REPUBLIC OF KENYA

High Court at Machakos

Criminal Appeal 78 of 2005

DOUGLAS BOY OMALA……..……APPELLANT
VERSUS

REPUBLIC…….RESPONDENT

(Being an appeal from the original conviction and sentence in Kithimani Senior Resident Magistrate's Court Criminal Case No. 1455/2004 by Hon. M. Maundu, Ag SRM on 20/7/2005)

JUDGMENT

Douglas Boy Omala, hereinafter "*the appellant"* was charged before the Senior Resident Magistrate's Court, Kithimani with the offence of defilement of a girl contrary to section 145(1) of the Penal Code. It was alleged that on 14th November, 2004 at *[particulars withheld]* in Machakos District, the appellant had canal knowledge of **N. M.,** a girl under the age of 14 years. The appellant denied the charges and was soon thereafter tried.

At the conclusion of the trial, he was found guilty of the offence, convicted and sentenced to 14 years imprisonment. He was aggrieved by the conviction and sentence aforesaid and decided to lodge the instant appeal on the grounds that his defence and mitigation were ignored, the evidence adduced was hearsay and not corroborative, the evidence was shaky and biased and lastly that the sentence imposed was harsh and excessive.

When the appeal came before me for hearing on 23rd July, 2012, the appellant opted to abandon the appeal on conviction. He instead opted to pursue the appeal on sentence only. The State not objecting to the election by the appellant the appellant's wish was duly granted.

In support of his appeal on sentence, the appellant submitted that the sentence of 14 years imprisonment was manifestly harsh and excessive. He had suffered immensely in prison and in the process learnt a lot. He was now a fully qualified carpenter.

Mr. Mukofu, learned State Counsel opposed the appeal on sentence. He submitted that the sentence imposed was legal. The court considered the fact that the appellant was a first offender and the effect of the offence on the complainant.

Like findings of fact which are particularly within the realm of the trial court, sentencing is essentially a discretion of the same court. Where the trial court has acted on correct principles and has taken all relevant factors into account, unless the sentence imposed is manifestly excessive, it is not open to the appellate court to interfere with such sentence. However, the converse is equally true. In the case of **Wanjema vs Republic [1971] E.A. 493** the Court stressed this aspect by stating that an appellate court should not interfere with the discretion which a trial court has exercised as to sentence unless it is shown that it overlooked some material factor, took into account some immaterial factors, acted on wrong principle, or the sentence is manifestly excessive. Again an appellate court is not entitled to interfere with the sentence on the ground that if it had been trying the case it might have passed a somewhat different sentence.

In the instant case, the offence with which the appellant was charged and convicted carried a maximum sentence of life imprisonment with hard labour. However, the appellant was sentenced to 14 years imprisonment. Though the sentence was legal, it was nonetheless manifestly harsh and excessive in my

view and given that the appellant had been in prison custody since 20th July, 2005 pending his trial. To-date he has actually served ½ of the prison term imposed. I am satisfied that he has been sufficiently punished. I will therefore allow the appeal to the extent that I will commute the sentence to the term so far served with the consequence that the appellant should be set at liberty forthwith unless otherwise lawfully held.

DATED at **MACHAKOS** this **22ND** day of **NOVEMBER, 2012.**

ASIKE-MAKHANDIA
JUDGE

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

GEORGE DULU
JUDGE