



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

HCCRA NO. 138 OF 2015

HESBON OKELLO.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[Being an appeal from the conviction and sentence of the Senior Principal Magistrate's Court at Nyando (Hon. J. Ng'arng'ar SPM) dated the 17th September 2015 in Nyando SPMCCR No. 178 of 2015]

JUDGMENT

On 13th February 2015 the appellant in this case was charged with Attempted Defilement Contrary to Section 9(1)(2) of the Sexual Offences Act. The particulars of the charge were that on 11th February 2015 in Nyando District within Kisumu County he intentionally and unlawfully attempted to cause his penis to penetrate the vagina of B A a child aged 8 years.

He faced an alternative charge of Indecent Act With a Child Contrary to Section 11(1) of the Sexual Offences Act.

He initially pleaded not guilty to both charges. However after the prosecution had called three witnesses he intimated to the Court that he wished to plead guilty. The Court after warning him of the possible sentence read and explained the charges to him and the record shows that he pleaded guilty to the main charge. The facts were then stated to him and when he admitted the same the Court convicted him and subsequently sentenced him to serve 10 years imprisonment. He has now filed this appeal on grounds framed as follows:-

“(1) That, I plead guilty to the charge;

(2) That I humbly request the Hon. Court to have leniency on me and reduce the long term sentence to a lenient one;

(3) That I was the sole bread winner in the family hence kindly request the Hon. Court to have leniency on me and reduce the sentence to accord me the opportunity of a non-custodial sentence to enable me carter for my dependents.

(4) That with the period I had been in custody, I humbly pray for leniency of a short term sentence as my health has markedly deteriorated due to severe illness such as currently I am suffering from acute ulcers;

(5) That I humbly urge the Hon. Court to consider me for leniency as far as the aforementioned

mitigating factors are concerned.”

At the hearing of the appeal he urged this Court to exercise leniency saying that he did not commit the offence but was framed.

Prosecution Counsel opposed the appeal and contended that the sentence imposed was the minimum provided by the law.

The appellant unequivocally pleaded guilty to the charge for which was sentenced to serve ten years imprisonment. He admits that much in his petition of appeal and his submission that he was framed cannot be but an afterthought. Indeed from his petition it is clear that his is an appeal against the severity of sentence only. However the appeal cannot succeed as the sentence imposed is the minimum provided under Section 9(2) of the Sexual Offences Act which provides:-

“(2) 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's hands were tied by this provision and as was held by the Court of Appeal in **Johnson Muiruri V. Republic [1983]KLR 445:-**

“where there is a prescribed mandatory sentence, in this case death as provided by Section 204 of the Penal Code, the argument that such a sentence is harsh and excessive cannot be upheld. A mandatory sentence can neither be harsh nor excessive.”

The appeal is dismissed.

Signed, dated and delivered at Kisumu this 8th day of September 2016

E. N. MAINA

JUDGE

In the presence of:-

Ms Nyamosi for state

Appellant in person

CC: Felix