



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CRIMINAL APPEAL NO. 88 OF 2009

EVANS MAINA MWANGI.....APPELLANT

Versus

REPUBLICRESPONDENT

(Appeal arising from judgment of Senior Resident Magistrate's

Court at Kangema in Cr. Case No.145 of 2009)

JUDGMENT

The appellant **Evans Maina Mwangi** was charged with the offence of breaking a dwelling house with intent to commit a felony contrary to section 305(1) of the Penal Code the particulars of which were that on the night of 9th/10th October 2009 at about midnight in Murang'a District within Central Province broke and entered the dwelling house of J.N.K with intent to commit a felony namely attempted defilement.

On count II he was charged with attempted defilement contrary to section 9(1) of the Sexual Offences Act No. 3 of 2006 particulars of which were that on the night of 9th and 10th April 2009 at about midnight in Murang'a North District within Central Province intentionally and unlawfully committed an act which could cause penetration with his genital organ on L.W.K a girl aged 15 years.

He was convicted on both counts on his own plea of guilty and was sentenced to 4 years imprisonment on count 1 and 10 years imprisonment on count 2 with the sentence running concurrently.

He has filed an appeal before this court on the ground that the sentence imposed upon him was very harsh and excessive and has therefore asked this honourable court to review the same.

Miss Maundu for the State has conceded that the facts as presented before the trial court did not disclose the elements of the charges to which the appellant pleaded guilty.

I have looked at the record before the trial court and note that it is alleged that it is only L.K who felt that there was a stranger in the house and found somebody touching her private parts and that when she woke up she immediately recognized the appellant. He should therefore would have been charged with indecent assault. It is therefore clear that the facts as presented to the court did not disclose the offence as charged and therefore set aside the sentence on count 2.

I find that the fact as presented supported the charge of breaking and entering and therefore uphold

the sentence on the same but since the appellant has served the full term thereof I order that the appellant be set at liberty forthwith unless otherwise lawfully held.

Dated and delivered at Nyeri this 5th day of March 2012.

J. WAKIAGA

JUDGE
