



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL NO. 31 OF 2017**

**S M.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Appeal against the conviction and sentence by Hon. L. A. Mumassabba (RM) delivered on 1<sup>st</sup> September, 2015 in Mavoko Sexual Offences No. 27 of 2014)***

**JUDGEMENT**

1. The appellant was convicted of the offence of attempted defilement and sentenced to 10 years imprisonment. He filed grounds of appeal seeking revision of the sentence to a lesser term or to non-custodial sentence. The rest was mitigation.

2. Brief facts of the prosecution case are as follows. R N M (PW2) and the appellant are R. M.'s parents. The two separated when R. M. was nine months old. The two later got back to talking terms and PW2 once in a while sent her children including R.M. for money for basics. On 11<sup>th</sup> August, 2014, the material day, PW2 sent R. M. to the appellant for money for paraffin. R. M. went to the appellant's house and was seated on the bed since he had no seats. While there, the appellant removed her pant, unzipped his trouser and defiled R. M. He then gave her KShs. 20/. She gave her mother KShs. 10/ and told her that the other KShs. 10/- was hers. PW2 noticed that R.M. cried the entire night but assumed that she had a toothache. She took her to hospital for that. She then left her with her mother. Later when R.M.'s sister V N washed her, she discovered R.M. had a bruise and she informed PW2 who upon inquiry was told by R.M. that it was inflicted by the appellant. PW2 reported the matter to the police who issued her with a p3 form and took her to Athi River Health Centre and Makadara for treatment. Dr. Loyce Njoroge who is a Medical Officer at Athi River Medical Centre examined R.M. on 15<sup>th</sup> August, 2014. Upon the examination, she found that her vagina had bruises and had dirt as well as swollen and she was in pain. Laboratory tests revealed that she had an infection and was put on antibiotics but had no syphilis, hepatitis and HIV. That the vagina was swollen at the labia majora and had scars. She thereby made an inference that there was attempted forceful entry. She then produced an age assessment reports as P. Exhibit 1, treatment notes as P. Exhibit 2 and medical report as P. Exhibit 3. The investigating officer, Caroline Mukiri (PW4) who is attached to Athi River Police Station received the report on 15<sup>th</sup> August, 2014. She interviewed R.M. who informed her that her father had removed her clothes and tried inserting his penis in her vagina. That the appellant was taken for treatment at Athi River Health Centre. The appellant was arrested by members of the public and R.M. identified him.

3. The Appellant's case on the other hand was that he did not commit the offence. That PW2 forced him to marry her and because he refused, PW2 vowed that he'll see and that the charge was fabricated. On cross examination, he stated that R.M. went to his house at 8.00 am when he gave her KShs. 50/- to buy milk and KShs. 20/- to buy mandazi but that she did not stay for long. He maintained that PW2 vowed to do something bad to him.

4. In his submissions, the appellant expressed that he is remorseful and asked for leniency. He stated that he is a first-time offender. That his conviction and imprisonment is a blow to the family since he is the sole breadwinner. That he has gone through prison rehabilitation programs and has changed both mentally and spiritually. He sought revision of the sentence to a lesser term or to a non-custodial sentence. In that regard the appellant relied on Articles 2 (1) (5), 20 (1) (3) (b), 21 (1) (4) 22 (1) 23 (1) 27 (1) 28 29 (c) (d) (e) (f) 47 (2) and 51 (1) of the Constitution.

5. The respondent on the other hand submitted that sentencing is the discretion of the court. That such discretion must be exercised judiciously and not capriciously. That during sentencing, the court must take into account all relevant factors and eschew all extraneous and irrelevant factors. That the appellant court will interfere with the sentence imposed by a trial court only if it is demonstrated that the sentence is not legal or it is so harsh and excessive as to amount to miscarriage of justice and that the court relied upon wrong principles or if the court exercised its powers capriciously. The respondent cited **Shadrack Kipchoge Kogo v. Republic [2017] eKLR**. That while exercising its discretion in sentencing, the court should bear in mind the principles of proportionality, deterrence and rehabilitation and as part of the proportionality analysis, mitigation and aggravating factors should also be considered. That section 9 (1) (2) of the Sexual Offences Act provides for a term not less than 10 years for attempted defilement. That considering that the law provides for the minimum sentence, the seriousness on the said offence, the age of the victim at the material time and the principles of sentencing, and that there is no reason for this court to interfere with the sentence imposed by the trial court.

6. Section 9 (1) (2) of the Sexual Offences Act provides for a term not less than 10 years for attempted defilement. The Appellant was sentenced to serve ten (10) years imprisonment which is the minimum sentence possible in law. His mitigation was duly considered by the trial court which properly exercised its sentencing discretion bearing in mind that the minimum sentence provided for is ten years. I find the trial court considered all the relevant factors and arrived at the possible minimum. I am unable to find fault with the trial court.

7. In the result, I find the Appellant's Appeal is devoid of any merit. The same is dismissed. The conviction and sentence of the trial court is upheld.

Orders accordingly.

**Dated, signed and delivered in Machakos this 4<sup>th</sup> day of October, 2018.**

**D.K.KEMEI**

**JUDGE**

**In the presence of:-**

Stephen Makau - the Appellant

Machogu for the Respondent

Josephine - Court Assistant