



IN THE COURT OF APPEAL
AT KISUMU

(CORAM: BOSIRE, GITHINJI & VISRAM, JJ.A.)
CRIMINAL APPEAL NO. 5 OF 2010

BETWEEN

ALFRED OTIENO OMONDIAPPELLANT

AND

REPUBLICRESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kisumu (Mwera, J.) dated 2nd April, 2009

in

H.C.Cr.A. No. 96 of 2008)

JUDGMENT OF THE COURT

By this second appeal, *Alfred Otieno Omondi*, the appellant, has requested this Court to reduce the sentence of 11 years imprisonment which was imposed upon him by the Principal Magistrate's Court at Siaya, for the main offence of attempted defilement of a child contrary to **section 9(1)** of the Sexual Offences Act, *Act No. 3 of 2006*. Having been convicted of the main count, no finding was made on the alternative count of indecent act with a child contrary to **section 11(1)** of the same Act.

In both his first appeal and this appeal the appellant does not challenge his conviction, quite properly so because the evidence against him is overwhelming. *Stephen Ochieng* (PW2) and *Mannase Ochieng* (PW3), both testified at the appellant's trial that they saw the appellant lying over a small girl whom they identified as *V.A*, aged about 3½ years, chased him and arrested him. The child was crying. It was the cry which drew their attention. Both the trial and first appellate courts believed the two men and rejected the appellant's denial of having committed the act of attempted defilement.

Section 9(2) of the Sexual Offences Act, 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.”

In sentencing the appellant the trial Magistrate rendered himself thus:

“COURT - Offence carries a mandatory sentence of 10 years. To serve 11 years imprisonment.”

The penal provision provides a minimum sentence of 10 years. The trial court had power to impose a higher sentence if the circumstances of the case so demanded. The appellant was given 11 years imprisonment. That was a lawful sentence and considering the circumstances of the case 11 years imprisonment cannot be said to be manifestly excessive. The complainant was a child of 3½ years of age and in our view a severer sentence was called for. Besides, severity of sentence is by dint of the provisions of **section 361(1)(a)** of the Criminal Procedure Code a matter of fact. This being a second appeal only issues of law fall for consideration. For that reason we agree with *Mr. Gumo*, Assistant Director Public Prosecutions that the appeal has no merit. In the result it is dismissed. Order accordingly.

Dated and delivered at Kisumu this 23rd day of June, 2011

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR