



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 92 OF 2007

(From original conviction and sentence in Criminal Case No. 2727 of 2005 of the Chief Magistrate's Court at Nakuru – H. NYAGA, SRM)

DANIEL ODHIAMBO.....APPELLANT
VERSUS
REPUBLIC.....RESPONDENT

JUDGMENT

Daniel Odhiambo has appealed against the sentence of the Senior Resident Magistrate's Court. He was sentenced to 35 years imprisonment with hard labour for an offence of defilement of a girl contrary to **Section 145(1) of the Penal Code**. He did not contest the conviction.

The appellant filed submissions in which he prays that the court do reconsider the sentence because he has learnt from his short stint in prison on how to behave in society, he has changed in behaviour and wants to go out there to impact others with that knowledge. It is his view that he has also learnt a trade which will help him to live a better life out there. The rest is mitigation that he had siblings who looked up to him for support who need him.

Mr. Omutelema, the Senior Principal State Counsel opposed the appeal and urged the court not to interfere with the sentence. He submitted that the complainant in the case was a child aged 3 years and the court considered that fact and handed a sentence of 35 years which is not excessive in the circumstances.

The child, the complainant herein was said to be 3 years. The mother of the child (**PW1**) testified that the child was born in September, 2003 and this incident occurred on 11.10.2005. The court noted that she was a child who was not able to testify. As per **PW1's** evidence, she was actually 2 years old. **PW3, Dr. Jackline** also testified that she was about 3 years. She was therefore a child of very tender age. **PW1** and **PW2** who examined the child soon after the incident found a whitish discharge from her genitalia and the doctor later confirmed that the labia majora was bruised. Although, the doctor termed it as attempted penetration, partial insertion of the male organ in the child's genitalia does amount to penetration.

The appellant lived in the same plot as the child hence a neighbour. He took advantage of the child when she went to see television in his house. I find no good reasons advanced by the appellant as to why this court should interfere with the sentence meted on him. He should have known better. All that he relies on as grounds of appeal are but mitigation. **Section 145 (1)** prescribes a sentence of life imprisonment and hard labour. He was only sentenced to 35 years which will be subject to remission if he is of good conduct. I therefore dismiss the appeal.

DATED and **DELIVERED** this 15th day of March, 2011.

R. P. V. WENDOH

JUDGE

PRESENT:

The appellant present – in person
Mr. Omutelema for the State.
Kennedy – Court Clerk.