REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 40 OF 2017

THOMAS MUTUA MUEMA ..... APPELLANT

VERSUS

REPUBLIC ..... RESPONDENT

(Appeal against the sentence by Hon. L. Mumassabba (R.M.) in Mavoko Principal Magistrates' Court Criminal Case No. 2 of 2015 on 16th July, 2015.)

JUDGEMENT

1. The appellant was charged and convicted of the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. He was subsequently sentenced to 10 years imprisonment.

2. He appealed against the sentence and submitted that he is a transformed man. That he is the family's sole breadwinner and his family needs him. That he had a surgery and cannot carry out hard duties. He sought the revision of the sentence meted upon him.

3. The Respondent in opposition submitted that section 9 (1) (2) of the Sexual Offences Act provides for a sentence of imprisonment of not less than 10 years which is the minimum. That the appellant was given the bare minimum provided by the law. That the appellant's mitigation that he is remorseful is not sufficient ground to warrant this court to interfere with the sentence by the trial court.

4. The principles upon which an appellate Court will act in exercising its discretion to interfere with a sentence imposed by the trial court are now sell settled. 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". To this, we 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)." See also Omuse - v- R (supra) while in the case of Shadrack Kipkoech Kogo - vs - R., Eldoret Criminal Appeal No.253 of 2003 the Court of Appeal stated thus:-***
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> ***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. The Appellant in this case was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. He was upon conviction sentenced to 10 years imprisonment. The issue for determination is whether or not the sentence meted out to the appellant is illegal or unlawful, harsh or excessive. Section 9 (1) (2) of the Sexual Offences Act provides:

> *"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.*
>
> *(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."*

6. It is clear from the above provision that the minimum sentence available is 10 years. The sentence by the trial court was thereby within the law and this court has no legal basis of reducing the same. Indeed the trial court duly considered the Appellant's mitigation as well as the circumstances and factors surrounding the commission of the offence before deciding to mete out the sentence upon the Appellant. This appeal therefore fails and that the trial court's sentence is hereby affirmed.

Orders accordingly.

Dated and delivered at Machakos this **16th** day of **October 2018**.

D. K. KEMEI

JUDGE