



**REPUBLIC OF KENYA**

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

**Criminal Appeal 25 of 2008**

**ANDREW MASINDE JOHN .....APPELLANT**

**~VRS~**

**REPUBLIC..... RESPONDENT**

**JUDGMENT**

The Appellant Andrew Masinde John was convicted of an offence of attempted defilement contrary to section 9 (1) of the Sexual Offences Act and sentenced to twenty years imprisonment. He appealed to this court on grounds that the offence was not proved to the standards required in criminal cases and that the burden of proof was shifted to him. On sentence, the Appellant states that it is harsh and excessive and that his mitigation was not considered.

The state did not oppose the appeal. The Senior Principal State Counsel, Mr. Onderi submitted that, the age of the victim was not established as required. The prosecution said the child was aged six (6) years with no proof.

I have perused the proceedings and find that there was no medical evidence to prove the age of the victim was tendered. The child while testifying said; " *I do not know my age.*" The mother (PW2) said the child was aged six years but did not produce a birth certificate. The Clinical Officer said the child was five (5) years. This is the age estimated in the P.3 form. A P.3 form gives an estimate of the parent's age and cannot be sufficient proof. The lower court misdirected itself in convicting the accused without establishing the age of the victim.

It is also noted that before the child testified, the mandatory test under section 124 of the Evidence Act was not conducted. Its purpose is to assist the court to establish whether the child has the capacity give sworn evidence. In the absence of this test, the evidence taken would serve no useful purpose.

The sentence provided for under section 9(1) of the Sexual Offences Act is ten (10) years imprisonment. The lower court imposed an illegal sentence of twenty (20) years.

For the above reasons, I quash the conviction and set aside the sentence. The Appellant was charged in court on 29/10/2007 and convicted on 24/04/2008. The trial took only six months and the appeal has been pending for about one (1) year. I find this case suitable for a retrial and I hereby order that the same be done before a different magistrate within the shortest time possible.

F. N. MUCHEMI

JUDGE

*Dated, Delivered and Signed at Bungoma*

*This 22nd. day of July 2009 in the presence of the appellant and state counsel.*