

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

CRIMINAL APPEAL NO.153 OF 2013

(An Appeal arising out of the conviction and sentence of Hon. Linda C. Kosgei - RM delivered on 28th August 2013 in Makadara CM. CR. Case No.3702 of 2011)

PAUL KILONZI MWANGANGI
APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The Appellant, Paul Kilonzo Mwangangi was charged with **attempted defilement** contrary to **Section 9(1)** as read with **section 9(2)** of the **Sexual Offences Act**. The particulars of the offence were that on the 5th day of August 2011 at Mukuru kwa Njenga in Embakasi Division, Nairobi Province, the Appellant attempted to commit an act which could have caused penetration into the genital organ of H O, a child aged seven (7) years. In the alternative, the Appellant was charged with **indecent assault with a child** contrary to **Section 11(1)** of the **Sexual Offences Act**. The particulars of the offence were that on the 6th day of August 2011 at Mukuru Kwa Njenga in Embakasi Division in Nairobi Province, the Appellant intentionally and unlawfully committed an indecent act with H O, a girl aged seven (7) years by touching her private parts namely the vagina. When the Appellant was arraigned before the trial magistrate's court, he pleaded not guilty to the charge. After full trial, he was convicted as charged on the main count of **attempted defilement**. He was sentenced to serve ten (10) years imprisonment. The Appellant was aggrieved by the sentence that was imposed on him by the trial court and duly filed an appeal to this court.

In his petition of appeal, the Appellant pleaded with the court for a reduction of sentence. He asked the court to take into consideration that he was the sole bread winner of his family and was sickly man. The Appellant urged the court to take into consideration the period he had been in remand custody. He urged the court to exercise leniency on him and directs that he serves a non-custodial sentence instead. During the hearing of the appeal, the Appellant reiterated the contents of his petition of appeal. He pleaded with the court for a reduction of the sentence. Ms. Nyauncho for the State opposed the plea for reduction of sentence. She submitted that the Appellant was sentenced to serve the minimum sentence. She urged the court to affirm the sentence.

This court has carefully considered the plea by the Appellant for reduction of sentence. When the Appellant was sentenced to serve the custodial sentence, the trial court was exercising its judicial discretion. As an appellate court, this court will only interfere with such exercise of judicial discretion if it is established that the sentence was manifestly harsh and excessive or was so lenient as to amount to a miscarriage of justice. This court will interfere with the sentence if it is established that the sentence was unlawful. In the present appeal, the Appellant failed to establish that the trial magistrate erred in either sentencing him to serve a manifestly excessive and harsh sentence or alternatively sentencing him to serve a custodial sentence that did not accord with the law.

The Appellant was convicted for **attempted defilement** contrary to **Section 9(1)** as read with **Section 9(2)** of the **Sexual Offences Act**. Under that Section, a person convicted of committing such offence is liable to ***“imprisonment for a term of not less than ten years.”*** The Appellant was sentenced to serve ten (10) years imprisonment. It was the minimum sentence provided by the law. The sentence was legal. This court will not interfere with the sentence.

The upshot of the above reasons is that the appeal lodged by the Appellant on sentence lacks merit and is hereby dismissed. He shall serve the sentence that was imposed by the trial court. It is so ordered.

DATED AT NAIROBI THIS 4TH DAY OF JUNE 2015

L. KIMARU

JUDGE