



THOMAS NJURU MAINA.....APPELLANT

-versus-

REPUBLIC.....PROSECUTOR

*(Judgment arising from the original conviction and sentence in Criminal Case No.1207 of 2006 in the Senior Resident Magistrate's Court*

*at Kangema by P. Ngare Gesora – Ag. S.R.M.dated 27<sup>th</sup> October 2006)*

### J U D G M E N T

The Appellant, i.e. **Thomas Njuru Maina**, was convicted for the offence of **Defilement of a Girl under the age of 16 years** contrary to **Section 145 (1)** of the **Penal Code** and an **Alternative Charge of Indecent Assault on Female** contrary to **Section 144(1)** of the **Penal Code**. He was sentenced to serve 10 years imprisonment. Being aggrieved, he preferred an appeal before this court. On appeal, he put forward the following grounds:

***“1. That the Learned Trial Magistrate erred in finding the added evidence as corroborative by not considering that the victim (a) was examined after a space of more than 4 days.***

***(a) No breakage of hymen.***

***(b) No pants neither clothes exhibited.***

***(c) No examination of the defence party.***

***2. That the Learned Trial Magistrate erred in both points of law and facts in weighting the entire evidence in isolation particularly failed in not considering the grudge between the family allegedly offended and myself.***

***3. That the Learned Trial Magistrate erred in both points of law and facts in finding Section 144 of the Penal Code as violated but failed to observe that the prosecution hardly an independent witness.***

***4. That I pray for a copy of the trial proceedings and I wish being present at the hearing of this appeal.”***

When the appeal came up for hearing, the Appellant successfully applied to abandon the appeal against conviction. This judgment therefore, is in respect of the appeal against sentence. The particulars of the offence are that: ***On 26<sup>th</sup> day of April 2006, at G[...] Village in Murang'a District within Central Province, unlawfully had carnal knowledge of SNK, a girl under the age of 16 years.*** The particulars of the Alternative Charge are that: ***On the 26<sup>th</sup> day of April 2006 at G[...] Village in Murang'a District within Central Province, unlawfully and indecently assaulted SNK, by removing her inner pant and touching her private parts.***

The prosecution submitted the evidence of 6 witnesses in support of this case. The Appellant denied the offence by giving unsworn testimony. He is now before this court claiming that the sentence of 10 years imprisonment is harsh and excessive in the circumstances. Mr. Kaigai, Learned Provincial State Counsel, has urged this court to dismiss the appeal against sentence because the same is not harsh nor excessive. In the case of Wanjema =vs= R [1971] E A Page 494 D, Trevelyan J. restated the principles of sentencing as follows:

*“A sentence must in the end, depend upon the facts of its own particular case.....*

*An appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is evident that it overlooked some material factors, took into account some immaterial factor, acted on a wrong or the sentence is manifestly excessive in the circumstances of the case.”*

I will apply the above principles to this case. The Appellant pleaded for leniency before the trial court. It is also noted in the judgment of the trial court that he was a first offender. Under **Section 145(1)** of the **Penal Code** (now repealed) the offence attracts a sentence of life imprisonment with hard labour. The sentence meted out against the Appellant is 10 years imprisonment. In my view, I find the sentence not harsh nor excessive. In fact, the sentence should be corrected which I hereby order so that the Appellant serves a term of 10 years imprisonment from the date of sentence in addition to hard labour. Consequently, the appeal is dismissed in its entirety save for the sentence should be corrected as hereinabove proposed.

**Dated and delivered this 6<sup>th</sup> day of July 2012.**

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**J. K. SERGON**  
**JUDGE**