MOSES MBUTHIA GACHARA…….APPELLANT

VERSUS

REPUBLIC……..……..RESPONDENT

JUDGMENT

Moses Mbuthia Gachara, the appellant herein was charged with the offence of **attempted defilement of a girl** contrary to **section 9(1)(2)** of the **Sexual Offences Act 2006 Laws of Kenya.** The particulars of offence state that on the 27th day of October 2007 at Subuku Trading Centre in Nyandarua District of the Central Province attempted to defile EMMa girl under the age of sixteen years. The appellant was convicted on his own plea of guilt. Upon conviction, he was sentenced to 10 years imprisonment.

The appellant has now appealed against sentence, he pleaded with the court to consider that when he committed the offence he was under the influence of alcohol. From the time the appellant was incarcerated in prison he has reflected on his mistake and promises not to take alcohol again in his lifetime. He wishes to be reunited with his family so that he can offer them support.

The appeal was opposed by **Mr. Njogu** who submitted that the plea was properly taken. The sentence of ten *(10)* years for an offence such as the one the appellant committed with a young girl is serious. He urged the court not to interfere with the trial court's discretion on sentencing.

I have gone through the proceedings before the trial court. The learned trial magistrate properly recorded the plea after the appellant on his own volition applied to change his plea. The charge was read over to him on 21st February 2008. The facts were given by IP Kipyegon who was the prosecutor. The facts reveal that the appellant seduced the complainant a 15 year-old girl who had been sent from school to get school fees. The complainant was in full school uniform when the appellant lured her and booked her in a lodging. The appellant went on a drinking spree, and then returned to the lodging.

The appellant attempted to have sex with the complainant but failed due to his drunkenness. The following day, the appellant's wife went looking for him and on making enquiries she was informed that the appellant was seen with a school girl in the lodging. It is the appellant's wife who reported the matter at Ndaragwa Police Station. She was given police officers who arrested the appellant from the lodging. Investigations were carried out and it emerged that the complainant had been sent away to look for school fees when the appellant took undue advantage of her and lured her into a lodging.

Both the appellant and the complainant were taken to hospital. The complainant was examined and it was found out that although there was no sexual intercourse there was a struggle between the complainant and the appellant. That is when the appellant was charged with the present offence. The appellant confirmed the facts were correct. He offered a mitigation that he has three children who are school going. They lived in a rented house and since he was a first offender he pleaded for leniency. The trial court considered the mitigation and the fact that the appellant was remorseful. However the offence committed by the appellant carries a mandatory custodial sentence of not less than ten (10) years. He was therefore sentenced to ten (10) years as per the law provided.

This appeal only turns on the issue of sentence. Sentencing is an exercise of the trial court's discretion. This court in its appellate jurisdiction cannot alter the sentence by the trial court merely because this court would have given a different sentence. See the case of **Ogalo s/o Owuor [1954] E.A.C.A at page 270** where the Court of Appeal held as follows:

"**T*he court does not alter a sentence on a mere ground that if the member of the 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 judge unless it is evident that the judge acted upon some wrong***

principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case."

The law provides for a mandatory custodial sentence of not less than 10 years for a person found guilty of this offence. The appellant pleaded for leniency on the grounds that his judgement was impaired by alcohol. The facts reveal that the appellant went on a dinking spree after luring the complainant who was in full school uniform. He deliberately imbibed in alcohol for his own gratification and he should bear his own consequences. The appellant was convicted according to the provisions of the law. This appeal has no merit. The decision by the trial court and the sentence are hereby upheld.

The appeal is dismissed.

Judgment read and signed this 14th day of May 2009

M. KOOME

JUDGE