



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT VOI**  
**CRIMINAL APPEAL NO 38 OF 2014**

**KITSAU KARISA MUTHEKE.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**(From original conviction and sentence in Criminal Case Number 523 of 2011 in the Senior Resident Magistrate's Court at Wundanyi delivered by Hon M. Chesang(RM) on 16<sup>th</sup> February 2012)**

**JUDGMENT**

**INTRODUCTION**

1. The Appellant, Kitsau Karisa Mutheke, was tried and convicted by Hon C. Chesang, Resident Magistrate for the offence of attempted defilement of a girl contrary to Section 9 (1) as read with Section 9 (2) of the Sexual Offences Act No 3 of 2006.
2. The particulars of the main charge were as follows :-

**“On the 27<sup>th</sup> day of November 2011 at [particulars withheld] Taita Taveta County, intentionally attempted to cause his penis to penetrate the vagina of I K L a child aged 13 years.”**

3. The particulars of the alternative charge were as follows:-

**“On the 27<sup>th</sup> day of November 2011 at [particulars withheld] within Taita Taveta County, intentionally touched the vagina of I K L a child aged 13 years with his penis.”**

4. On 16<sup>th</sup> February 2012, the Prosecution successfully applied to amend the Charge Sheet to show the age of the “girl” as fourteen (14) years. When the Amended Charge was read to the Appellant, he changed his plea to guilty upon which a plea of guilty was entered against him. When the facts were read to him, he stated as follows:-

**“Maelezo kama alivyosema in ya ukweli” which translated into English was that the “Facts as stated are true.”**

5. Being dissatisfied with the judgment therein, on 3<sup>rd</sup> June 2014, the Appellant filed a Mitigation of Appeal which stated inter alia:-

1. **THAT he was a Kenyan aged 42 years.**
2. **THAT he was a married man with a wife and 6 children all depending on him and since his**

**arrest, they had all dropped out of school.**

6. On 22<sup>nd</sup> March 2016, the court directed him to file his Written Submissions. Instead of doing so, on 7<sup>th</sup> April 2016, he filed fresh Mitigation Grounds of Appeal which were generally as follows:-
  1. **THAT he was a first offender and layman on issues pertaining to the law.**
  2. **THAT he had served more than two thirds (2/3) of his sentence and promised never to repeat the mistake again.**
  3. **THAT he had gone through intensive reform programme, counselling, acquired grades in masonry (building and construction) and was now a law abiding citizen who would be an ambassador of law who would care for justice in the society.**
  4. **THAT he was the sole breadwinner to his family and aging parents and his continued detention meant that they would continue suffering.**
7. The State's undated Written Submissions were filed on 14<sup>th</sup> June 2016.
8. When the matter was mentioned on 15<sup>th</sup> June 2016, both the Appellant and the State informed this court that they would not highlight their respective Written Submissions but that they would rely on the same in their entirety. The Judgment herein is therefore based on the said Written Submissions.

### **LEGAL ANALYSIS**

9. As can be seen from his Written Submissions but which were ideally Mitigation Grounds of Appeal, the Appellant admitted to having committed the offence that he was charged with. No value then would be added in analysing the evidence that was adduced during trial.
10. In view of the fact that the Appellant did not have any legal representation at the appeal stage, this court deemed it proper to consider the said Mitigation Grounds as an appeal against the sentence. It was apparent that he was seeking a non-custodial sentence on several grounds which included having already served two thirds (2/3) of his sentence, becoming a reformed man who had acquired skills that would help him take care of his family and aging parents.
11. The question that this court was being asked to consider and determine is whether or not the Appellant having reformed, the fact that he had been counselled, the fact that he was the sole bread winner of his family and aging parents, the fact that he had served two thirds (2/3) of his sentence, the fact that he had acquired skills in masonry, the fact that he was abiding citizen and/or any other ground in the Mitigation Grounds were good reasons to persuade it to set aside the aforesaid sentence and replace it with a non-custodial sentence.
12. Notably, after being convicted on his own plea of guilty and the Prosecution requesting that he be treated as a first offender, the Appellant did not say anything in mitigation. He ought to have raised the Mitigation Grounds herein at the Trial Court then. He was thus barred from raising the said mitigation grounds at this appeal stage as the said omission amounted to a waiver to object.
13. The child the Appellant attempted to defile was aged fourteen (14) years. The penalty for such an offence is to be found in Section 9(2) of the Sexual Offences Act that provides as follows:-

**“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.”**

14. Against that backdrop, while sentencing him, the Learned Trial Magistrate rendered herself as follows:-

**“Taking into consideration the nature of the offence of the accused has admitted to, the facts of the case and the absence of mitigation by the accused person which is indicative that the accused is not remorseful at all for the offence committed, the accused is sentenced to serve 10(TEN) sic years imprisonment.”**

15. Once the Appellant pleaded guilty to the charge, the Learned Trial Magistrate was mandated to impose on him a minimum sentence of ten (10) years imprisonment. She had discretion of handing

- him a more severe sentence. However, she exercised her discretion judiciously and opted to impose the minimum sentence, a fact that was rightly pointed out by the State herein.
16. Accordingly, having considered the submissions by the Appellant and the State, the court found that its hands were tied as the Appellant did not demonstrate that the Learned Trial Magistrate meted out to him a sentence that was illegal or unlawful. The question of the said Learned Trial Magistrate wrongly exercising her discretion did not arise herein as she actually sentenced the Appellant to the minimum prescribed sentence.
  17. Appreciably, the fact that the Appellant was a first offender or that he was reformed or that he was the only source of hope for his family and elderly parents amongst other reasons that he gave could not form a basis for this appellate court giving a non-custodial sentence.
  18. Indeed, any requests for release of convicts other than those that touch on law and facts emanating from a trial in a subordinate court ought to be directed to the relevant fora such as the Committee for Community Service Orders (CSOs) or the Committee of Power of Mercy. This court has found it necessary to pronounce itself on this issue due to the large number of appeals from Manyani Maximum Prison in which Appellants are seeking to be released from prison on Probation or to be given CSOs even after exhausting their right of appeal at the Court of Appeal.

### **DISPOSITION**

19. The Learned Trial Magistrate did not address her mind to the alternative charge, an issue that she ought not to have left hanging with no determination. From the facts that were read to the Appellant herein, there was no indication of him having indecently assaulted PW 1 within the definition ascribed to indecent assault in the Sexual Offences Act. What was said to have occurred was a struggle between them.
20. As there was no evidence of indecent assault on PW 1, this court makes no determination of the alternative charge. It is important that trial courts pronounce themselves on pending charges for completeness of record and to avoid ambiguity to accused persons on what the fate of such charges against them are.
21. As the Appellant admitted to having committed the offence of attempted defilement, this court found that he had not advanced any sufficient reason to persuade it to interfere with the decision of the Trial Court. This court therefore declines to set aside the sentence that was meted upon him by the Trial Court as the same was lawful and fitting but instead affirms the same.
22. The upshot of this court's judgment, therefore, is that the Appellant's Appeal filed on 3<sup>rd</sup> June 2014 was not merited and the same is hereby dismissed.
23. It is so ordered.

**DATED and DELIVERED at VOI this 30TH day of JUNE 2016**

**J. KAMAU**

**JUDGE**

In the presence of:-

Kitsau Karisa Mutheke ..... Appellant

Sirima .....for State

Simon Tsehlo– Court Clerk