



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 77 OF 2011
P K W.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

[Appeal from the Judgment and Conviction by Hon. D.O.Ogembo Principal Magistrate in Nyeri CR.C.No.41of 2010 dated 22nd March, 2011]

JUDGMENT

1. The appellant, **P K W**, was charged with two counts of defilement of a girl contrary to **Section 8(1) (2)** of the **Sexual Offences Act**. The particulars of the charge were that on the 7th November, 2010 at [particulars withheld] area in Nyeri District he intentionally and unlawfully defiled **TN and JW** both of the minors were aged 8 years and 11 years respectively.
2. In the alternative, the appellant was charged with two alternative counts of Indecent Act with a child contrary to **Section 11(1)** of the **Sexual Offences Act, 2006**; that on the date and place hereinabove mentioned he indecently touched **TN and JW** both girls are aged 8 years and 11 years their private parts with his member.

FACTS

3. The facts of the case as recorded by the trial magistrate are that the prosecution called a total of seven witnesses; that the appellant who is the uncle of the complainants had been luring the girls with money and would take them in turns and defile them; the actions of the appellant went unreported as the two complainants out of fear could not tell anyone; it was on the 8/11/2010 that **PW3 P G K** got suspicious when he saw the appellant chasing **PW2** one of the complainants in the coffee plantation that all was revealed by the two minors; they narrated to **PW3** that the appellant had defiled both of them on the 7/11/2010 and also on previous dates; they were then taken to Nyeri Provincial General Hospital and thereafter the matter was reported at Giakanja Police Station; the appellant was arrested and subsequently charged in court was tried and convicted on the main counts and was sentenced to fifteen (15) years imprisonment for each count; both sentences were to run concurrently.
4. Being aggrieved by both conviction and sentence, the appellant filed a petition of appeal on 24th May, 2011 raising three main grounds of appeal, inter alia;
 - (i) That his constitutional and fundamental rights were violated as he was held for more than the stipulated time of 24 hours;

(ii) The trial magistrate erred in convicting the appellant on hearsay evidence; which evidence was secondary and inadmissible;

(iii) The appellant was not taken for a medical examination to ascertain whether there had been any contact between him and the complainants;

5. When the appeal came up for hearing the appellant abandoned his appeal on conviction and requested that he be allowed to appeal only as against sentence; and made oral presentations and Prosecuting Counsel for the State also made an oral presentation;

6. Hereunder is a summary of the parties submissions;

APPELLANTS SUBMISSIONS

7. The appellant stated that he had been sentenced to 15 years imprisonment and prayed for a reduction in sentence; and prayed that his appeal be allowed;

RESPONDENTS SUBMISSIONS

8. The appellant was convicted and sentenced for the offence of defilement on two (2) counts; he was sentenced to 15 years imprisonment on each count and the sentences were to run concurrently; that the trial court was lenient otherwise it would have ordered for the term to run consecutively;

9. Counsel prayed that the sentence be upheld.

ISSUES FOR DETERMINATION

10. Taking into consideration the above submissions the only issue for determination is whether the sentence was harsh in the circumstances; and whether there are good reasons that warrant interference with the sentence imposed.

ANALYSIS

11. The appellant proceeded only with the appeal against sentence; he was sentenced to serve a term of fifteen (15) years; which he finds to be harsh and excessive; and seeks a reduction which is opposed by the State.

12. The case of **Wanjema vs Rep [1971] EA 493** lays down the principles as to when an appellate court may interfere with a sentence imposed by a trial court. The principles to be taken into consideration by the appellate court are that it must satisfy itself that the trial court overlooked material factors; or took into account immaterial factors; or acted on a wrong principle; or in the circumstances of the case the sentence was harsh and excessive.

13. The appellant was convicted on two counts of defilement contrary to Section 8(1) as read with Section 8(2) of the Sexual Offences Act; the prosecution proved that the two minors were aged 8 years and 11 years which means that the penalty falls within the confines of Section 8(2) which provides as follows;

“Section 8(2): A person who commits an offence of defilement with a child aged 11 years or less shall upon conviction be sentenced to imprisonment for life.”

14. The record shows that the appellant was a first offender and was invited by the trial court to mitigation before he was sentenced; in mitigation the appellant pleaded for leniency; it is this courts considered view that the trial court could have imposed the maximum sentence provided in law which is life imprisonment but instead was indeed very lenient when it sentenced him to a term of fifteen (15) years imprisonment on each count; it ordered that both sentences to run concurrently as opposed to consecutively; from the evidence adduced the appellant was the uncle of the minors and was in a position

of trust and had a duty to love and protect the orphaned minors from harm instead of breaching their trust and carrying out beastly and dehumanizing acts on them; this court finds no good reason that warrants interference with the term imposed by the trial court.

FINDINGS AND DETERMINATION

15. For the forgoing reasons this court finds no good reason that warrants interfering with the sentence imposed.

16. The appeal on sentence is found to be lacking in merit and is hereby disallowed.

17. The sentence is hereby affirmed.

Orders accordingly.

Dated, Signed and Delivered at Nyeri this 16th day of February, 2017.

HON.A. MSHILA

JUDGE