PETER MAWEU……...APPELLANT

VERSUS

REPUBLIC ..…….RESPONDENT

(Being an appeal against the original conviction and sentence in Makueni Principal Magistrate's Court Criminal Case No. 303/2006 by Hon. F.M. Nyakundi,Ag P.M on 18/9/2008)

JUDGMENT

The appellant, **Peter Maweu** was charged before the Principal Magistrate's Court at Makueni with the offence of unnatural offence contrary to section 162(a) of the Penal Code. The particulars of the offence were that on the 6th July, 2006 at [name withheld] Sub-location, Kiteta Location in Makueni District within Eastern Province, he had carnal knowledge of **MV** against the order of nature. In the alternative count, the appellant was charged with the offence of indecent assault on a boy contrary to section 164 of the Penal Code. The particulars of the offence being that on the same day and place he unlawfully and indecently assaulted **MV,** a boy under the age of 14 years by touching his private parts. He denied both counts.

The prosecution called a total of 6 (six) witnesses in support of their case. The complainant, **MV** aged 8 years testified as PW2. In his evidence, he stated that on 6th July, 2006 at 6.00 p.m., he was at home when the appellant came and called him and asked him to escort him. PW1 **SMM** the complainant's aunt was at home too, and was present when the appellant made this request. On the way however, the appellant told him that he would give him Kshs. 5/=. He then removed his pant, covered his mouth, and then inserted an object into PW2's anus, alleging he wanted to know his temperature. PW2 felt something enter him and felt pain. The appellant then left without giving him the Kshs. 5/= he had promised. PW2 went home and informed his aunt (PW1). PW1 on checking PW2 who was crying and on inspecting his anus found it dirty and with a watery substance. She informed PW2's mother when she got home and so was PW2's father. PW3, **JKM**, in turn informed his uncle, a village elder, **PW4, JKM** and two other people and together they went to the house of the appellant at about 10.00 p.m and arrested him. Both the complainant and the appellant were taken to Tawa Police Station where a report was made. PW5, **P.C. Christopher Chege** received the report and took PW2 to Tawa Health Centre, and later to Machakos District Hospital, while the appellant was placed on cells. He subsequently charged the appellant with the present offences.

PW6, **Dr. Virginia Musau** produced the P3 form of the complainant on behalf of **Dr. Kochi**, whom she had worked with and whose handwriting she had been familiar with, as exhibit 1. She stated that PW2 was seen at the hospital following allegations of sodomy and he had no injuries except on the anus, which were assessed and classified as grievous harm.

The appellant upon being placed on his defence gave an unsworn statement and did not call any witness. He denied committing the offences and stated that on 5th My, 2006, he worked in his farm upto 8.30p.m, went home, ate and slept, only to be woken up at 11.00 p.m by the prosecution witnesses who testified as PW3, 4 and another. They alleged that he had defiled a young boy and took him to the home of PW3 and later to the police station, were issued with P3 form which he turned to station after being

taken to hospital and later charged with the present offences. He denied committing the offence and claimed that those responsible for his arrest had a grudge with him arising from a pending land case and this case was a frame up to ensure he is jailed so that they can snatch his land. That was the extent of both the prosecution and defence cases. At the conclusion of the trial, the learned magistrate was satisfied that the prosecution had proved its case against the appellant on the 1st count. She therefore convicted the appellant and sentenced him to 15 years imprisonment.

No happy with the conviction and sentence, the appellant lodged this appeal on the grounds that:-

- the language in which the trial was conducted was not indicated in the record,
- the evidence of the complainant was unsworn,
- he had been detained in police custody for a period not authorized by law,
- his defence was not given due consideration,
- the court failed to appreciate that there was a grudge between the complainant's family and the appellant; and
- Finally, sentence imposed was harsh.

When the appeal came before me for hearing on 14th June, 2012, the appellant opted to drop the appeal on conviction and instead concentrate on appeal on sentence. The State not objecting, the appellant wish was granted.

In support thereof, the appellant submitted that he was aged 76 years old. He had served already 4 years of the term imposed. He felt that he had been sufficiently punished. Otherwise the sentence imposed was manifestly harsh and excessive. In response, **Mr. Mwenda,** learned State Counsel agreed that indeed the appellant was an old man. However, he opted to leave the fate of the appeal to court.

The principles upon which an appellate court may interfere with the sentence imposed by a trial court were succinctly set out by **Trevyan, J** in the case of **Wanjema vs Republic [1971] E.A. 494**. He stated thus: -

"A sentence must in the end, depend upon the facts of its own particular case. In the circumstances with which we are concerned a custodial order was appropriately made. But that which was made cannot possibly be allowed to stand. An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it over looked some material factors, took into account some immaterial factors, acted on wrong principle or the sentence is manifestly excessive in the circumstances of the case…"

I am contend wholly to adopt this passage as epitomizing the principles by which I must be guided in determining this appeal.

So then what was the appropriate sentence in this case? After considering all the facts before me and the submissions of the appellant, I am satisfied that the sentence imposed was legal and the trial court did not act on any wrong principle, or took into account anything it should not have done, or left out of account anything it should have in imposing the sentence. Nevertheless, after due consideration of the age of the appellant, I think that 15 years imprisonment for a first offender, was on the facts of the case, too severe and I am in the premises persuaded to interfere with the same. I will reduce the sentence to the term so far served with the consequence that the appellant is to be set at liberty forthwith unless, otherwise lawfully held. In the result, the appeal succeeds to the limited extent I have indicated above.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **30TH** dayof **JULY 2012.**

ASIKE-MAKHANDIA
JUDGE