REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CRIMINAL APPEAL 164 OF 2008

GEOFFREY WANJOHI NJOGU ..... APPELLANT

VERSUS

REPUBLIC …….... RESPONDENT

(Appeals from original Conviction and Sentence of the Senior Principal Magistrate's Court at Nanyuki

in Criminal Case No. 69 of 2006 dated 20th September 2007 by Ndungu H. N. (Miss) – Ag. S.P.M.)

J U D G M E N T

The appellant, **Geoffrey Wanjohi Njogu** was charged before the Senior Principal Magistrate's Court, Nanyuki with incest by male Contrary to Section 466(1) of the Penal Code. In the alternative he faced a charge of indecent assault on a female Contrary to Section 144(1) of the Penal Code. To both the principle and alternative counts aforesaid, the appellant pleaded not guilty and his trial ensued in earnest.

The prosecution case was that on 2nd June 2006 the complainant, 14 year old **Agnes Wanjiku**, a daughter of the appellant though not biological was at home at about 10.00 p.m. She was waiting for the appellant to come home. The appellant had earlier on told her not to go to sleep until he had come home as he wanted to speak to her. Her mother (PW2) who had been privy to those instructions however went to bed at 10.00 pm. in the main house about 10 metres away from the kitchen where the complainant was left waiting for the appellant. The appellant duly arrived and began to ask the complainant why she had returned to the home. Apparently in December of the previous year the appellant had sent her away from home to stay with her grandmother after he had discovered that she had written a love letter to her boyfriend. She had however returned in January to stay with them. The appellant then started caressing her hands as he spoke to her. He asked her to go out with him and he held her hands and led her to a nearby forest. Whilst in the forest the appellant held her by the mouth and knocked her down, tore her petticoat and underpants and had sex with her for a long time.

As she resisted she bit the appellant on the hand which action forced the appellant to remove his hand from her mouth allowing her to scream loudly. The appellant then released her and she ran towards home and met her mother running towards her. She told her what the appellant had done to her and the appellant beat up her mother and she ran to her grandmother's place. Neighbours came and took her away for overnight sleep. The following day she and her mother reported the incident at Matanya Police Post and she was taken to Nanyuki District Hospital where she was treated and discharged.

PW2 **Rose Wangui Wanjohi** testified that the complainant was her daughter while the appellant was her husband. The appellant was not the biological father to the complainant though but when he married her he also adopted the complainant as his own daughter. That on 21st January 2006 she and the appellant

went to visit a friend and the appellant told her that he wanted to speak to the complainant because they had differed earlier. The complainant had then gone to stay with her grandmother. On the material day she went to sleep at about 10 p.m. leaving the appellant and complainant talking in the kitchen. Later she returned to the kitchen and did not find the two and thought that they had gone to collect the complainant's clothes from her grandmother's home. After a short while she heard the complainant screaming and she ran towards her. When she met her the complainant told her that the appellant had had sex with her. In the morning she reported the matter to Matanya Police Post where they were issued with P3 form and the complainant referred to hospital for treatment. PW2 told the court that the complainant had differed with the appellant earlier because she had a boyfriend. The witness had since however returned to her parent's home following the defilement of the complainant by the appellant.

PW3 **PC Munguti** of Matanya Police Patrol Base testified that on 3rd January 2006 at about 6.30 a.m. whilst at Matanya Police Patrol Base he received a report to the effect that the appellant had defiled his daughter. The report was made by the wife of the appellant (PW2) who also alleged that when she intervened the appellant assaulted her. He issued the complainant with P3 form and later he arrested and charged the appellant.

PW4, Clinical Officer **Richard Kateiya** examined the complainant on 3rd January 2006. On examination she had bruises on both labia minora and labia majora. Hymen was broken. Analysis was done and revealed red blood cells. HVS was done but no spermatozoa were seen. Injuries pointed to forceful penetration. He filled and signed P3 form.

Asked to defend himself the appellant simply told the court that he had quarrelled with the complainant and that the evidence of the complainant and her mother differed.

The learned magistrate having carefully analysed and evaluated the evidence tendered by both the prosecution and defence found favour with he prosecution case, convicted the appellant and sentenced him to the maximum sentence permitted for the offence which then was 5 years.

That conviction and sentence provoked this appeal. However when the appeal came up for hearing, the appellant elected to abandon the appeal on conviction and instead pursue the appeal on sentence. I think that, that was a smart move on the part of the appellant. The state did not object to the move by the appellant aforesaid. Accordingly, this appeal only proceeded on sentence.

In support of his appeal on sentence, the appellant submitted that the sentence imposed was the maximum for the offence. It was thus manifestly harsh and excessive. He submitted further that he felt that the time he had so far served in prison was sufficient punishment. He had since trained as a carpenter and was remorseful.

Mr. Orinda, learned Senior Principal State Counsel agreed with the appellant that he sentence imposed was excessive considering that the appellant was a first offender. Counsel therefore invited me to interfere with the sentence as appropriate.

The sentence of 5 years imprisonment imposed on the appellant pursuant to his conviction has caused me grave concern. Apart from the statutory maxima, for example, those on the sentencing of persons convicted of robbery with violence contrary to section 296 (2) of the Penal Code and murder, the appropriate sentence is a matter for the discretion of the sentencing court. This being the case the trial court must act judicially and not to award sentences capriciously. At this junction I may wish to revert to the case of **George Otieno Oloo v/s Republic C.A. 137 of 2004 (unreported) (Kisumu)** in which the court of appeal had this to say regarding excessive sentences "…… ***of late, we have noted a trend where maximum and manifestly harsh sentences are being imposed by trial courts on wrong factual basis. Though it is the duty of the court to protect the public and punish and deter the criminal, the trial courts must adopt a uniformity of approach."***

The appellant was a first offender. He was not a serial child molester. Much as the offence is serious and abominable, I do not think that however maximum sentence was called for nor was it desirable.

The appellant was convicted and sentenced on 20th September 2007. He has so far served almost 2 years of the sentence imposed. I think that he has been duly and sufficiently punished. In the exercise of my discretion I will remit the sentence to one so far served with the consequence that the appellant shall forthwith be released from prison custody unless otherwise lawfully held.

Dated and delivered at Nyeri on 30th day of June 2009

M. S. A. MAKHANDIA

JUDGE