



KTL.NO.648/2019

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CRIMINAL APPEAL NO. 38 OF 2018

JACOB MUTEMI MUTUA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an Appeal from Original Conviction and Sentence in Kyuso Principal Magistrate's Court Criminal Case (S.O.) No. 3 of 2016 by Hon. John Aringo (RM) on 16/02/17)

J U D G M E N T

1. **Jacob Mutemi Mutua**, the Appellant was charged with the offence of **Attempted Defilement** contrary to **Section 9(1)** as read with **Sub-Section (2)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on the **19th** day of **February, 2016** at about **2000hrs** in **Mumoni** within **Kitui County**, attempted to defile **MM**, a girl child aged **16 years**.
2. In the alternative he was charged with the offence of **Committing an Indecent Act with a Child** contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence were that on **19th** day of **February, 2016** at about **2000hrs** in **Mumoni** within **Kitui County**, intentionally and unlawfully touched the breast of **MM**, a child aged **16 years** with his hands.
3. After full trial he was convicted for Attempted Defilement and sentenced to **ten (10) years imprisonment**.
4. Aggrieved, he appeals against the sentence meted out on grounds that: he is remorseful, repentant and he regrets his action; he is reformed and rehabilitated, he has acquired skills and reformed spiritually. That he is a father and has siblings who depend on him. And, if granted an opportunity he will serve people as an Ambassador of Christ.
5. The State/Respondent through learned State Counsel, **Mr. Mamba** urged that the Appellant was not disputing the fact that he committed the offence and he was sentenced to a term provided by statute. And, that he had not demonstrated that he had reformed.
6. The minimum prescribed sentence for the offence of attempted defilement is provided for in **Section 9(2)** of the **Sexual Offences Act** that stipulate thus:

“A person who commits an offence of attempted defilement with a child is liable upon conviction to imprisonment for a term of not less than ten years.”
7. In the case of **Republic vs. Scott (2005) NSW CCA 152** it was stated that:

“... sentence imposed must ultimately reflect the objective seriousness of the offence committed and there must be a reasonable proportionality between the sentence passed in the circumstances of the crime committed ... one of the purposes of sentence is to ensure that an offender is adequately punished ... a further purpose of punishment is to denounce the conduct of the offender.”
8. It is urged, but not demonstrated by the Appellant that he has reformed and is rehabilitated. It is worth noting that the purpose of sentence includes reforming and rehabilitating offenders like the Appellant herein. The victim of the offence should also be protected following the fact of the offender being incarcerated.
9. In the case of **Bernard Kimani Gacheru vs. Republic (2002) eKLR** it was stated that:

“It is now settled law, following several authorities by this Court and by the High Court, that sentence is a matter that rests in the discretion of the trial court. Similarly, sentence must depend on the facts of each case. On appeal, the appellate court will not easily interfere with sentence unless, that sentence is manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some wrong material, or acted on a wrong principle. Even if, the Appellate Court feels that the sentence is heavy and that the Appellate Court might itself not have passed that sentence, these alone are not sufficient grounds for interfering with the discretion of the trial court on sentence unless, anyone of the matters already stated is shown to exist.”

10. The learned trial Magistrate exercised discretion and opted to administer the lowest prescribed sentence for the offence. Therefore, I have absolutely no reason to interfere with the sentence meted out.

11. In the result, I find no merit in the Appeal which I hereby dismiss.

12. It is so ordered.

Dated, Signed and Delivered at Kitui this 2nd day of December, 2019.

L. N. MUTENDE

JUDGE