



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 11 OF 2012

ERICK KINJA GITONGA.....APPELLANT

V E R S U S

REPUBLIC.....RESPONDENT

JUDGMENT.

The Appellant Erick Kinja Gitonga was charged with the offence of defilement, contrary to section 8 (1) of the Sexual Offences Act No. 3 of 2006. In the second count, the Appellant was charged with abduction with intent to confine, contrary to Section 259 of the Penal Code CAP 63 of the Laws of Kenya.

The Appellant was convicted of the two counts and sentenced to twenty years and seven years in respect of count one and two respectively, with an order that the sentences run concurrently.

The brief particulars of the case are that on the night 5th and 6th December 2008, at [particulars withheld], the Appellant defiled N. N., a child of 15 years and that on 4th, 5th and 6th December 2008, at [particulars withheld] village, the Appellant abducted N N, by locking her in a house.

The Appellant was aggrieved by both conviction and sentence and therefore filed this appeal challenging both.

However, when the Appeal came up for hearing on 10th February 2015, the Appellant urged the court to consider the sentence only and intimated to court that he did not oppose the finding on conviction. This Appeal is therefore on sentencing only.

The Appeal was opposed. M/s Kigira Learned Counsel for the State contended that under Section 8 (1) (4) of the Sexual Offences Act, the minimum sentence was 15 years whereas for the offence of abduction, the minimum sentence is 7 years. For that reason, she contended that the sentences were lenient and urged the court to dismiss the Appeal and uphold the sentences.

I have carefully considered this Appeal and the submissions by both the Appellant and M/s. Kigira. Though M/s. Kigira contended that the Appellant was charged under section 8 (1) as read with (4) of the Sexual Offences Act and that the minimum sentence was 15 years the same is incorrect. The charge reads that the appellant was charged under section 8(1). Section 8(1) should have been read with another subsection that provides for sentence. The charge did not indicate whether it was read with section 8(2), (3) or 8(4). However, the particulars of the charge clearly read that the complainant was aged 15 years. The charge should have read section 8(1) as read with section 8(3) of SOA. The omission does not

however prejudice the appellant was at the time aged 15 years. The Appellant because the complainant was therefore charged with defilement under section 8 (1) as read with section 8(3) of the Sexual Offences Act. Under the said section, where one is found guilty of defilement he or she is liable upon conviction to imprisonment for a term not less than twenty years. The Appellant in this case was sentenced to 20 years imprisonment which is the minimum sentence.

For the second count which is abduction with intent to confine, the Appellant was handed the maximum sentence of 7 years. However the sentence were ordered to run concurrently.

The principles which guide the appellate court in exercising its jurisdiction to review sentences were firmly established in the case of OGALO S/O OWOURA (1954) 21 EACA 270 where it was stated as follows:

“the court does not alter a sentence on mere grounds that if members of the court had been trying the appellant they might have passed a different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless, as was said in James v Republic (1950) 18 EACA 147, “it is evident that the judge has acted upon some wrong principle or overlooked some material factor”

The court having ordered that the sentences run concurrently, I find no ground upon which to interfere with the trial court’s decision. The Appellant has not in any way demonstrated that the court acted on wrong principle or overlooked some material factor.

Consequently, I find that the appeal lacks merit and is accordingly dismissed.

DATED AT MERU THIS 11TH DAY OF MARCH, 2015

R. P. V. WENDOH

JUDGE.

Appellant in person

Kariuki Mugo for State

Kirimi/ Jane Court Assistant