



**NO. 465/2014**

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**CRIMINAL APPEAL NO. 235 OF 2013**

**NZUKI MUOKI.....APPELLANT**

**VERSUS**

**REPUBLIC .....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mutomo Senior Resident Magistrate's Court Criminal Case No.29 of 2013 by*

*Hon. S. K. Mutai Ag.PM on 17/09/2013)*

**J U D G M E N T**

1. **Nzuki Muoki**, the appellant, was charged with the offence of attempted defilement contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act No.3 of 2006**. Particulars of the offence being that on **11<sup>th</sup>** day of **September 2013** at about 1.00 pm at **[particulars withheld]** in **Mutomo District** within **Kitui County**, intentionally and unlawfully attempted to cause his penis to penetrate the vagina of **M.K** a child aged **9 years**.
2. In the alternative he faced a charge of committing an **Indecent Act** with a child contrary to **Section 11(1)** of the **Sexual Offences Act No. 3 of 2006**. Particulars of the offence being that on **11<sup>th</sup>** day of **September 2013** at about 1.00 pm at **[particulars withheld]** in **Mutomo District** within **Kitui County**, intentionally touched the vagina of **M.K** a child aged **9 years** with his penis.
3. On being arraigned before the court he admitted the main charge whereby he was convicted on his own plea of guilty and sentenced to serve **ten (10) years imprisonment**.
4. Being dissatisfied with the decision of the court he now mitigates on sentence on grounds that:
  - i. Currently his health has deteriorated due to severe illness.
  - ii. Prior to his arrest he was a law abiding citizen.
  - iii. He has reformed and been rehabilitated.

He prayed for a noncustodial sentence to enable him access medication.

5. The learned state counsel, **Mr. Maina** opposed the appeal on grounds that the plea taken was unequivocal and the sentence imposed was the minimum mandatory one. He urged the court to dismiss the appeal.
6. The court is aware of the fact that it is the first appellate court hence the need to reconsider the record and come up with its own conclusion bearing in mind it had no opportunity of hearing and seeing the appellant at trial.

7. According to **Section 348** of the **Criminal Procedure Code** the appellant having pleaded guilty to the charge may only appeal against the legality of the sentence imposed.
8. An appellate court will only interfere with the sentence imposed by a trial court when there is an irregularity. There must be failure to exercise discretion or failure to take into account a material consideration or where an error in principle was made by the trial court. (*See Kamyia Johnson Wavamuno versus Uganda, Criminal Appeal No. 16 of 2000*).
9. The appellant was charged with a **Sexual Offence**. The law provides for minimum sentences to be imposed. In the instant case the minimum prescribed sentence for the offence the appellant admitted is **ten (10) years imprisonment**. This is the sentence that was imposed by the trial court. Therefore, even if the offender looks frail this court cannot invent some other law by meting out an illegal sentence. In the premises the trial magistrate did not err in law. Consequently the appeal lacks merit. Accordingly, it is dismissed.
10. It is so ordered.

**DATED, SIGNED and DELIVERED at KITUI this 11<sup>TH</sup> day of DECEMBER, 2014.**

**L.N. MUTENDE**

**JUDGE**