



**MUTUA KILUNDU.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

***(Being an appeal from the conviction and sentence in Machakos Chief Magistrate's Criminal Case no. 1538/2005***

***by Hon. V.V. Wandera, Ag PM on 21/10/2005)***

### **JUDGMENT**

**Mutua Kilindu**, hereinafter referred to as “*the appellant*” was charged before the Chief Magistrate’s Court at Machakos with defilement of a girl contrary to section 145(1) of the Penal Code, in that he had carnal knowledge of **R.N**, a girl under the age of 16 years at W[...] in Machakos District within Eastern Province on the 8<sup>th</sup> May 2005 without her consent. In the alternative he was charged with indecent assault contrary to section 144 of the Penal Code in that on the same day and place he unlawfully and indecently assaulted **R.N**, a girl under the age of 14 years by touching her vagina. He denied both counts and he was tried.

The prosecution’s case was that on 8<sup>th</sup> May, 2005 at about 2.00p.m. **R.N**, a girl aged 12 years (PW1) was walking from her aunt’s home where she used to stay to collect school fees from her mother, **A.M** (PW3) at Makutano Market where she sold vegetables. While on the way she met the appellant crossing Kyanganga River. The appellant, who was coming from the opposite direction, suddenly caught hold of both of the complainant’s hands and pulled her into the bush beside the rural access road. The complainant tried to free herself without success as the appellant held her tightly. In the bush, the appellant pushed her to the ground, fell on her back and he removed her pants and the biker. He pulled up her skirt to the chest before he dropped his pair of trousers and underwear to the position of his knees and thereafter lay on top of her. The appellant used his legs to force her legs wide apart and forced his body in between her thighs. He then inserted his penis into her vagina and penetrated her. She felt pain in the process. He defiled her for about two minutes and made her wet in her private parts. When done, the appellant wore his clothes and ran away towards the direction he was heading to when they met. She immediately screamed and two women, a man with a motor cycle and a young man answered her screams by rushing to the scene. After she told them what had transpired the good Samaritans pursued the appellant and arrested him about fifty meters away from the scene. She accompanied the four good Samaritans to Makutano Police Post together with the appellant.

**John Ndolo Maungu** (PW2), an Education Officer at Mutia Division, Mango Location in Machakos District was among the good Samaritans. On 8<sup>th</sup> August, 2005 at about 4.30 p.m. while riding a motor cycle from [PARTICULARS WITHHELD] saw two persons pushing each other on the right side of the road about 100 metres ahead. He slowed down and when he was about ten metres away from the two, he noticed the appellant and the complainant. The appellant was pushing the complainant from the road towards a thicket on the right side of the road but the complainant was resisting. When the appellant saw him he threw the complainant on the ground and walked away staggering apparently due to drunkenness.

The complainant rushed to him in a bid to escape from the appellant. He together with members of the public who had answered the complainant's screams pursued the appellant and arrested him. They thereafter escorted him to Makutano Police Patrol Base.

**Eunice Nduku Kiilu** (PW5), a registered clinical officer, Masii Health Centre on 8<sup>th</sup> May, 2005, examined the complainant who was complaining of having been defiled and injured by a person known to her. On examining her she noticed a blouse without buttons and a skirt that was extensively torn at the rear. The complainant was crying and anxious though not under the influence of any drugs or alcohol. She had haematoma on forehead and there were blunt injuries around her neck, right upper limb with swelling, right elbow joint and shoulder joint. On examining the complainant's genitalia, she noted extensive swelling of the libia majora and minora. She found a tear around the vaginal entrance. She did a spectrum examination and found the cervix oedematous (*swelling of the cervix*) as well as whitish thick discharge from the vagina wall face with blood. She also took a high vaginal swab and urine analysis which revealed many pus and some gram positive cocci. Some morti spermatozoa were also noted. With that examination and findings from the laboratory tests she concluded that the complainant had been defiled. She produced the complainant's P3 form and treatment card in evidence.

**P.C. David Itirithia** (PW4) had earlier on 8<sup>th</sup> May, 2005 received the appellant from members of public accompanied by the complainant at Makutano Police Base on allegation that he had attempted to rape the complainant. After investigating the case, he preferred the charges.

The appellant gave unsworn evidence in his defence. He testified that he was coming from Makutano on the material day when he met the complainant and greeted her by word of mouth. She was his cousin as her mother was married to his uncle. He was then arrested without having done anything.

Having evaluated the evidence on record by the prosecution and defence, the learned magistrate was convinced that the appellant committed the offence in the main count. He convicted him and thereafter sentenced him to life imprisonment.

The Appellant was aggrieved by the conviction and sentence. He therefore lodged this appeal on 5 grounds to wit;

***“1. That the learned trial magistrate erred both in***

***law and fact when he convicted and sentenced the appellant yet failed to consider that the charges were fatally defective.***

***2. That the pundit trial magistrate erred in fact and law when he relied on the evidence which was contradictory***

***3. That the learned magistrate erred both in law and fact when he failed to analyze and evaluate the evidence in record***

***4. That the learned trial magistrate erred in law and fact while convicting and sentencing the appellant yet failed to consider that the prosecution failed to prove its case beyond reasonable doubt.***

***5. That the learned trial magistrate erred in law and fact when he rejected may plausible defence without giving cogent reasons.”***

When the appeal came before me on 12<sup>th</sup> June, 2012 for hearing, the appellant opted to abandon the appeal on conviction and prosecute the appeal on sentence instead. **Mr. Mukofu**, learned State Counsel not opposing the appellant's move, it was so ordered.

In support of his appeal on sentence, the appellant submitted that the sentence imposed was harsh and excessive. He had so far served 7 years of the sentence. In the process he had contracted tuberculosis. He felt therefore that he had been sufficiently punished. **Mr. Mukofu** opted to leave the appeal on sentence

to court.

Under section 354(3) of the Criminal Procedure Code this court has jurisdiction to interfere with a sentence imposed by the trial court. The principles upon which this court will so act were stated in opt quoted case of **Ogalo s/o Owuor vs Republic [1954] 21 EACA 270**. First, the appellate court does not alter a sentence on the mere ground that if members of that court had been trying the appellant they might have passed a somewhat different sentence, and it will not ordinarily interfere with the discretion exercised by a trial court unless it is evident that the trial court had acted upon some wrong principle or overlooked some material factors. Secondly, if the sentence imposed is manifestly harsh and excessive in view of the circumstances of the case, such sentence will definitely be disturbed. These considerations are however informed by the fact that sentencing is a matter of the discretion of the trial court and that the sentence should fit the crime as well as the offender.

No doubt the offence for which the appellant was convicted was serious. He was as a result sentenced to life imprisonment. Of course the sentence imposed was legal since the offence charged upon conviction; one was **“liable to imprisonment with hard labour for life....”** However, this does not necessarily mean that upon conviction, the convictee must mandatorily be sentenced to life imprisonment with hard labour. It simply means that the maximum sentence which can be imposed on such convictee is a life sentence for the offence. Accordingly the trial court is left with a window or given discretion to impose any other sentence prison upto to life imprisonment depending on the circumstances of the case. In sentencing the accused, the trial court considered that- **“ the offence of defilement is a heinous act and deserved a deterrent sentence”**. The heinousness of a particular class of crime in the locality is not necessarily of itself a ground for imposing a more severe sentence than that which would normally be imposed, although, as I think the trial court was entitled, if not required, to have the matter in mind. The trial court does not seem to have taken into account the fact that the appellant was a first offender. To my mind, maximum sentences should be left to serial offenders. Having said all the foregoing, it must be obvious that I consider the sentence imposed given the circumstances, manifestly harsh and excessive as to call for my intervention. The appellant has so far served 7 years of the life imprisonment. I consider that period to be sufficient punishment. Accordingly I would commute the sentence to that so far served with the consequence that the appellant shall be set at liberty at once unless otherwise lawfully held.

**JUDGMENT DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of JULY 2012.**

**ASIKE-MAKHANDIA**  
**JUDGE**