



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO 61 OF 2018

SAMWEL ONDENG APIYO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal against both the conviction and the sentence dated 2.11.2018, in Bondo PMCCRA (S.O.) No. 39 of 2017 before Hon. Hon. M. Obiero – P.M.)

JUDGMENT

1. The appellant **Samwel Ondeng Apiyo** was on 9.3.2018 convicted vide **Bondo P.M. S.O. 39 of 2017** for the offence of **Attempted defilement contrary to Section 9(1) of the Sexual offences Act No. 3 of 2006**. He was sentenced to serve 10 years imprisonment by Hon. M. Obiero Principal Magistrate. Being dissatisfied with the said judgment, conviction and sentence, the appellant filed this appeal on 8.11.2018.
2. I note that the appeal was filed nearly 8 months after the judgment, without any leave of court being obtained in the first instance. It was therefore erroneous for appeal to have been admitted to hearing on 31.1.2019.
3. However, I observe that as at 8.11.2018 the appellant had not received copies of proceedings and judgment of the lower court and it was not until 26.2.2019 when this court served him with same, in the open court.
4. Initially, the appellant had on 30.4.2019 sought for more time to file written submissions to canvas his appeal. The appellant also informed this court that he had another **CRA 39/2018** pending and due for hearing on 15.5.2019.
5. The Court granted the appellant leave to file written submissions and set the hearing for 29.7.2019 but on the latter date, this court was travelling out of station to attend High Court leaders meeting and had 5 witnesses waiting to be heard in a Murder trial hence I fixed the hearing to 30.10.2019. On 30.10.2019, the appellant appeared in person and informed the court that he wished this court to consolidate his sentence in this case with sentence in **HCRA 39 of 2018**. He then said that he wished to withdraw his appeals in both cases, against conviction and urged the court to consider sentence reduction. The Court ordered for withdrawal of appeal against conviction.
6. On sentence reduction, the appellant submitted that sentence of 10 years imprisonment was harsh as he is serving 20 years imprisonment imposed on him in **HCRA 39 of 2018**.
7. This court then called for HCRA 39 of 2018 which I have just determined and therefore this judgment relates to a challenge to sentence only.
8. Section 9(1) (a) of the Sexual offences Act provides for Minimum sentence in attempted defilement where the victim child is aged 11 years and below.
9. The sentence of 10 years mandatory hence the same as imposed was lawful. However, as stated in **HCRA 39/2018**, the Mandatoriness of minimum sentences has been successfully challenged before the court of Appeal and the Court of Appeal applying the principles espoused in **Francis K. Muruatetu V R [2017]e KLR** has declared the Mandatory sentence unconstitutional.
10. This is not to say that a trial court cannot, in appropriate circumstances, impose such mandatory minimum sentence, taking into account mitigation of an accused person and circumstances under which the offence was committed.
11. In the instant case, PW1 a child aged 11 years, S.A. in class four was on 27.9.2017 at 5 p.m. plucking guavas at her home and she was alone when the appellant went to her home and held her hand telling her he was taking her to the bush. When they reached the bush, he told her to remove her skirt and pant which she did, innocently. He then started fondling her naked body using his hands and when PW2 Joseph

Otieno Ojuki who was passing by heard people talking in a bush, he moved nearer to establish what they were doing. He saw the appellant Samwel. When he asked the appellant as to what he was doing, the appellant told PW2 to go away as he was doing nothing. The appellant tried to move away but Pw2 held him and beat him to prevent him from running away, after realizing that the appellant had attempted to defile the child who was on the ground. PW2 then called PW1's mother who went to the scene and they interrogated PW1 who told them what the appellant had done to her. The appellant was arrested and later taken to Ndori Police Post and charged with this offence.

12. The appellant denied the offence but he has now owned up and withdrawn the challenge against conviction. The Clinic card produced in evidence as an exhibit 1 shows that the complainant was born on 2nd May 2006.

13. The appellant in mitigation stated that he did not commit the offence. He pleaded for leniency and stated that his mother was sick.

14. The trial court considered mitigation and the fact that the appellant was serving another 20 years imprisonment in a related offence. He sentenced him to serve 10 years imprisonment and ordered that the sentence runs concurrently to the sentence in Cr. S.O. 40 of 2018 with the sentence in the latter case to be completed first.

15. I have considered the appeal against sentence and the mitigation and circumstances under which the appellant lured an innocent child into the bush and attempted to defile her.

16. The appellant is no doubt a recidivist who derives pleasure in molesting young children. He deserved long incarceration to keep him away from society so that vulnerable children can be protected from such sex pests. The sentence imposed was lawful, despite its mandatoriness, as the appellant is a repeat offender who can only be deterred by long prison term. I find no reason to interfere with the said sentence. I uphold it and dismiss the appeal against sentence imposed on him by the trial court.

17. Orders accordingly.

Dated. Signed and Delivered at Siaya this 18th day of November, 2019.

R.E. ABURILI

JUDGE

In the presence of:

The appellant in person

Mr. Okachi Senior Principal Prosecution Counsel for the Respondent

CA: Brenda and Modestar