



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 29 OF 2015

SIMON MWANGI MACHARIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Being an appeal from the Judgment of Honourable M. I. G Moranga Principal

Magistrate, delivered on 28th January, 2015 in Nakuru Chief Magistrate's

Court Adult Criminal Case No. 119 of 2013)

JUDGMENT

1. Simon Mwangi Macharia was charged with attempted Defilement contrary to Section 9(1)(2) of the Sexual Offences Act, 3 of 2006. Particulars of the offence being that

“On the 20th day of June, 2013 at [Particulars Withheld] area in Nakuru North District within Nakuru county, unlawfully and intentionally attempted to commit an act which would cause penetration with his male genital organ namely penis into the female genital organ namely vagina of D M M”.

2. He was tried, convicted and sentenced to serve ten (10) years imprisonment.

3. Aggrieved by the sentence he filed a petition of appeal mitigating on sentence on the 6th day of February, 2015 on the grounds that he is an orphan with younger siblings and they all depend on their grandmother, he is asthmatic therefore requires medication and that the lower court did not consider his mitigation. In his mitigation he asked the court to consider time spent in custody.

4. The State through learned counsel Mr. Kemo opposed the appeal. He urged that the appellant accosted the complainant, a pupil in Standard 3 while she was taking part in cross country race. He ran after her an action that made her trip, stumble and fall. As he attempted to undress her she was rescued. That he was convicted and sentenced to serve ten (10) years imprisonment which is minimum sentence for the offence.

5. In considering the appeal and mitigation on sentence, I am duty bound to re-consider what transpired in the lower court and come up with my own conclusion.

6. The minor complainant was aged eight (8) years at the time the offence was committed. Section 9(2) of the Sexual Offences Act provides that:-

“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”

7. Principles upon which an appellate court will act in exercising its discretion to interfere with the sentence meted out by the lower court were stated in the case of **Ogalo s/o Owoura Vs Republic (1954) EALA 270** as follows:-

“The principles upon which an Appellate Court will act in exercising its jurisdiction to review sentences are firmly established. The Court does not alter a sentence on the mere ground that if the members of the Court had been trying the appellant they

might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial Judge unless, as was said in James Vs Republic (1950) 18 E.A.C.A 147, "it is evident that the Judge has acted upon some wrong principle or overlooked some material factor". To this we would also add a third criterion, namely, that the sentence is manifestly excessive in view of the circumstances of the case: Republic Vs Shershewsky, (1912) C.C.A 28 T.L.R 364"

8. The prescribed minimum sentence for the offence that was committed by the Appellant is ten (10) years imprisonment. Therefore the trial court did not overlook any material fact in meting out the sentence. Since the sentence imposed was legal, this court cannot interfere with it. In the premises the appeal is devoid of merit and is dismissed.

Dated and delivered in Nakuru this 6th day of November, 2018

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L. Mutende

Judge