



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Appeal Number 77 Of 2017

(From Original Conviction And Sentence In Mariakani Pm's Court

Criminal Case No. 106 Of 2013, **L. K. Gatheru, Rm** On 26th October, 2016)

NYAE RAI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGEMENT

1. The appellant herein, **Nyai Rae**, was charged in the Mariakani Principal Magistrate's Court Criminal Case No. 106 of 2013 with the offence of Sexual Assault contrary to section 5(1)(a)(i) and (2) of the ***Sexual Offences Act, No. 3 of 2006***. The particulars were that on the 21st march, 2013 at [particulars withheld] in Kwale County within Coast Region, he appellant unlawfully used his fingers to penetrate the vagina of UT, a child aged 9 years. He also faced an alternative charge of committing an indecent assault with a child contrary to section 11(1) of the ***Sexual Offences Act***.

2. Upon hearing the evidence on record, the Learned Trial Magistrate, found the appellant not guilty of the offence of sexual assault and found that he was guilty of the alternative charge of committing indecent act with a child, convicted him accordingly and sentenced him to 10 years imprisonment.

3. The appellant's appeal is only on sentence. The principles upon which an appellate Court will act in exercising its discretion to review or alter a sentence imposed by the trial court are now old hat. The predecessor of the Court of Appeal in the case of **Ogolla s/o Owuor vs Republic, [1954] EACA 270**, pronounced itself on this issue as follows:-

"The Court does not alter a sentence unless the trial Judge has acted upon wrong principles or overlooked some material factors".

4. To this, I would add a third criterion namely, "that the sentence is manifestly excessive in view of the circumstances of the case". (**R - v- Shershowsky (1912) CCA 28TLR 263**) while in the case of **Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003** the Court of Appeal stated thus:-

"sentence is essentially an exercise of discretion by the trial court and for this court to interfere it must be shown that in passing the sentence, the sentencing court took into account an irrelevant

factor or that a wrong principle was applied or that short of these, the sentence itself is so excessive and therefore an error of principle must be interfered (see also Sayeka –vs- R. (1989 KLR 306))”

5. In this case the appellant was found guilty of the offence committing an indecent act with a child. The child was a young girl aged 11 years and the appellant was her uncle. Section 11(1) of the **Sexual Offences Act** provides that:

Any person who commits an indecent act with a child is guilty an offence and is liable upon conviction to imprisonment for a term of not less than ten years.

6. I have considered the appellant’s submissions and while I harbour reservations about the lawfulness of mandatory minimum sentences under the current constitutional dispensation, in his case, the appellant, a close relative of the complainant took advantage of the tender age of the complainant for his own selfish satisfaction. As rightly submitted by **Ms Ogweno** for the Respondent, the appellant ought to have been in the forefront of protecting the complainant. Instead of doing so he chose to be the source of the complainant’s agony. The appellant ought to have known better than to do what he did. The Court of Appeal in **Thomas Mwambu Wenyi v Republic [2017] eKLR** cited the decision of the Supreme Court of India in **Alister Anthony Pereira vs State of Maharashtra** at paragraphs 70-71 where it was held on sentencing that:-

“Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no strait jacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances. The principle of proportionality in sentencing a crime doer is well entrenched in criminal jurisprudence. As a matter of law, proportion between crime and punishment bears most relevant influence in determination of sentencing the crime doer. The court has to take into consideration all aspects including social interest and consciousness of the society for award of appropriate sentence.”

8. In the premises it is my view that the sentence meted to the appellant was appropriate in the circumstances.

9. This appeal therefore fails and is dismissed.

10. It is so ordered.

11. Right of appeal 14 days.

Judgement read, signed and delivered in open court at Mombasa this 7th day of September, 2018.

G V ODUNGA

JUDGE

In the presence of:

Appellant in person

Ms Ogweno for the Respondent

CA Gladys