

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CRIMINAL APPEAL NO. 328 OF 2013

KENNEDY TOM KITHUKA.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Machakos Chief Magistrate's Court Sexual Offence No.430 of 2011 by Hon. J. Omange PM on 22/9/2011)

J U D G M E N T

1. **Kennedy Tom Kithuka** was charged with the offence of defilement contrary to **Section 8 (1) (2)** of the **Sexual Offences Act No. 3 of 2006**. In the alternative he was charged with the offence of committing an Indecent Act with a child contrary to **Section 11(1) of the Sexual Offences Act**.
2. He was tried and convicted of the alternative charge and sentenced to serve **ten (10) years** imprisonment.
3. The appellant was satisfied with the conviction entered but appealed against the sentence meted out. Seeking to serve a non-custodial sentence, he stated that he is a first born of a single parent (mother).
4. In a response thereto learned counsel **Ms. Njuguna** opposed the appeal arguing that in fact the court should alter the finding of the lower court and convict the appellant of the offence of defilement since the evidence adduced proved the main charge.
5. The duty of this court is to re-look at the lower court record afresh prior to reaching any conclusion.
6. It is important to note that there was no cross appeal by the state therefore this court restrains itself from dealing with the conviction of the appellant.
7. Ordinarily, an appellate court would not interfere with the sentence meted out is reasonable in the circumstances (See **Joakim John versus Republic Criminal Appeal No. 58 of 2014 (Tanzania)**).
8. In the instant case the sentence that was meted out by the lower court was the minimum prescribed sentence for the offence the appellant was convicted of. Consequently, the sentence was reasonable in the circumstances.
9. In the premises the appeal lacks merit. It is dismissed.

DATED, SIGNED and DELIVERED at MACHAKOS this 3RD day of DECEMBER, 2014.

L.N. MUTENDE

JUDGE