



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CRIMINAL APPEAL NO. 36 OF 2017

ISSACK NDUNGU PETER.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from conviction and sentence of the Resident Magistrate's Court (Hon. T. Olando, RM) delivered on the 19 December 2014 in Eldoret Chief Magistrate's Criminal Case No. 5352 of 2013)

JUDGMENT

[1] This is an appeal from the decision of the Learned Trial Magistrate, **Hon. T. Olando, RM**, dated **19 December 2014** in **Eldoret Chief Magistrate's Criminal Case No. 5352 of 2013**. The Appellant, **Issack Ndungu Peter**, had been charged before the lower court with the offence of attempted defilement contrary to **Section 9(1) and (2)** of the **Sexual Offences Act, No. 3 of 2006**. It was alleged that on the 18th day of November 2013 in Uasin Gishu County, he intentionally and unlawfully attempted to cause his genital organ (penis) to penetrate the genital organ (vagina) of **EWV**, a child aged 7 years.

[2] In the alternative, the Appellant was charged with indecent act with a child, contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars alleged that on the 18th day of November 2013 in Uasin Gishu County, he intentionally and unlawfully caused his genital organ (penis) to come into contact with the genital organ (vagina) of **EWV**, a child aged 7 years.

[3] The Appellant denied the charges and after his trial before the lower court, he was found guilty of the offence of indecent act with a child contrary to **Section 11(1)** of the **Sexual Offences Act**. The Appellant was accordingly convicted thereof, and sentenced to serve 10 years' imprisonment. Being aggrieved by his conviction and sentence, the Appellant preferred this appeal on **27 March 2017**, raising following Grounds of Appeal;

- [a] That he is a first offender and is remorseful and apologetic for the offence;
- [b] That he is the sole bread winner to his family;
- [c] That there is a possibility that the 10 years imprisonment will have a negative impact on his future;
- [d] That he has siblings who depend upon him for their daily upkeep.

He accordingly prayed that his appeal be allowed, the conviction quashed and the sentence set aside.

[4] The Appellant, relied entirely on his written submissions that he filed herein, whereby he took issue with the fact that he was convicted of the Alternative Charge yet the trial court found no evidence to support the Main Charge of defilement. His contention was that the Prosecution did not discharge the burden of proof beyond reasonable doubt as required by law; and therefore that he ought to have been acquitted. He cited **Sections 106 and 107** of the **Evidence Act, Chapter 80** of the **Laws of Kenya**, as well as **Section 134** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya** to support his submissions. The Appellant also placed reliance on **Sigilai & Another vs. Republic** for the holding that an accused person ought to be charged with an offence known in law; and that the offence should be disclosed and stated in a clear and unambiguous manner.

[5] The Appellant attacked the evidence of the minor, contending that she was not a credible witness, granted the inconsistencies noted in her testimony. He relied on **Ndungu Kimani vs. Republic [1979] KLR 282** wherein it was held that the witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that she is not a straightforward person. Lastly, the Appellant contended that his constitutional rights to a fair hearing under **Articles 25(c), 50(2) and 159** of the **Constitution were infringed**; and that no

reasons were assigned for the conclusion reached by the trial court, in contravention of **Section 169(1)** of the **Criminal Procedure Code, Chapter 75** of the **Laws of Kenya**. The cases of **James Nyanamba vs. Republic, Criminal Appeal No. 121 of 1983** and **Albanus Mwasia Mutua vs. Republic [2006] eKLR** were cited by the Appellant to support his arguments.

[6] On behalf of the State, the response of **Mr. Mulamula** was that the sentence imposed on the Appellant is lawful and is the minimum penalty prescribed for the offence of indecent act with a child. His view therefore was that the trial court had no discretion in the matter. Counsel accordingly urged for the dismissal of the appeal.

[7] Although the Appellant made detailed written submission attacking his conviction, his Petition of Appeal was confined to sentence only. He petitioned for **"...reduction of sentence arising from the original conviction and sentence of 10 years for the offence of indecent act with a child c/sec. 11(1) of the sexual offences act no. 3 of 2006..."** Granted the provisions of **Section 11(1)** of the **Sexual Offences Act**, the sentence was reasonable.

[8] In the result, I find no merit in the appeal and would dismiss the same.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 6TH DAY OF JUNE, 2019

OLGA SEWE

JUDGE