



IN THE HIGH COURT OF KENYA

AT NAKURU

CRIMINAL APPEAL NO. 334 OF 2004

[From original conviction and sentence in Criminal Case No. 1199 of 2004 of the Chief Magistrate's Court at Nakuru – H. Wasilwa, PM]

TOM MWANGI KAMAU.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

Tom Mwangi Kamau, the Appellant herein, was charged with five offences. In the first three counts, he was charged with the offence of defilement contrary to **Section 145(1) of the Penal Code**. In Count I, he was alleged to have had carnal knowledge of **M.M.**, a girl under 14 years of age, on 11th May, 2004. In count II, he is alleged to have had carnal knowledge of **J.W.** a girl under the age of 14 years and in Count III, he was alleged to have defiled **D.N.**, a girl under the age of 14 years on 3rd May, 2004.

In counts 4 and 5, the Appellant was charged with the offence of attempted defilement contrary to **Section 145(2) of the Penal Code**. In the alternative, he was charged with indecent assault contrary to **Section 144(1) of the Penal Code**. In count 4, he is alleged to have attempted to have carnal knowledge of **R.W.**, a girl under the age of 14 years, on 2nd May, 2004 and in count 5, he is alleged to have attempted to have carnal knowledge of **M.N.**, a girl under 14 years on the 8/5/2004. After a full hearing, the court found the appellant guilty as charged and convicted him and he was sentenced to serve 5 years imprisonment on each count with hard labour. The sentences were ordered to run consecutively.

Being dissatisfied with the conviction and sentence, the appellant filed this appeal alleging that the court erred by ordering that the sentences run consecutively and that the offences were not proved beyond any reasonable doubt.

At the hearing, the Appellant informed the court that he was abandoning all the other grounds save that the court do order that the sentences do run concurrently. **Mr. Omwega**, Counsel for the state opposed the appeal. Counsel observed that the offences were committed in 2004 when the Penal code was still applicable. He recalled that all the complainants were infected with venereal diseases and that the trial court correctly considered that the sentences should run consecutively.

Though the Appellant abandoned the challenge to the conviction, this court will briefly consider the evidence that was adduced in the trial court. It is noteworthy that all the complainants were children of very tender age. The first complainant, **M.M.** was a child of 7 years. She was examined by **Michael Sirma Komu (PW9)** – a Clinical Officer at Solai Medical Centre who found that her hymen was broken, she had a PV discharge, an indication that she had candidiasis. The 2nd complainant was **J.W.**, a Standard

one child, aged 7 years old. On examination, she was found to have been infected with a venereal disease. She had a laceration of the vagina and the hymen was broken. She had a PV discharge which is evidence of a venereal disease.

The 3rd complainant, D.N. (PW3) was a girl aged about 4 years. On examination, she was found to have been infected with a venereal disease, had a laceration of the vaginal wall with a PV discharge and the hymen was broken.

The 4th complainant was R.W., who was not able to testify due to her tender age. Her mother PW7, testified that she was 3 years old. On examination, she was found to have been infected with a venereal disease.

The 5th complainant was M.N., a Standard one child aged 7 years old. On examination, she was found to have a laceration on the vaginal wall. There was some bleeding, the hymen was broken and she had a PV discharge suggesting that she had a venereal disease.

From the evidence adduced in support of the 4th and 5th complainants, it is clear that it was not an attempt to defile but the complainants were actually defiled as there was evidence of penetration. The Appellant however, got off lightly with an offence of attempted defilement. I set out the evidence adduced before the Lower Court to underscore the seriousness of the offences committed on the complainants who were children of very tender age. They were not only defiled but they were also infected with a venereal disease by the Appellant who was then a neighbour.

As pointed out by Mr. Omwega, the Appellant was charged under the Penal Code before the **Sexual Offences Act No. 3 of 2006**, came into force. Under the Penal Code, the sentence for defilement was fourteen years imprisonment together with hard labour.

In my view, the sentence meted out on the Appellant is very lenient and he deserved a much longer sentence. Section 37 of the Penal Code allows the trial court to impose consecutive sentences. It reads as follows;

“Section 37;

Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence, other than a sentence of death, which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that it shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence under subparagraph (i) of paragraph (c) of subsection (1) of section 28 or of any part thereof.

I find nothing illegal about the trial court ordering the sentences to run consecutively. The Appellant has not adduced any ground that would merit the court interfering with the sentences meted.

Section 354 (3)(b) of the Criminal Procedure Code, gives the court the discretion to increase the sentence upon appeal. I have observed above that the Lower Court was too lenient on the appellant. This is a case where the appellant required to be sentenced to a severe sentence. I hereby invoke the above Section and increase the sentence to 7 years imprisonment on each count plus hard labour. The sentences to run consecutively. Appeal is dismissed.

DATED and DELIVERED this 10th day of June, 2011.

R. P. V. WENDOH
JUDGE

Right of Appeal

PRESENT:

In person - Appellant

Mr. Omutelema for Respondent

Kennedy – Court Clerk