



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Criminal Appeal 125 of 2005**

*(From original conviction and sentence in Criminal Case No.250 of 2004 of the Principal*

*Magistrate’s Court at Garrissa, J. G. King’ori –Ag. PM)*

**IBRAHIM ABDI MOHAMUD .....APPELLANT**

**VERSUS**

**REPUBLIC ..... RESPONDENT**

**JUDGMENT**

The Appellant, **IBRAHIM ADBDI MOHAMUD** was jointly charged with one **RASHID NOOR HASSAN** with one count of attempted defilement contrary to section 145 (2) of the Penal Code. They also faced an alternative count of indecent assault on a female contrary to Section 144 (1) of the Penal Code. They were tried by the Acting Principal Magistrate at Garissa and were accordingly convicted on the main count. The Learned trial Magistrate then proceeded to sentence the Appellant to 10 years imprisonment while his co-accused was placed on probation and committed to Getathiru Approved School for a period of 3 years.

The Appellant was aggrieved by the conviction and sentence. He therefore lodged the instant Appeal. When the Appeal came up for hearing, the Appellant abandoned the Appeal on conviction and chose to prosecute the Appeal on sentence only.

In support of the Appeal on sentence, the Appellant submitted that the sentence imposed was harsh and excessive. That he was remorseful. The Appellant further submitted that since his incarceration his parents had passed on leaving behind 10 siblings that wholly depend on the Appellant. Finally he stated that he was first offender.

The Learned State Counsel, Mr. Makura conceded to the Appeal citing disparity in sentencing as his main ground for conceding to the Appeal. According to the Learned State Counsel the disparity in sentencing may lead to the conclusion that the trial Magistrate did not exercise his discretion in sentencing properly.

I must state on the onset that his Appeal has given me considerable anxiety. The disparity in sentencing has no basis at all. Indeed if anything, the sentence imposed by the trial Court in the circumstances smacked of discrimination. If the Magistrate was minded to put the Appellant’s co-accused on probation, there was no reason why the same consideration should not have applied to the Appellant. When dealing with disparity in sentencing the Court of Appeal in the case of **FATEHALI MANJI VS REPUBLIC (1972) EA 158** held:-

***“.....We agree that care should be taken not to discriminate between two accused person where all the circumstances and facts are the same....”***

There was no appreciable distinction between the Appellant’s case and the case of the co-accused. In this Appeal, the evidence accepted by the trial Magistrate was to the effect that the Appellant was with the co-accused when they confronted the Complainant on the material day and attempted to defile her. The

Appellant's co-accused's role in the whole episode was well captured in the testimony of the Complainant. I fail to ascertain any reason or basis for dealing so leniently with the Appellant's co-accused. Yes, the Appellant's co-accused may have been a minor. However, there was nothing to stop the Appellant from equally being placed on probation.

Having agonized over this matter and taking into account the fact that the state conceded the Appeal, I am constrained to allow the Appeal. I was minded to consider placing the Appellant on probation as well. However considering that he has been serving term since 23<sup>rd</sup> December, 2004 and before then he had been in remand custody for well over 1 year, I am of the considered view that the Appellant has been sufficiently punished. I will therefore allow the Appeal on sentence to the extent that I will commute the same to the period so far served. The Appellant should thus be set free forthwith unless otherwise lawfully held.

Dated at Nairobi this 20<sup>th</sup> day of September, 2006.

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**MAKHANDIA**

**JUDGE**