

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Criminal Appeal 61 of 2007

DAVID MATUNDU NGUNGU.....APPELLANT

VERSUS

REPUBLICRESPONDENT

(Being an appeal from the original conviction and sentence in Makindu Principal Magistrate's Court Criminal Case No. 2778/2005 by Hon. J.M. Munguti, SRM on 29/11/2005)

JUDGMENT

The appellant, **David Matundu Ngungu** was charged before the Principal Magistrate's Court at Makindu with two counts of defilement of a girl contrary to section 145(1) (3) of the Penal Code as well as two alternative counts of indecent assault of female contrary to section 144(1) of the Penal Code. The particulars of defilement charges were that on 9th November, 2005 at [particulars withheld] of Kajiado District within Rift Valley Province, the appellant unlawfully had carnal knowledge of **N N M** and **N S M**, both girls under the age of 16 years. With regard to the alternative charge of indecent assault, it was alleged that on the same day and place, the appellant indecently assaulted **N N M** and **N S M** by touching their private parts, namely the vaginas.

The appellant pleaded guilty to all the counts and was accordingly convicted on his own plea of guilt. Upon conviction, he was duly sentenced to 10 years imprisonment on each of the main counts with hard labour. The learned magistrate ordered that the said sentences be served consecutively.

The appellant was aggrieved by conviction and sentence aforesaid. He therefore lodged the instant appeal complaining that the learned magistrate erred in law and fact in sentencing him to 20 years imprisonment without finding out why he had pleaded guilty, when he was a first offender, the sentence imposed was manifestly harsh and excessive and finally, he was otherwise remorseful and repentant and undertook not to indulge again in criminal activities.

When the appeal came before me for hearing on 28th June, 2012 the appellant opted to limit his appeal to sentence only. He did not wish to challenge conviction. He was also not contesting the imprisonment term imposed. He only wished that the sentences imposed be ordered to run concurrently as opposed to consecutively.

Mr. Mukofu, learned State Counsel did not oppose the appeal on sentence. He also agreed that the sentences be ordered to run concurrently.

Ordinarily offences committed in the same transaction should attract a concurrent sentence as opposed to consecutive. In this case the offences forming the main counts were committed in the same transaction. From the facts as narrated by the prosecution, the two victims had been left by their mother, **A N N** who had gone to Mombasa. The appellant called the two into his house and ordered them to remove their pants. He then proceeded to defile **N N M** before turning on **N S M**. After defiling them, he gave them a fruit and ordered them not to tell anybody or else he would kill them. From the foregoing facts it is quite evident that the defilement occurred at the same time and place. Accordingly, the learned magistrate ought to have ordered the sentence to run concurrently. To that limited extent, the appeal succeeds. Accordingly, the appellant shall continue to serve 10 years imprisonment on each main

count. However both sentences shall be served concurrently.

DATED, SIGNED and DELIVERED at MACHAKOS this 28TH day of SEPTEMBER 2012.

ASIKE MAKHANDIA
JUDGE