REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT CRIMINAL APPEAL NO. 164 OF 2005

GEORGE WAWERU MWANGI ..... APPELLANT

VERSUS

REPUBLIC..... RESPONDENT

(Appeal from original Conviction and Sentence in the Senior Principal Magistrate's Court

at Murang'a in Criminal case no. 1266 of 2004 dated 7th June 2005 by Mr. T. W. Murigi – SRM)

J U D G M E N T

For reasons which are not clear to us, the judge who admitted this appeal for hearing on 28th September 2006, directed that the same be heard by a panel of two judges, yet the offence for which the appellant was convicted was not capital. It was defilement of a girl contrary to section 145 (1) of the Penal Code. An appeal arising out of a conviction for such an offence ordinarily is heard by a single judge. We do not wish to speculate the reasons behind the learned judge's order that the appeal be heard a bench of two judges.

Our misgivings notwithstanding, we proceeded to hear the appeal nonetheless. However the appeal was limited to sentence only.

The appellant herein is an employee of **Nancy Wanjiku Mwangi** (PW2). He was charged with the offence of defilement of a girl contrary to section 145 (1) of the Penal Code in that on the 7th day of August 2004 at K village in Murang'a District within Central Province, he had carnal knowledge of **RWK**, a girl under the age of sixteen yeas. He also faced an alternative count of indecent assault on a female contrary to section 144 of the penal code in that on the same day and place he unlawfully and indecently assaulted **RWK** by touching her private parts. He pleaded not guilty to the charges and he was thereafter tried. At the end of the trial, the appellant was convicted of the main count and was thereafter sentenced to life imprisonment.

The appellant was aggrieved by the sentence imposed and hence preferred this appeal. In his home made petition of the appeal, the appellant says:

1. I pleaded not guilty to the charge.

2. That I am a mentally retarded person.

3. That I was induced by the house girl to engage myself with the said crime which I didn't know was an offence which would hurt both the victim and the public.

4. That I am a layman in law and didn't know the effects of such action on me.

5. That I am quite remorseful.6. That I am a first offender having never been aligned (sic) in a court of law in connection with any criminal activities.

7. That I am orphan having lost both parents five years ago.

8. That I have other siblings who depend on my income from the contract job I do in peoples' shamba.

9. That I am in my youthful age of 17 years and my continued incarceration will adversely ruin my life.

10. That I was not given a chance to mitigate these problems before the court during my trial process because the trial magistrate was biased & dismissed me as wasting court's time.

To our mind these are pleas in mitigation really.

When the appeal came up for hearing, the appellant stated in his written submissions that the sentence imposed was manifestly harsh and excessive. **Mr. Orinda**, Principal State Counsel contended in agreement that the sentence imposed was harsh and excessive.

The offence for which the appellant was convicted carries a maximum sentence of life imprisonment plus hard labour. This is the sentence that the learned magistrate imposed though the appellant was a first offender. No doubt the sentence imposed has caused us grave concern. We wish to draw the attention of trial courts to the caution sounded by the court of appeal regarding meting out excessive sentences in the case of **George Otieno Oloo v/s Republic KSM Criminal appeal No. 137 of 2004**. The court stated:

"**..... 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 magistrate or judge. This being the case, the magistrate and the judge must act judicially and not to award sentences capriciously. Of late, we have noted a trend where maximum and manifestly harsh sentences of imprisonment have been imposed on convicted persons 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 sentencing notes of the trial magistrate do not at all justify why the maximum sentence was preferred. Much as the offence committed was serious, it did not however justify the sentence imposed, bearing in mind that the appellant was a first offender. **Mr. Orinda** did indicate that the appellant appeared to be mentally disadvantaged. However from our own observation of the appellant, we are unable to agree with the learned state counsel. We are certain that the appellant's mental condition would not have escaped the attention of the learned magistrate.

Anyway, we have heard the appellant on his plea for reduction of the sentence and the learned Principal state counsel, **Mr. Orinda's** input.

For our part we think that although the offence committed was serious in all the circumstances we however are of the view that the sentence meted out was harsh and excessive. We allow the appeal, set aside that sentence and substitute it with one of fifteen years imprisonment with hard labour to run from time of his conviction by the subordinate court.

Dated and delivered at Nyeri this 29th day of May 2008

MARY KASANGO

JUDGE

M. S .A .MAKHANDIA

JUDGE