



**REPUBLIC OF KENYA**

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

**CRIMINAL APPEAL CASE NO. 151 OF 2012**

**KIMANZI MWEMA .....APPELLANT**

**VERSUS**

**RESPONDENT.....RESPONDENT**

*(Being an appeal from the original conviction and sentence in Mwingi Senior Resident Magistrate's Court, Criminal Case No. 888/2010 by H.M. Nyaberi, SRM on 31/1/12)*

**JUDGMENT**

1. **Kimanzi Muema** (*appellant*) was charged, tried, convicted and sentenced to serve ten (10) years imprisonment for the offence of attempted defilement contrary to section 9(1) (2) of the Sexual Offences Act, No. 3 of 2006.
2. Being aggrieved by the sentence imposed he now mitigates on sentence. He seeks to be placed on a non-custodial sentence. He states that he was known for drunkenness and consumption of drugs. Having been in prison he has undergone various rehabilitation programmes. He called upon the court to find that the sentence imposed was harsh and give him an opportunity of being reintegrated in the society.
3. In is response **Mr. Mwangi**, the learned State Counsel opposed the appeal. He submitted that the complainant, a 17 year old child was inside the toilet answering a call of nature when the appellant forced the door open and attempted to defile the complainant. When the witnesses testified the appellant failed to challenge their evidence in cross-examination; when put on his defence he elected to remain silent pursuant to his constitutional rights. He therefore offered no explanation to what transpired.
4. On sentence, counsel stated that the offence carried a mandatory minimum sentence. The trial magistrate in his opinion was within the law when he imposed the sentence.
5. This being the first appeal it is within my knowledge that my duty is to re-evaluate the evidence of the Lower Court in order to reach an independent decision as to whether the sentence meted out was in accordance with the law.
6. The appellant was sentenced for having committed an offence contrary to section 9(1) (2) of the Sexual Offences Act No. 3 of 2006 which provides:-
  1. ***"A person who attempts to commit an act which would cause penetration with a child is guilty of an offence termed attempted defilement.***
  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"***.
7. The Statute provides for a minimum sentence for the offence that the appellant faced. The trial magistrate having convicted the appellant passed a mandatory and minimum custodial sentence provided by the law. There was no misdirection whatsoever. This court declines to interfere with the lawful sentence imposed. I therefore confirm it.
8. Accordingly, the appeal is dismissed.

**DATED, SIGNED and DELIVERED at MACHAKOS this 9TH day of SEPTEMBER, 2013.**

**L.N. MUTENDE**

**JUDGE**

