ISAACK MWINJI…..…….APPELLANT

VERSUS

REPUBLIC …….....RESPONDENT

(Being an appeal from the conviction and sentence in Makindu Principal Magistrate's Criminal Case No. 779/2006 by Hon. B. Ochieng, Ag P.M. on 23/16/2006)

JUDGMENT

On 5th July, 2006, **Isaack Mwinji**, hereinafter ***"the appellant"*** was arraigned before the Principal Magistrate's Court at Makindu on one count of defilement of a girl under the age of sixteen (16) years contrary to section 145 of the Penal Code. It was alleged that on 27th, June, 2006 at […] Village, […] Sub-location […] location in Makueni District within the Eastern Province, he unlawfully had carnal knowledge of **N.S.,** a girl under the age of sixteen years. Alternatively he faced a charge of indecent assault contrary to section 144(2) of the Penal Code; particulars being that on the same date and place, he unlawfully and indecently assaulted **N.S.** a girl under the age of sixteen (16) years by touching her private parts namely, vagina.

Initially a plea of not guilty was entered against the appellant on both counts. However, when the case subsequently came up for hearing on 23rd January, 2006, the appellant elected to change his plea to one of guilty. After the facts were read by the prosecutor and the appellant accepted the same as true and well put, he was convicted on his own plea of guilty and sentenced to a prison term of 15 years.

Dissatisfied with the conviction and sentence aforesaid, the appellant lodged the instant appeal on grounds that-

"1. That I am so remorseful and repentant of what really transpired and do ask the court to have lenience on me.

2. That since I am first offender. I humbly request the court to reduce the sentence imposed upon me and /or substitute it with a non custodial one.

3. That I have contracted T.B. and urge the court to consider this mitigation of mine that is meekly sought herein.

As it can obviously be seen, the appellant's appeal is really on sentence and no more. He does not question his conviction. When the appeal came before me for hearing on 12th June, 2012, the appellant maintained his call and submitted that the sentence imposed was manifestly harsh and excessive. On his part, **Mr. Mukofu,** learned State Counsel opted to leave the issue to court.

Under section 354(3) of the Criminal Procedure Code this court has jurisdiction to interfere with a sentence imposed by the trial court. The principles upon which this court will so act were stated in opt quoted case of **Ogalo s/o Owuor vs Republic [1954] 21 EACA 270**. Firstly, the appellate court does not alter a sentence on the mere ground that if members of that court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial court unless it is self evident that the trial court had acted upon some wrong principle or overlooked some material factors. Secondly, if the sentence imposed is manifestly harsh and excessive in view of the circumstances of the case, such sentence will definitely be disturbed. These considerations are however informed by the fact that sentencing at the end of the day, is a matter of the discretion of the trial court and that the sentence should fit the crime as well as the offender.

No doubt the offence for which the appellant was convicted was serious. He was as a result sentenced to

life imprisonment. Of course the sentence was legal since the offence charged upon conviction, one was ***"liable to imprisonment with hard labour for life…"*** However, this does not mean that upon conviction, the convictee must mandatorily be sentenced to life imprisonment with hard labour. It simply means that the maximum sentence which can be imposed upon conviction is life imprisonment. Accordingly the trial court is left with window or given discretion to impose any other prison sentence upto to life imprisonment depending on the circumstances of the case. In sentencing the appellant in this case, the trial court considered that- ***"the offence of defilement is a heinous act and deserved a deterrent sentence".*** The heinousness of a particular class of crime in the locality is not necessarily of itself a ground for imposing a more severe sentence than that which would normally be imposed, although, as I think the trial court was entitled, if not required, to have the matter in mind. The trial court does not seem to have taken into account the fact that the appellant was a first offender. To my mind, maximum sentences should be left to serial offenders. Having said all the foregoing, it must be obvious that I consider the sentence imposed given the circumstances, manifestly harsh and excessive as to call for my intervention. The appellant has so far served 7 years of the life imprisonment. I consider that period to be sufficient punishment. Accordingly I would commute the sentence to that so far served with the consequence that the appellant shall be set at liberty at once unless otherwise lawfully held.

JUDGMENT DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** day of **JULY 2012.**

ASIKE–MAKHANDIA
JUDGE