



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIVASHA**

**CORAM: R. MWONGO, J.**

**HCCR APP NO. 21 OF 2017**

**CR: CASE FILE NO. 674 OF 2014**

**JARED ARISI NYANDIEKA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

(Being an Appeal from the Original Conviction and Sentence dated 17/2/2015

in Criminal Case No 674 of 2014 in the Chief Magistrate's Court,

Naivasha, P. Gesora) – CM )

**JUDGMENT**

1. The appellant filed a petition of appeal on 17<sup>th</sup> May, 2017, against the sentence of ten years' imprisonment for the offence of. The petition had five grounds of appeal as shown below:

1. That I pleaded not guilty to the above charges.
2. That the learned trial magistrate convicted and sentenced the appellant to serve 10 years imprisonment but failed to note that the appellant had a problem of an injury since he was young.
3. That the appellant was the only one who was dependent [on] his mother who is old and [has] young brothers who are now schooling [with] difficulty due to lack of school fees and food
4. That may the honourable court have mercy to the remaining sentence to probation or be sent to community to be able to serve my old suffering mother and young brothers as I serve the nation
5. That I pray to be present during the hearing and determination of this appeal

The accused prayed that the honourable court be pleased to reduce the sentence or order for probation or set aside the conviction or order the appellant to serve in community service.

2. At the hearing fixed for 4<sup>th</sup> July, 2017, the prosecution stated that they could not proceed as there were no substantive grounds of appeal against the decision of the trial magistrate for determination. The court thus asked the appellant to re-consider his appeal and file substantive grounds against the trial court's decision.

3. The appellant filed submissions on 11<sup>th</sup> July 2017 retaining and elaborating on the grounds of appeal which raised only grounds of mitigation. The hearing was held on 21<sup>st</sup> February, 2019.

4. At the hearing, the appellant asserted that his family depends entirely upon him, and sought a reduction in the sentence so that he could help rebuild his life and family

5. The prosecution urged that the sentence meted by the trial court for the offence was ten (10) years which was in accord with **section 9(2)** of the **Sexual Offences Act**.

6. I have agonized about whether what is before me is an appeal at all given that the grounds are merely on mitigation. The **Criminal Procedure Code** requires an appeal to be filed under a petition of appeal. **Section 350(2) CPA** provides that:

**“ A petition of appeal shall be signed, if the appellant is not represented by an advocate, by the appellant, and if the appellant is represented by an advocate, by the advocate, and shall contain particulars of the matters of law or fact in regard to which the subordinate court appealed from is alleged to have erred, and shall specify an address at which notices or documents connected with the appeal may be served.....and the appellant shall not be permitted, at the hearing of the appeal, to rely on a ground other than those set out in the petition of appeal”**

7. Clearly therefore, what is before me is not an appeal as the petition contains no “particulars of the matters of law or fact in regard to which the subordinate appealed from is alleged to have erred”. To that extent, there is nothing before this court which challenges any aspect of the trial court’s judgment, and this court has no lawful ground upon which to interrogate the trial court’s judgment.

8. In the case of **Kiema Mutie v Republic [2018] eKLR** the Court of Appeal also dealt with the issue of mitigation grounds. Relying on the case of **M K M v Republic [2018] eKLR** where the Court, faced with a similar “appeal” rendered itself as follows:

**“Indeed, we need to state quite categorically that the practice now seeming to gain traction and notoriety, of second appeals against severity of sentence only being presented as „mitigation statements? or the like, has no foundation in law, is contrary to statute and should stop. It is also worth recalling, that when all a person presents on a second appeal is a mitigation, there really is no appeal because an appeal under our Rules is based on a memorandum of appeal.”**

9. In essence the appellant has placed himself in a position where he is deemed to have no appeal.

10. That notwithstanding, the lower court file is before this court, and I have perused it, as I am constitutionally bound to do. In exercise of this court’s inherent constitutional supervisory mandate and obligation under **Article 165 (6) and (7)**, this court has a unique judicial function that goes beyond handling and determining appeals. It is a supervisory authority over subordinate courts under **Article 165(7)** of the **Constitution** to:

**“.....call for the record of proceedings before any subordinate court or person, body or authority...and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”**

11. The file being before me, I noted as follows.

12. The appellant was charged with the offence of attempted defilement contrary to **section 8(1)** of the **Sexual Offences Act, 2006**. The particulars were that on the night of 4<sup>th</sup> April 2014 at [particulars withheld] trading centre in Gilgil sub-county, he intentionally attempted to cause his penis to penetrate the vagina of the complainant FW. The alternative charge was that the accused committed an indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**. The particulars of this offence being that on the night of 4<sup>th</sup> April 2014 at [particulars withheld] trading centre in Gilgil sub-county, he intentionally touched the breasts of FW a child aged 15 years with his hands

13. The brief facts were that the complainant was to attend a wedding of her uncle and was in the bridal party. She testified as PW1 that on the way to her uncle’s house at Viewpoint from Githurai in Nairobi, the matatu she was in dropped her about 3 kms away from the bus stop. She therefore found a taxi and asked the driver to take her to Viewpoint, but he instead took her to Viewpoint in Nakuru. She managed to get a vehicle that drove her back to the spot where she had been. There, she found the accused who told her he knew her uncle. He even allegedly spoke to the uncle on the phone at that point, and told her that her uncle would not make it and had asked him to come for her.

14. The accused took her to a hotel where he bought her some tea. Then he offered her a place to rest, and took her to a room where he locked her in. Once there, he started touching her breasts and attempted to unbutton her trousers. A struggle ensued and she screamed, trying to get away. He pulled her down and she injured her knee. The accused managed to remove her jacket, and she managed to grab a bottle with which she hit the accused, and he released her. She adroitly opened a window, jumped out and ran away. Eventually, she reported the matter to her aunt and the relevant authorities, leading to the arrest of the accused.

15. The evidence of PW2 merely confirmed that the complainant was due to attend a wedding and did not show up. She later explained to him that the accused had attempted to rape her.

16. PW3 worked at the hotel where the incident occurred. He confirmed that the accused was a guard at the premises, and that the following day police officers came to arrest the accused.

17. PW4, PC Vincent Kiptoo, the investigating officer repeated the story as told him by the complainant. He confirmed that he was the one who arrested the accused upon the complainant pointing him out. In the complainant’s room under the bed, he found the clothes she had left when escaping from accused. He produced them in court as exhibits

18. PW5, Dr. Moses Oluoch, was the doctor who examined the complainant at Gilgil Hospital. He produced the P3 form. He confirmed the complainant had bruises on the arm

19. Section 9 of the Sexual Offences Act describes the offence of attempted defilement as follows:

**“a person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement”**

20. It is an offence that is constituted by the act of doing or *actus reus* to cause penetration. “Penetration” is defined in **Section 2** of the **Sexual Offences Act** as follows:

**“ ‘penetration’ means the partial or complete insertion of the genital organs of a person into the genital organs of another person.”**

And “genital organs” are defined in the same section as follows:

**“ ‘genital organs’ includes the whole or part of male or female genital organs and for purposes of this Act includes the anus”**

21. From the evidence on record, there is nothing to ascertain the attempted defilement for which the accused was convicted. That offence is proved when it is shown that the accused committed an act which would cause penetration.

22. The evidence availed did not show an attempt to penetrate the genital organs of the complainant by the accused. What the evidence did show, however, was that the accused touched the complainant’s breasts and unbuttoned her trousers. She then managed to struggle free. Whilst it may have been the accused’s intention to rape the complainant, intent does not form part of the offence of attempted defilement.

23. The trial court determined at page 22 of the judgment:

**“I hold that accused attempted to defile the complainant. That is an offence by itself and for that he is guilty and he has committed a charge in the main charge”.**

24. The court should, instead, have convicted the accused for the alternative charge of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**. The accused had been charged with that offence. The evidence showed he had touched the complainant’s breasts. That amounted to an indecent act not attempted defilement. “*Indecent act*” is defined in **section 2** as follows:

**“ ‘Indecent act’ means an unlawful intentional act which causes –**

***a. Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration***

***b. .... ”***

25. Accordingly, I substitute the appellant’s conviction with that of indecent act for which he was undoubtedly guilty. As that offence carries a minimum sentence of not less than ten (10) years similar to that for attempted defilement, the term of sentence imposed by the trial court shall remain undisturbed.

26. The appellant’s plea is otherwise dismissed.

27. Orders accordingly.

**Dated and Delivered at Naivasha this 14<sup>th</sup> Day of May, 2019**

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**RICHARD MWONGO**

**JUDGE**

Delivered in the presence of:

1. Jared Arisi Nyandieka - Appellant in person

2. Mr. Koima for the State

3. Court Clerk - Quinter Ogutu