REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL CASE NO. 162 OF 2007

FRANCIS GITARI MATHENGE……..……..APPELLANT
VERSUS

REPUBLIC…….……...……RESPONDENT

(Appeal arising from the original conviction and sentence by E. J. Osoro Senior Resident Magistrate in the Nyeri Chief Magistrate's Criminal Case No.238 of 2005 delivered on 12th July 2006 at Nyeri)

JUDGMENT

FRANCIS GITARI MATHENGE, the appellant herein, was tried on a charge of indecent assault on a female contrary to *Section 144(1)* of the Penal Code. In the end, he was convicted and sentenced to serve ten (10) years imprisonment. Being dissatisfied he preferred this appeal.

On appeal, the Appellant put forward the following grounds in his petition:

1. ***That the learned trial magistrate erred in both point of law and fact in finding the prosecution case as well established whilst flowed with doubts and inconsistencies.***
2. ***That the learned trial magistrate erred in both point of law and fact in accepting the prosecution case as sufficiently established but failed to observe that the evidence that was adduced was a hotch-potch evidence.***
3. ***That the learned trial magistrate failed in not analyzing and evaluating the evidence adduced adequately.***
4. ***That the learned trial magistrate erred in both point of law and fact in finding Section 145(1) pc as sufficiently established whilst bases ingredients were not established i.e. pants and the clothes the girl wore were not produced as exhibits.***
5. ***That the learned trial magistrate erred in both points of law and fact in finding the prosecution case as well established whereas it lacked corroboration.***
6. ***That the learned trial magistrate erred in both points of law and fact in finding evidence upon the prosecution case whereas no positive medical signs were established to satisfy the defilement.***
7. ***That the learned trial magistrate erred in both points of law and fact in rejection my defence failing provisions of law under Section 169 (1) without proper determination.***
8. ***And that I wish being present during the hearing of this appeal and be served with the lower court trial proceedings to enable me prepare more reasonable hypothesis before the commencement of this appeal.***

When the appeal came up for hearing, the Appellant abandoned the appeal as against conviction but pursued the appeal against sentence. The Appellant urged this court to find that the sentence pronounced against him was harsh and excessive. He beseeched this court to reduce the sentence claiming he has learnt his lesson while serving his sentence. Mr. Makura, learned Senior State Counsel, urged this court to

dismiss the appeal on the basis that the sentence was neither harsh nor excessive. The learned Senior State Counsel also pointed out that the trial magistrate considered the mitigating factors before sentencing the Appellant.

It is convenient at this stage to set out in brief the case that was before the trial court. The particulars of the offence are that on the 15th day of January 2005 at around 7.00 p.m. in Nyeri District, within Central Province, unlawfully and indecently assaulted B.W.K, a girl under the age of fourteen years by touching her private parts. A total of five witnesses testified in support of the prosecution's case while the Appellant gave sworn statement without summoning independent witnesses in his defence. The complainant (P.W.1), by then, a child aged 7 years, told the trial magistrate that on 15th January 2005, at about 5.30 had been sent to collect milk from the home of a lady called Mama George. She said she found the Appellant in that home repairing a gate. It is said the Appellant waited for the complainant on the way. The Appellant lured the Complainant into the bushes at D Academy where he removed her underpants while placing her on the ground. The Appellant is alleged to have unzipped his trousers and lay on P.W.1. The Appellant is said to have attempted to insert his penis into the Complainant's genitalia but was forced to cut short his mission when the Complainant's mother arrived at the scene in response to the Complainant's screams. The Appellant is said to have escaped. The Complainant told her mother what the Appellant did to her. She was taken to hospital for treatment. When placed on his defence, the Appellant denied committing the offence. He even denied that he had gone to repair a fence on that particular day. He claimed the Complainant had been coached by her mother to tell lies. He alleged that he was in bad terms with the Complainant's mother (P.W.2). The trial magistrate considered the evidence presented before her. She came to the conclusion that there was sufficient evidence proving indecent assault. She did not find any evidence of a grudge existing between the Appellant and P.W. 2., hence the Appellant's defence was dismissed. I have also re-evaluated the evidence and I am convinced that the Appellant was convicted on sound evidence.

Having set out in brief the case that was before the trial court, let me now settle the question as to whether or not the sentence meted out was harsh and excessive. It is trite law that an appellate court will not interfere with a trial court's order on sentence unless it is shown that the trial court overlooked some material factors or that it took into account some irrelevant factors or that it acted on the wrong principles and or that the sentence is manifestly excessive. The record shows that the trial magistrate noted that the Appellant was a first offender. She also considered the Appellant's mitigation before sentencing. The maximum sentence prescribed for an offence under *Section 144(1)* of the Penal Code is 21 years imprisonment with hard labour. The Appellant was sentenced to serve ten (10) years imprisonment. I do not think the sentence is harsh nor excessive. It would appear the trial magistrate did not make an order to the effect that the Appellant should serve the sentence with hard labour. I hereby correct the anomaly under *Section 354* of the Criminal Procedure Code.

In the end, the appeal as against sentence is without merit. It is dismissed in its entirety. Pursuant to the provisions of *Section 354 (3) (b)* of the Criminal Procedure Code, I order that the Appellant should serve the sentence with hard labour.

Dated and delivered at Nyeri this 25th day of March 2011.

J. K. SERGON

JUDGE

In open court in the presence of Appellant and in the presence of Miss Ngalyuka for the State.