



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CRIMINAL APPEAL NO. 207 OF 2010

SAID KUNO TANOAPPELLANT

VERSUS

REPUBLICRESPONDENT

(From the original conviction and sentence in criminal case No.501 of 2005 of W.K. Korir, Senior Resident Magistrate's court at Isiolo)

J U D G M E N T

The Appellant, a herdsman, was convicted of the offence of defilement of a girl contrary to Section 145(1) of the Penal Code. The Appellant was tried and convicted and sentenced to serve 15 years with hard labour. He appealed against both the conviction and the sentence; on the grounds that evidence was inadequate to warrant conviction and that the sentence was excessive.

When the appeal came up for hearing the Appellant abandoned the appeal against the conviction and proceeded on appeal against sentence of 15 years and hard labour.

The facts of the case is that on 31st day of March, 2005 in Isiolo District the accused person had carnal knowledge of K.M a girl under the age of fourteen years. The Appellant pleaded not guilty and case proceeded to full trial. The prosecution called seven witnesses and the Appellant gave sworn defence and called two witnesses.

The trial court after evaluating the whole evidence and analyzing the same convicted the Appellant and sentenced him to serve 15 years with hard labour.

The Appellant has asked this court to reduce the sentence on the grounds that he is now an orphan. That his mother died whilst he was in prison and that his father died before his conviction. That he was caring for his young siblings and now his grandmother who is caring for them is old and their house has been burnt. That his siblings do not attend school. That the Appellant has served six years and eight months.

The learned State Counsel Mr. Musau, on his part, submitted that sentence of fifteen years and hard labour is lawful, because under Section 145(1) of the Penal Code, that was in force at the time of charging Appellant, before it was repealed, the maximum sentence was life sentence. That the sentence of 15 years with hard labour is lawful and within the law. He further submitted the sentence was not excessive considering the circumstances.

He further submitted under the old law court can interfere with the sentence on grounds that it was excessive. He submitted that the Appellant should count himself lucky for as if it was under the new law, that is to say, the Sexual Offences Act, No.3 of 2006, he would have been sentenced to life imprisonment.

The learned State Counsel in view of his submissions as stated herein above supported the sentence.

In case of **Ogalo Owuora – Vs- Republic(1954) 21 EACA 270** the former Court of Appeal for Eastern Africa declared it might alter a sentence imposed by the trial court only if it were evident that it acted on wrong **principle** or overlooked some **material factors** or if the sentence were manifestly excessive in all the circumstances of the case.

The trial court took into account the fact that the Appellant was a first offender. That the offence committed is serious and deterrent sentence is called for.

I note under the new law that is The Sexual Offences Act the offenders of such offence as the one with which the Appellant was charged under the old law are liable upon conviction to be sentenced to imprisonment for life. The Appellant should count himself lucky that as the time he committed the offence with which he was charged with, The Sexual Offences Act was not operational otherwise if it was, he would have been sentenced to imprisonment for life.

For the reasons indicated herein above I do not see the reason for interfering with sentence as the trial court acted on the right principle and did not overlook any material factor nor is the sentence manifestly excessive in all the circumstances of the case.

I therefore dismiss the appeal.

Right of appeal 14 days.

DATED, SIGNED AND DELIVERED AT MERU THIS 8TH DAY OF DECEMBER, 2011

J. A. MAKAU
JUDGE

Judgment Delivered in Open Court in Presence of:

1. Appellant
2. Mr. Musau for State

J. A. MAKAU
JUDGE