REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 155 OF 2013

FRED OTIENO ODHIAMBO..APPELLANT

VERSUS

REPUBLIC..RESPONDENT

RULING

[1] The Appellant, **Fred Otieno Odhiambo**, was tried and convicted by **Hon. Mary W.N.,** Senior Resident Magistrate, in respect of **Eldoret Chief Magistrates Court's Criminal Case No. 1480 of 2011,** for the offence of Attempted Defilement contrary to **Section 9(2)** of the **Sexual Offences Act, No. 3 of 2006**. The particulars thereof were that on **8 April 2011** in Wareng District of the Rift Valley Province, he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **WP**, a child aged 9 years. He was sentenced to 10 years' imprisonment on **18 July 2013.**

[2] Being aggrieved by the decision of the lower court, the Appellant filed this appeal on **2 August 2012** citing the following grounds:

> **[a]** That the Learned Trial Magistrate erred in law and fact in convicting and sentencing him to 10 years' imprisonment;
>
> **[b]** That the Learned Trial Magistrate misdirected himself on the essential ingredients of Defilement contrary to **Section 8(1)** as read with **Section 8(3)** of the **Sexual Offences Act;**
>
> **[c]** That the Learned Trial Magistrate erred in failing to evaluate the evidence adduced by the Prosecution to ascertain that the Charge was proved beyond reasonable doubt;
>
> **[d]** That the Learned Trial Magistrate erred in law and fact by imposing a very harsh and improper sentence in the circumstances.

[3] Consequently, the Appellant prayed that his appeal be allowed and the anomalies corrected by the Court so as to have his conviction quashed and the sentence set aside. Thereafter, on **21 December 2018,** the Appellant moved the Court for sentence review, citing **Articles 1(1), 2(4), 19(3), 27, 28, 29** and **47** of the **Constitution, Section 39(2)** of the **Sexual Offences Act** and **Section 261** of the **Criminal Procedure Code**, **Chapter 75** of the **Laws of Kenya**, contending that:

> **[a]** He was convicted and sentenced for the offence of Attempted defilement contrary to **Sexual Offences Act;**
>
> **[b]** He has served more than one third of the sentence and remains with less than two years imprisonment to go;
>
> **[c]** The Court be pleased to admit him to probation or community service for the remaining part of his sentence;
>
> **[d]** He is now remorseful and regrets the offence he committed;
>
> **[e]** His incarceration has rehabilitated and reformed him through vocational training in various fields for which he was awarded certificates;
>
> **[f]** He was a bread winner to his young siblings at the time of his arrest.

[4] The Appellant relied on the written submissions he filed alongside his request for sentence review. He urged the Court to note that the lower court failed to take into account the period he spent in remand custody pending his trial. He added that he has since reformed and

become a better person. He similarly urged the Court to note that this was his first offence; and that he was, at the time of his arrest, taking care of his siblings. He accordingly prayed that the period spent by him in custody be taken into consideration and that he be admitted to probation for the remainder of his sentence.

[5] **Mr. Mulamula**, Learned Counsel for the State, was in agreement. He was of the view that, under **Section 39** of the **Sexual Offences Act**, the Court has the discretion to make an order for the remainder of a convict's sentence to be served on Probation; subject to a Probation Report being availed. He therefore had no objection to the appeal. The Court then called for a Probation Officer's Report in the matter, which was filed on **28 March 2019**. That report confirms that the Appellant was born in **1986** and is the firstborn of four siblings; and that both his parents are deceased. The report further shows that the Appellant is remorseful and that his incarceration has afforded him an opportunity for introspection and reform; and that he has benefited from various rehabilitation programs while in prison. In sum, the social inquiry conducted by the Probation Officers revealed that:

> **"In view of the appellant's penitent attitude toward the offence that he was convicted of, coupled with his youthful age and the fact that he had not only acquired vocational skills, but had reformed, we find him a suitable inmate to benefit from the provisions of Section 39 of the Sexual Offences Act..."**

[6] In the light of the foregoing, it is manifest to the Court that the Appellant, in effect, abandoned his appeal against conviction in favour of a reconsideration of the sentence imposed on him. To that end, I have carefully considered the appeal against sentence in the light of the Written Submissions filed herein by the Appellant as well as the response thereto by Learned Counsel for the State. I have also keenly perused and considered the record of the lower court; which confirms that the Appellant was indeed arrested on **19 April 2011**; arraigned before the lower court on **20 April 2011** and was ultimately found guilty of the Main Charge of Attempted Defilement under **Section 9(2)** of the **Sexual Offences Act,** after a trial that took slightly over 2 years by the time of his conviction and sentence on **18 July 2013**. Quite unfortunately for him, the record shows that his appeal did not receive any attention until **2018** when it was admitted and listed for directions.

[7] Be that as it may, **Section 39** of the **Sexual Offences Act** provides that:

> **(1) A court may declare a person who has been convicted of a sexual offence a dangerous sexual offender if such a person has--**
>
> > **(a) more than one conviction for a sexual offence;**
> >
> > **(b) been convicted of a sexual offence which was accompanied by violence or threats of violence; or**
>
> **(c) been convicted of a sexual offence against a child**
>
> **(2) Whenever a dangerous sexual offender has been convicted of a sexual offence and sentenced by a court to imprisonment without an option of a fine, the court shall order, as part of the sentence, that when such offender is released after serving part of a term of imprisonment imposed by a court, the prisons department shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence."**

[8] It is manifest therefore that, whereas the Appellant qualified for declaration as a dangerous sexual offender for purposes of **Section 39** of the **Sexual Offences Act,** granted the fact that he was convicted of a sexual offence against a child, it is noteworthy that he was not so declared by the court that convicted and sentenced him. **Section 39(2)** of the Act is explicit that:

> **"...<u>the court</u> shall order, <u>as part of the sentence</u>, that when such offender is released after serving part of a term of imprisonment imposed by a court, <u>the prisons department</u> shall ensure that the offender is placed under long-term supervision by an appropriate person for the remainder of the sentence..."** (Emphasis added)

[9] It is for the foregoing reason that I find that, in the absence of an order of the trial court, made as part of the Appellant's sentence, **Section 39** of the **Sexual Offences Act** there would be no basis for an order that the Appellant be released on probation or placed on community service for the remainder of his imprisonment term. To my mind, **Section 39** aforementioned would only kick in were it to be demonstrated that the Appellant, say after having earned remission, is due for release soon before serving the full term. There is no such indication herein, save the assertion that he has served a substantial part of his sentence.

[10] As to whether the Appellant is entitled to reduction of sentence pursuant to the proviso to **Section 333** of the **Criminal Procedure Code,** there is no disputing that courts are obligated to take into account the time spent in custody by accused persons in the event of conviction. Hence, **Section 333(2)** of the **Criminal Procedure Code** provides that:

> **"Subject to the provisions of section 38 of the Penal Code (Cap.63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code. Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody."**

[11] Accordingly, the **Judiciary Sentencing Policy Guidelines** acknowledges, in Paragraph 7.10, that:

> **"...Failure to do so impacts on the overall period of detention which may result in an excessive punishment that is not proportional to the offence committed."**

[12] Case law abound to the effect that the period spent in remand from the date of arrest to date of sentence ought to be taken into account

in the convict's favour. For instance, in **Musyeki Lemoya vs. Republic [2014] eKLR** the Court of Appeal held that:

> **"Our view, in these circumstances, is that the two courts below erred in principle in assessing the sentence and this Court is thus entitled to interfere. The minimum sentence for the offence under the alternative count is 10 years imprisonment.The time spent in custody was a relevant factor to consider but it was not considered. We set aside the sentence of 14 years and substitute therefor a sentence of 11 years."**

[13] In the instant case however, it is significant to note that the Appellant was given the minimum penalty of 10 years that is prescribed for the offence of Attempted Defilement. That decision cannot therefore be faulted, for the trial court was left with no room for manouvre.

[14] In the light of the foregoing, it is my finding that, although Counsel for the State did not oppose the appeal, and although the Probation Officer's Report is favourable to the Appellant, he neither qualifies for placement on probation for the remainder of his sentence as urged nor for reduction of sentence pursuant to **Section 333(2)** of the **Criminal Procedure Code**. In the premises, I would dismiss his appeal on sentence, which I hereby do.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF APRIL 2019

OLGA SEWE

JUDGE