



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 52 OF 2018**

**RICHARD MBATHA KYALO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the Judgement and sentence by C. K. Kisiangani (R.M) in the Chief Magistrates Court at Machakos in Criminal S.O. Case No. 215 of 2017 delivered on 10<sup>th</sup> May, 2018)***

**JUDGEMENT**

1. The Appellant herein **Richard Mbatha Kyalo** had been convicted and sentenced to serve ten (10) years imprisonment by Hon. Kisiangani vide **Machakos CM's Criminal (S.O.A.) 215 of 2017** on 24/05/2018 for the offence of attempted defilement contrary to Section 9(1) (2) of the Sexual Offences Act No.3 of 2006. The particulars were that on the 27<sup>th</sup> day of August, 2017 at [particulars withheld] village Utithini Sub-location, Miu Location in Mwala Sub-County within Machakos County intentionally and willfully attempted to cause his penis to penetrate the vagina of CM a child aged five (5) years.

2. The Appellant was aggrieved by the conviction and sentence and has now lodge this appeal. His petition of appeal filed on 4/06/2018 mainly dwelt on mitigation as follows:-

- (a) That he is a first offender.***
- (b) That he deeply regrets his action.***
- (c) That he is the sole breadwinner for his aged mother who has a terminal illness.***
- (d) That he has since reformed and is now an ambassador of Jesus Christ.***
- (e) That the period spent in prison custody be treated as proper time served and that he be released by being given a second chance.***
- (f) That he is deeply remorseful and repentant and seeks the court's mercy.***

3. The case for the prosecution was as follows: **MMK (PW.1)** sent her daughter, who is the complainant aged 5 years old to take some onions to the Appellant's house nearby. Earlier the appellant had requested for some onions. The complainant however took too long to return home and her mother then called out her name and also dispatched one of her daughters to go find out, and who actually met the Appellant emerging while holding his trouser at the waist. She rushed the child to a nearby clinic where the doctor confirmed that there had been an attempt of defilement. She identified the Lab Request Form, P.3 form, Post Rape Care Form and copy of birth certificate. On cross examination, she maintained that the Appellant had attempted to defile the minor.

4. A voir dire examination was conducted on the complainant who tendered an unsworn testimony but was cross-examined by the Appellant. She stated that the Appellant held her hand and took her to a bed and removed her underpants and also removed his underpants and then inserted his penis between her legs. As she was about to be defiled her mother called out her name and suddenly her sister M arrived. On cross – examination, she maintained that the Appellant took her to bed and did something to her.

5. **PW.3 was MK.** She stated that the Appellant had earlier come to their home and requested to be given some onions with which to cook vegetables. The Appellant's request was accepted and that the complainant was directed to take the onions to him. However, when the minor delayed she decided to go fetch her only to find the door closed. She opened the door and entered the house only to meet the Appellant zipping up his trouser while the complainant emerged while fixing up her underpant and informed her that the appellant had requested her that they do bad manners. On cross- examination, she stated that both the complainant emerged from the bedroom with the

appellant zipping up his trouser while complainant was pulling up her underwear.

6. **PW.4** was **EM** the complainant's grandmother. She testified that the complainant informed her that the Appellant removed her underpants and opened his trouser and then inserted his penis between her legs and did bad manners. She checked the underpants and noticed that it was wet and that the thighs were red. She also noticed that the minor had not been penetrated.

7. **PW.5** was **Dr. John Mutunga** of Machakos level Five Hospital. He testified that he examined the complainant and noted no injuries on her body. He noted that the external genitalia was tender and that the hymen was intact. He produced the P.3 form, lab request forms and the post rape care form as exhibits. He established that the weapon was a penile shaft. On cross – examination, he stated that someone had tried to penetrate the minor.

8. **PW.6** was **No. xxxx Corporal Shaïd Wali Jepha** of Muthetheni Patrol Base. He stated that he received the report and escorted the minor and her mother to hospital where the minor was examined. He later arrested the Appellant. He produced the birth certificate. On cross-examination, he stated that he preferred the charges based on the doctor's findings.

9. The prosecution closed its case and the trial court established that a prima facie case had been made against the Appellant and was thus placed on his defence. The Appellant opted to tender sworn testimony. He stated that he had gone to Muthetheni market only for police officers to arrest him and escorted him to the police station on allegations that he had defiled the complainant. He denied the allegations. He also claimed that the complainant's parents demanded a sum of Kshs.5,000/- so that he could be released. He maintained that he was not at the scene on the material day. On cross – examination, he stated that he was at work from 8.00 a.m. to 4.00 p.m. but had no witness to prove the same. He also confirmed that the complainant and her parents were his neighbours and that he did not ask the witnesses about the alleged demand for Kshs.5,000/- during cross – examination.

10. The appeal was canvassed by way of written submissions. The appellant's submissions mainly consisted of mitigation as per his Memorandum of Appeal and sought for revision of sentence. Learned counsel for the respondent submitted that as the Appellant has not challenged the conviction then it is only on the issue of sentence. He submitted that the offence herein attracts a minimum of ten years imprisonment and since the trial court had imposed the same then the appeal herein lacks merit and should be dismissed.

11. I have considered the submissions. I have also noted that the appellant in this appeal is not challenging his conviction by the trial court. His appeal is mainly against the sentence imposed by the trial court. He has listed a rapt of mitigations in which he has urged this court to consider interfering with the sentence. Hence the conviction by the trial court will remain intact and thus I do not need to delve into it. It is trite that sentencing is primarily at the discretion of the trial court. It is that court which has heard the case upto conclusion and noted all the circumstances of the case to decide the appropriate sentence to be imposed after receiving mitigation from the convict as well as other relevant reports. Hence the trial court must be given the requisite latitude to pass the appropriate sentence. In the case of **Shadrack Kipchoge Kogo –v- Republic – Eldoret Criminal Appeal No. 253 of 2003** the Court of Appeal stated as follows:-

**“Sentence is essentially an exercise of the trial court and for this court to interfere, it must be shown that in passing the sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of this the sentence was so harsh and excessive that an error in principle must be interfered. Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of an appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime and the manner in which the crime is done. There is no straight jacket formula for sentencing an accused on proof of crime. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep the gravity of the crime, motive for the crime, nature of the offence and all attendant circumstances.”**

Also in the case of **Wanjema –v- Republic [1971] EA 493** the court held that an appellate court can only interfere with the sentence imposed by the trial court if it is satisfied that in arriving at the sentence, the trial court did not consider a relevant fact or that it took into account an irrelevant factor or that in all the circumstances to the case the sentence is harsh and excessive. Hence the appellate court can only interfere with the trial court's exercise of discretion not as a matter of course but where circumstances of the case warrant it.

12. The Appellant has urged me to interfere with the trial court's sentence. The Appellant was sentenced to serve ten (10) years imprisonment for attempted defilement under Section 9(1) (2) of the Sexual Offences Act. The said statute provides as follows:-

**9(1) “A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.”**

**9(2) “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.”**

13. It is clear from the above provision that the trial court could only give the minimum sentence possible in law. The trial court received the Appellant's mitigation as well as a pre-sentence report and it also considered the age of the complainant and the circumstances under which the offence was committed and arrived at the minimum sentence of ten (10) years. I find the said sentence not excessive or harsh as it was the borderline minimum possible in law. I have no reasons to interfere with the same save only that the same should commence from the date of arrest namely **20/08/2017** as he was in remand custody throughout the trial.

14. In the result and save for the fact that the sentence of ten years is to commence from the date of arrest namely **20/08/2017**, the Appellant's appeal lacks merit and is dismissed.

Order accordingly.

Dated and delivered at **Machakos** this **9<sup>th</sup>** day of **December, 2019**.

**D. K. Kemei**

**Judge**