REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MAKUENI

HCCRA NO. 97 OF 2019

YOSHUA MUTISYA MBIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(From the original conviction and sentence of Hon. T.S. Nchoe (RM) in Makueni Principal Magistrate's Court Criminal Case No. 647 of 2015).

JUDGMENT

1. **Joshua Mutisya Mbia** the Appellant was charged with the offence of attempted defilement contrary to Section 9(1) as read with Section 9(2) of Sexual Offences Act No. 3 of 2006. The particulars being that the Appellant on the 4th day of October 2015 at [particulars withheld] location Makueni district within Makueni county, intentionally attempted to cause his penis to penetrate the vagina of **RMM** a child aged 12 years.

2. The Appellant was arrested on 8th October, 2015 and presented to court for plea on 9th October, 2015. When the charge was read to him in Kiswahili language, he admitted it and facts were then read to him. He confirmed their correctness and he was convicted on his own admission. Upon conviction, he was sentenced to ten (10) years imprisonment.

3. Being dissatisfied he filed this appeal against sentence only. He raised the following grounds:

> *i.* ***That,*** *the learned trial magistrate erred in both law and fact by failing to observe contravention of Section 107, 109 and 111 Evidence Act on where the prosecution case was not proved beyond reasonable doubt.*
>
> *ii.* ***That,*** *the learned trial magistrate erred in both law and fact by failing to observe contravention of Section 214 of the Criminal Procedure Code.*
>
> *iii.* ***That,*** *the Appellant urge this Honourable court to consider that the entire case was on the issue of or pertaining existing grudge between victim's and relative was not aware.*
>
> *iv.* ***That,*** *the earned trial magistrate erred in both law and fact by failing to observe contravention of Section 124 of Evidence Act on where the victim was not truthful and consistent.*
>
> *v.* ***That,*** *the learned trial magistrate erred in both law and fact by failing to observe contravention of Section 169(2) of the Criminal Procedure Code on where Appellant's defence was not adequately considered.*
>
> *vi.* ***That,*** *the Hon. court to exercise its discretionary power and jurisdiction hence invoke Section 39 of Sexual Offence Act.*
>
> *vii.* ***That,*** *the Appellant urges this Honourable court to put into adequate consideration on both relevant and irrelevant and material aspects and mitigating circumstances/factor. (in sentencing)*

4. He filed written submissions which are infact mitigation for the reduction of sentence. He submits that when the offence was committed he was under the influence of alcohol. He pleads remorse saying he has aged parents and younger siblings to take care of. He further submits that he has undertaken vocational training while in prison and attained grade 1 and 2 in building and masonry. He claims to have been in prison for five (5) years and completes sentence in 2022.

5. The State through Mrs. Owenga did not appear to seriously oppose his appeal on sentence.

6. As a first appeal court, this court has the duty to reconsider the evidence on record and arrive at its own conclusion. See **Okeno –vs- R (1972) E.A 32; Kiilu & Anor –vs- R (2005) IKLR 174.**

7. As mentioned above, the Appellant was convicted on his own admission. I have read the record and I am satisfied that the plea was properly taken as per the requirements in **Adan –vs- R (1973) E.A 445.** The conviction is therefore safe.

8. The Appellant's complaint is on the sentence which he seeks to have reduced. The sentence of ten (10) years is the minimum mandatory sentence under Section 9(2) Sexual Offence Act. Following the holding in the **Francis Karioko Muruatetu & Anor –vs- R (2017) eKLR** on the mandatory death sentence and followed by the Court of Appeal on minimum mandatory sentences in: -

- **Christopher Ochieng –vs- R, Kisumu Criminal Appeal No. 202 of 2011 (2018) Eklr.**

- **Jared Koita Injiri –vs- R, Kisumu Criminal Appeal No. 93 of 2014.** I find that the trial court did not exercise any discretion while sentencing the Appellant.

9. One of the considerations would be the fact that the Appellant was a first offender. Secondly, he admitted the charge the first day he appeared in court thus saving on Judicial time. Thirdly, he was accosted before carrying out his evil agenda because of the screams by the 12-year-old child. Her screams attracted the quick action by one N who in turn called two women who assisted the minor. I salute that little girl.

10. I have taken into account all the mitigating factors I have set out above. The Appellant was convicted and sentenced on 9th October 2015 and has been in prison for 4 years and **not** five years as he claims. I have considered his plea and allow his appeal on sentence only and make the following orders:-

i. The conviction is upheld.

ii. The sentence of ten (10) years is set aside and substituted with a sentence of seven (7) years imprisonment from the date of sentence.

Orders accordingly.

Delivered, signed and dated this 23rd day of October, 2019, in open court at Makueni.

H. I. Ong'udi

Judge