating circumstances and accordingly favourably consider his plea for reduction of sentence.

Mr. Momanyi for the State opposed the appeal. He submitted that the Appellant was found guilty of attempting to defile his sister in-law. Were it not for the fact that a neighbour intervened, the Appellant would have completed the sexual assault. Learned State Counsel submitted that the complainant was traumatized by the incident. The sentence that was imposed by the trial court was a minimum sentence provided under the law. He urged the court to dismiss the appeal and the Appellant's plea for reduction of sentence.

As stated earlier in this judgment, the Appellant's appeal is in regard to the severity of sentence only. The Court of Appeal in **Ahmad Abolfathi Mohammed & Another –vs- Republic Criminal Appeal No. 135 of 2016** (unreported) held at Page 25 thus:

*“As what is challenged in this appeal regarding sentence is essentially the exercise of discretion, as a principle this Court will normally not interfere with exercise of discretion by the court appealed from unless it is demonstrated that the court acted on wrong principle; ignored material factors; took into account irrelevant considerations; or on the whole that the sentence is manifestly excessive. In **Bernard Kimani Gacheru v. Republic, Cr App No.188 of 2000** this Court stated thus:*

“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, any one of the matters already stated is shown to exist.”

In the present appeal, the Appellant was sentenced in accordance with **Section 9(12)** of the **Sexual Offences Act** which provides that any person convicted of the offence of **attempted defilement** shall be sentenced to serve a term of imprisonment of not less than ten (10) years. The Appellant was sentenced to serve the minimum sentence provided by the law. This court cannot fault the trial court for imposing the sentence in question in view of the established circumstances that the crime was committed. It was clear that the trial court (as this court) took into account the effect that the attempted defilement had on the victim. She was severely traumatized. This court sees no reason to interfere with the said sentence. However, the Appellant established to the satisfaction of this court that he was in remand custody for two

and a half ($2\frac{1}{2}$) years before his conviction. This period was clearly not taken into account by the trial court when it sentenced the Appellant. **Section 333(2)** of the **Criminal Procedure Code** requires the period that a convict was in remand custody to be taken into account when a custodial sentence is meted out.

In the premises therefore, the Appellant's appeal on sentence will partially succeed. The period of two and a half ($2\frac{1}{2}$) years that he was in remand custody prior to his conviction shall be taken into account as a result of which the Appellant's custodial sentence of ten (10) years imprisonment is hereby set aside and substituted by a sentence of this court. The Appellant is sentenced to serve seven and a half ($7\frac{1}{2}$) years imprisonment with effect from 7th July 2015 when he was sentenced by the trial court. It is so ordered.

DATED AT NAIROBI THIS 2ND DAY OF APRIL 2019

L. KIMARU

JUDGE