



REPUBLIC OF KENYA

High Court at Mombasa

Criminal Appeal 501 of 2010

(From Original Conviction and Sentence in Criminal Case No. 2952 of 2010 of the Chief Magistrate's Court at Mombasa – R. Mutoka (CM))

KALASINGA KINDA APPELLANT

- Versus -

REPUBLIC RESPONDENT

JUDGMENT

The Appellant was convicted and sentenced to twenty years imprisonment on the alternative count of indecent act on a girl contrary to Section 11(1) of the Sexual Offences Act No. 3 of 2006.

The particulars are that on the 23rd day of September 2010 at Bakarani area Bamburi Location Kisauni District, Mombasa County he unlawfully and intentionally caused his penis to touch the vagina of a girl Z.A. The Appellant pleaded guilty to the alternative Count.

As stated above in the particulars the appellant is alleged to have touched the private parts of the complainant with his penis but the facts do show that the touching was with his fingers.

Section 2 of the Sexual Offences Act 2006 defines an indecent act to mean-

“An unlawful intentional act which causes-

(a) Any contact between any part of the body of a person with the genital organs, breasts or buttocks of another, but does not include an act that causes penetration.”

The variance and or inconsistency in the particulars of the charge and the facts are not fatal to the prosecution case. However, it is noted that the prosecution did treat the Appellant as a first offender. The trial Magistrate did call for a Probation Report. From the report she calls the Appellant a pedophile. I have perused the report but it does not present any concrete evidence that the Appellant is a pedophile.

I find the imprisonment term of twenty years meted out to the Appellant was manifestly harsh and excessive. The sentence of twenty years imprisonment is hereby reduced to ten years.

Accordingly, the Appellant will serve ten years imprisonment from the time of his conviction and sentence.

Judgement read and delivered in open Court this 11th day of April, 2013.

M. MUYA
JUDGE

In the presence of:-

Mr. Gioche for State

Mr. Mwawasi for the Appellant

Court clerk – Mr. Philip