

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CRIMINAL APPEAL NO. 56 OF 2013

ROBERT KATANA CHAI APPELLANT

VERSUS

REPUBLIC RESPONDENT

(From the Original Conviction and Sentence in Criminal Case No. 225 of 2013 of the Senior Resident Magistrate's Court at Kilifi – D. Kinaro, SRM)

JUDGEMENT

The appellant was charged with the offence of attempted defilement contrary to section 9 (1) (2) of the Sexual Offences Act No. 3 of 2006. The particulars of the offence were that the appellant on 7.5.2013 at 2000 hours at [particulars withheld] Village Dungicha Location Ganze District within the Kilifi County intentionally attempted to cause his penis to penetrate the vagina of E.S.M a child of 14 years.

The appellant was also charged with a second count of assault causing actual bodily harm contrary to section 251 of the Penal Code. The particulars of the offence were that the appellant assaulted the complainant in the first count.

The appellant pleaded guilty to the charge and was sentenced to serve 30 years imprisonment for the first count and 3 years imprisonment for the second count. The grounds of appeal are that the sentence is excessive, that he was not given time to reflect on his plea and that there was no truth that he assaulted the complainant. In his submissions, the appellant states that section 9 (2) of the Sexual Offences Act provides for a sentence of 10 years. The sentence of 30 years is excessive. It is also submitted that Article 50 (2) of the Constitution states that every accused has a right to a fair hearing and to have adequate time and facilities to prepare for a defence. The appellant was not given adequate time to prepare for his defence. It is also submitted that the appellant was misled by the police that if he pleaded guilty he will be acquitted.

The record of the trial court shows that the plea was taken on 19.6.2013. The appellant pleaded guilty to the charge. The facts were read over to the accused in Kiswahili and once again the appellant pleaded guilty to the facts. The facts of the case were as follows: -

On 7.5.2013 at 8.00 pm the complainant S. C. M met accused on her way from school. The accused was riding a motor cycle and stopped. The complainant is a standard 7 pupils. Accused was known to accused. Complainant was with her younger sister. Accused pulled complainant to the bush and attempted to defile her. Accused tore the complainant under pants and injured the complainant's legs. The complainant raised alarm and the accused ran away. The matter was reported to the police station. The accused was arrested and charged.

The record of the trial court indicate that the appellant was warned of the seriousness of the charge but remained adamant that he committed the offence. The trial court proceeded to convict the appellant on his own plea of guilty. I am satisfied that the plea was unequivocal. The facts were read to the appellant in Kiswahili language and he admitted committing the offence. The trial court warned him about the seriousness of the charge but he confirmed that the facts were true. I do find that the conviction is proper.

There was the count of assault causing actual bodily harm. The PW3 form was produced which indicated the injuries sustained by the complainant. Since the appellant pleaded guilty to the charges and the respective counts, I do find that the conviction on the second count is also proper.

The second ground of appeal relates to the sentence imposed by the trial court. It is submitted that the sentence is excessive. Section 9 (2) of the sexual Offences Act provides for a minimum of 10 years imprisonment for the offence of attempted defilement. The appellant is a first offender and pleaded guilty to the charges. There was no good reason to impose the 30 years imprisonment. I do find that the sentence is excessive and cannot be justified. I will set aside the 30 years imprisonment sentence imposed by the trial court on the count of attempted defilement and replace it with the minimum sentence of 10 years imprisonment.

In the end, the appeal on conviction is disallowed. The appeal on sentence is allowed. The appellant is sentenced to serve 10 years imprisonment for the first count and 3 years imprisonment for the second. The sentence shall run concurrently from the date of conviction.

Dated, signed and delivered in Malindi this 9th day of March, 2017.

S.J. CHITEMBWE

JUDGE