



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 51 OF 2015

MARTIN MUTHEE NYAMBURA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(Appeal against Sentence imposed in Criminal Case S.O Number 43 of 2015 in the Chief Magistrate's Court at Nyeri on 20.7.15 by Hon. J.Aringo (RM))

JUDGMENT

The Appellant herein **Martin Muthee Nyambura** has filed this appeal against sentence on a charge of attempted defilement contrary to section 9(1) as read with section 9(2) of the Sexual Offences Act. The particulars of the offence were that:-

“On the 15th day of July 2015 in Tetu Sub-County within Nyeri County unlawfully attempted to cause his penis to penetrate the anus of E W N a child aged 8

The charge was read out and explained to the accused person in Kiswahili language and he replied:-

Accused – “Ni kweli” meaning “It is true.”

The prosecution proceeded to give facts as follows:-

“On 15th July 2015 about 3.00 pm, the victim of E W N a child aged 8 arrived home from school where he was in class 1. He started playing outside. Accused who was a neighbor called him to his house. He went and accused sent him to collect some water to wash. On return, accused told him to lie on the bed while he washed in the same room. After bathing, accused went and removed the trousers of the boy and attempted to insert his penis in the anus of the boy. The boy cried out. Accused then stopped and told the boy to dress and leave. That at 7.00 pm, the mother of the boy returned home and found the boy asleep. That she woke up the boy and asked him why he was sleeping early and noticed that the boy would not sleep well. The boy told her what had happened in the day. He was escorted to Wamagana Health Centre. He was examined. Matter was reported to police and accused was arrested and charged with the offence.

The Appellant replied;-

“The facts are true.”

The learned trial magistrate proceeded to enter a plea of guilty against the accused and convicted him on his own plea of guilty.

The prosecution indicated that the appellant was a 1st offender. In mitigation, accused stated that it was his first time to do the act and prayed for forgiveness. In sentencing the Appellant, the trial magistrate had this to say;-

“Mitigation of the accused is noted. He seems to be taking the offence very lightly. The offence is grave and calls for a deterrent sentence. The sentence is that the hands of the court are tied. There is no discretion with regard to the minimum sentence. Accused is sentenced to serve 10 years imprisonment.”

Aggrieved by this decision, the appellant lodged the instant appeal. In his Petition of Appeal filed on 28th July 2015, the appellant set out 5 grounds of appeal. On 3rd May 2017, the appellant filed supplementary grounds of appeal which were word for word similar to the grounds of appeal except that he added that he was not represented by counsel. The grounds can be summarized into 3 grounds to wit:-

1. That the 10 years imprisonment imposed against him is harsh and excessive though he had pleaded guilty to the charges imposed against him

2. That if this sentence is reduced at the court’s discretion, it will enable him to join his family and society

3. That he is 24 years old and the only breadwinner of his younger brothers and disabled mother

This is a case of a plea of guilty and the appellant is only appealing on the extent of the sentence.

During the hearing of the appeal, the appellant relied wholly on his supplementary grounds of appeal. Mr. Nyamache, Counsel for the state, in response thereto submitted that the appellant was sentenced to the minimum sentence prescribed under section 9(2) of the Sexual Offences Act and that this court has no jurisdiction to interfere with it.

As stated earlier, the appellant was charged under section 9(1) as read with section 9(2). Section 9 states:

(1) A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.

Subsection (2) states:-

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.

The trial magistrate imposed a sentence of 10 years which is the prescribed minimum sentence for attempted defilement. Although this court has discretion under Section 354 (3) (b) of the Criminal Procedure Code to increase or reduce the sentence or alter the nature of the sentence, this is one case where the court’s discretion cannot be exercised in favor of the appellant since he was sentenced to the minimum term.

There is therefore no justification for interfering with the order on sentence by the trial court. The upshot of this is that the appeal is dismissed and the sentence imposed on the appellant is upheld.

DATED AND DELIVERED THIS 8th DAY OF June 2017

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - **Kinoti**

Appellant - **Present in person**

For the State - **Mr. Nyamache**