



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 15 OF 2016

DAVID NJENGA KARIUKI.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable R. Amwayi Resident Magistrate, delivered on 24th February, 2014 in Nakuru Chief Magistrate's Court Criminal Case No. 17 of 2013)

JUDGMENT

1. David Njenga Kariuki was arraigned in court on the 30th day of January, 2013 where he denied a charge of defilement of a girl contrary to Section 8(1) as read with Section 8(4) of the Sexual Offences Act No. 3 of 2016. He was taken through full trial, found guilty, convicted and sentenced to serve fifteen (15) years imprisonment. The complainant was a girl aged seventeen (17) years.
2. Contented with the conviction but aggrieved by the sentence he now appeals on ground that the learned trial magistrate erred in law and fact by failing to invoke the provisions of Section 333 and 137(1) (2) (a) of the Penal Code and to consider his mitigation that was plausible.
3. The Appellant canvassed the appeal by way of written submissions where he argued that the period he stayed in remand was not considered and the fact that he is the sole breadwinner of his family which consists of children who are in school and scavenging for survival was disregarded.
4. The State through learned Prosecuting Counsel, Mr. Kemo, opposed the appeal. He urged that the complainant was seventeen (17) years old and the sentence meted out was lawful. That the Appellant herein as per the facts presented betrayed the trust bestowed upon him by PW3 the grandmother of the complainant by defiling the complainant as he escorted her to school.
5. This being a first appeal I am duty bound to reconsider what prevailed at trial and come up with my own conclusion.
6. This is a case where the Appellant an employee of the complainant's grandmother was asked to take her to school. Instead of acting on instructions given he took her to a house where he defiled her. The learned trial magistrate gave him the opportunity of making submissions in mitigation where he sought forgiveness and leniency from the court.
7. The learned trial magistrate took into consideration mitigating factors and applied the law hence the sentence meted out.
8. Principles upon which an appellant court can exercise its discretion to alter the sentence imposed by the lower court are clear. In the case of **Shadrack Kipkoech Kogo Vs Republic 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 in principle must be interfered with”. (see also Sayeka Vs Republic (1989) KLR 306).

9. Section 8(4) of the Sexual Offences Act provides thus:

“A person who commits an offence of defilement with a child between the age of sixteen and eighteen years is liable upon conviction to imprisonment for a term of not less than fifteen years”

10. The mandatory minimum sentence provided by statute for the offence herein is fifteen (15) years imprisonment. The trial court did not have the discretion of considering meting out a sentence of less than what is stipulated. Therefore the sentence was lawful.

11. In the result, the appeal is devoid of merit. Accordingly it is dismissed.

Dated and delivered at Nakuru this 8th day of November, 2018

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L. Mutende

Judge