REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CRIMINAL APPEAL NO. 334 OF 2010

(From original conviction and sentence in Criminal case No. 122 of 2010 decided by honorable F. Munyi resident Magistrate on 25th February 2010 at Wundanyi court).

LANGALI MWAWURI……APPELLANT

VERSUS

REPUBLIC ……RESPONDENT

JUDGMENT

The appellant, LANGALI MWAWURI KITOSHO, in the case appealed against the conviction and sentence of twenty (20) years imposed upon him in Criminal Case No. 122 of 2010 at Wundanyi Court. The appellant was charged with sexual assault contrary to section 5 (1) (b) as read with Section 5 (2) of Sexual Offences Act, No. 3 of 2006.

The particulars of the charge were that the appellant on the 20th day of February, 2010 in Taita District within Coast Province, inserted one finger, forefinger of right hand into privates part namely vagina of S M.

He was also charged with indecent assault of a female contrary to Section 11 (1) of the Sexual Offences Act, in the alternative.

The appellant pleaded guilty to the offence of sexual assault in count 1. No findings were made in regard to the alternative charge.

Upon the facts of the offence in count 1 being read to the appellant, he admitted that they were correct. He was then convicted on his own plea of guilty and after mitigation the appellant was sentenced to serve twenty (20) years imprisonment.

The appellant, on being aggrieved by the sentence preferred this appeal.

The appellant is seeking to have the sentence reduced since it is excessive or he be acquitted in view of the period he has so far served.

In this written submissions, the appellant stated that the trial magistrate sentenced him to serve twenty (20) years in jail without considering that this was harsh and excessive contrary to section 50 (2) (h) of the Constitution.

M/s Ocholla, learned counsel for the state, opposed the appellant's appeal and said that he was convicted on his own plea of guilty and that the sentence of 20 years was lawful as he ought to have been sentenced to life imprisonment. She also submitted that his mitigation was considered.

She urged that court under Section (1) of the Sexual Offences Act No 2 of the 2006.

"any person who is found guilty of Sexual assault is liable upon conviction to imprisonment for a term of not less than 10 years but which may be enhanced to imprisonment for life".

I have considered the case before the trial court and the relevant provisions of the law.

I find that the provisions of Article 50 (2) (p) of the Constitution do not apply in the present case as the prescribed punishment for the offence the appellant was charged with has not been changed.

The minimum sentence provided for under section 5 (2) of the Sexual Offences Act is a time of ten years imprisonment. But this can be enhanced to imprisonment for life, and I believe based on the circumstances of a case.

In the instance case, where the appellant has not challenged conviction, it is alleged he inserted his right fore finger into the vagina of a minor aged 2 years old.

The appellant mitigated and the lower court noted his record, advanced age and the age of the victim who the offence was committed against in meeting out the sentence against the appellant.

A sentence must in the end, however, depend upon the facts of its own particular case. And before on appeal against sentence can succeed, the court must be satisfied that there exist to a sufficient extent, circumstances. Entitling to vary the order of the court below (see **Ugalo son of Owuora vs Republic (1954). 21 E.A.C.A. 270).**

I have considered the circumstances of the instant case and the relevant provisions of the law. I find that indeed the offence committed by the appellant was serious, and as observed by the trial magistrate, a deterrent sentence was necessary. I have also considered the age of the victim and the trauma and effect such an offence is likely to have left on her.

However, I have considered that the appellant was 54 years old at the time and was said to be a first offender. I have also considered that the appellant pleaded guilty to the charge thereby saving the prosecution trouble and expense of proving its case and avoiding the possibility of the appellant securing an unmerited acquittal through a technical or fundamental error (See **Nilson V Republic (1990) EA 599)** The appellant in his written submissions pleaded that the suffers from Asthma and doubted that he will be able to stand the 20 years imprisonment imposed on him behind the bars.

When he appealed in court, he mitigated that he wanted to go and take care of his family.

I note that the appellant was convicted and sentenced on 25th February 2010, meaning he has already served over five (5) years imprisonment. In my view, I believe the minimum sentence of the (10) years provided for under Section 5 (1) of the Sexual Offences Act is sufficient.

Guided by the aforementioned consideration, I accordingly reduce the sentence of 20 years to the minimum sentence of 10 years imprisonment provided for.

The sentence shall run from the date of conviction by the lower court.

The sentence reduces aforesaid.

Judgment delivered, signed and dated 29th December 2015.

D. CHEPKWONY

(JUDGE)

In the presence of:

M/s Ocholla for the state

Appellant in person.

C/Assistance- Kiarie