REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

CRIMINAL APPEAL NO. 116 OF 2017.

SAMWEL NYABUTO.....APPELLANT

VERSUS.

REPUBLIC.....RESPONDENT

[This is an Appeal from the Conviction and Sentence in Original Kimilili SPM CR No. 4/2017 delivered on 19.10.2017 by D.O. Onyango (SPM)].

JUDGMENT.

The appellant was charged with offence of Interference of witness contrary to Section 7(2) (b) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were; between 23rd May, 2016 and 20th January 2017 in Kimilili Sub-county of Bungoma County, jointly with another not before Court, Intentionally interfered with one witness namely G N who is the complainant in Criminal Case No. 26/2016 by transferring and hiding her.

The evidence before the trial Court was that G N was a complainant in a defilement Criminal Case No. 26/2016. The father of the complainant W S went with her to Kimilili Court on 23.5.2016 for Mention of the case and later took her to the grandmother's home. He later received information that the said G had disappeared from the home. She returned on 6.1.2017 while pregnant. On 11.1.2017 the appellant was seen with G. The appellant was arrested and recovered from him the Sim card for his Mobile Number but he tried to swallow it but was retrieved. On checking the call logs it was found that appellant was in constant communication with the Minor when G was financially traced, he confirmed that it was accused who had taken her to Kisii, Nairobi and Eldoret. The appellant in his defence denied the charge stating that prosecution did not produce G and therefore did not prove the charge. The trial Magistrate upon considering the evidence found appellant guilty of the offence convicted him and sentenced him to serve 3 years imprisonment or pay a fine of Kshs.100,000/=.

The appellant in this appeal informed court that he was not challenging conviction but pleading for reduction of the sentence. This appeal is therefore against the sentence only. Sec. 354(3) of the Criminal Procedure Code provides; (a) in an appeal from a conviction –

> *(i) reverse the findings and sentence, and acquit or discharge the accused, or order him to be tried by a court of competent jurisdiction; or*
>
> *(ii) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce or increase the sentence; or*
>
> *(iii) with or without a reduction or increase and with or without altering the finding, alter the nature of the sentence;*

(b). in an appeal against sentence, increase or reduce the sentence or alter the nature of the sentence.

The court in exercise of the powers under (b) above will be guided by the principles set out in that sentencing is at the discretion of the trial court. The appellate court will interfere with the discretion if it is shown;

> *(1) that the trial magistrate acted on wrong principles.*
>
> *(2) failed to consider relevant factor or*
>
> *(3) considered irrelevant factors or*
>
> *(4) that the sentence is manifesting excessive in the circumstances.*

The appellant was charged with offence of intentionally interfering with witnesses Contrary to section 37 of the Sexual Offences Act; which

provides;

> *(1) Any person who intentionally interferes with a scene of crime or any evidence relating to the commission of an offence under this Act is guilty of an offence and is liable upon conviction to imprisonment for a term of not less than three years or to a fine of one hundred thousand shillings or to both.*
>
> *(2) Interference referred to in subsection (1) includes but is not limited to;*
>
> > *(a) tampering with a scene of crime;*
> >
> > *(b) interference or intimidation of witnesses; and*
> >
> > *(c) any other act or omission that would hind or obstruct investigations or materially misrepresent any evidence.*

The sentence provided in respect of imprisonment is not less than 3 years. The fine of Kshs.100,000/= though not stated is not the set minimum. The trial court can imprison for 3 years or fine Kshs.100,000/= with a default sentence of imprisonment. If the trial magistrate elect to imprison only then it must be for not less than 3 years. However if he elects to fine the accused, then the default sentence upon non payment on fine is guided by Sec. 28 92) of the Penal Code.

The trial magistrate in this sentence noted that the appellant was not a first offender as he had earlier been convicted of escape from lawful custody. Considering the antecedents of the appellant, I find the fine of Kshs.100,000/= though being the maximum was well merited taking into consideration the nature of the offence. I therefore dismiss this appeal.

Dated and Signed at Bungoma this 5th day of November, 2018.

S.N. RIECHI

JUDGE