

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

Criminal Appeal 84 of 2006

STEPHEN INEGENE MUGO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence in Senior Principal Magistrate's Court at Murang'a in Criminal Case No. 1612 of 2004 dated 29th March 2006 by S. B. N. Atambo – R.M.)

J U D G M E N T

The appellant whose age was put at 85 years at the time of conviction and sentence and who must now be over 87 years was charged with 3 counts of defilement of a girl contrary to section 145 (1) of the Penal Code. Alternative to the above 3 counts, the appellant also faced three counts of indecent assault on a female contrary to section 144 (1) of the Penal Code. The girls allegedly defiled and or indecently assaulted and who were the complainants in all the charges were **V. W. M** aged 8 years, (PW1) **N. N. P**, aged 9 years (PW2) and **J.W** aged 8 years (PW3). The appellant pleaded not guilty to all the charges but was however after a full trial convicted on the alternative count to count 1, that is indecent assault and sentenced to 2 years imprisonment. He was also convicted on counts 2 and 3 (main counts) and sentenced to 7 years imprisonment respectively on each of those 2 counts. The learned magistrate whether deliberately or by inadvertent omission failed to impose the mandatory hard labour as part of the sentence. Nonetheless he ordered that the sentences imposed as aforesaid do run concurrently.

Those convictions and sentences triggered this appeal. When the appeal came up for hearing however, the appellant elected to abandon the appeal on conviction, but pursue the appeal on sentence instead.

In support of his appeal on sentence, the appellant submitted that the sentence imposed was harsh and manifestly excessive. That he was an old man aged 86 years and cannot cope with prison conditions.

Mr. Orinda, learned principal state counsel conceded to the appeal on sentence. Counsel submitted that although the sentence imposed was within the law, the same was nonetheless manifestly harsh and excessive bearing in mind that the appellant was a first offender and his age. Counsel therefore invited me to review the sentence downwards.

The sentence imposed on the appellant pursuant to his conviction was of course legal. However considering the appellant's age (he is actually 87 years old), the sentence imposed appears to be too harsh and excessive in the circumstances. It has been constantly reiterated that the appropriate sentence to be imposed 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. The sentencing court must be guided by evidence and sound legal principles. It must take into account all relevant factors and eschew all extraneous or irrelevant factors.

The appellate court will only interfere with the sentence imposed if it is shown to be unlawful and illegal or if it is manifestly harsh and excessive as to amount to a miscarriage of justice. See **Ogola s/o Owuora v/s Republic (1954) 19 EACA 270, Nilson v/s Republic (1970) EA 599 and Wanjema v/s**

Republic (1971) EA 493.

The offences for which the appellant was convicted carries maximum sentences of life imprisonment and 21 years respectively with hard labour. The appellant was a first offender and not a serial defiler. Considering the circumstances, though the sentence was legal, it was nonetheless manifestly harsh and excessive as to amount to a miscarriage of justice.

Mr. Orinda was therefore right in conceding to the appeal on sentence. The offence committed no doubt is serious and it is prevalent in this area. As correctly observed by the learned magistrate, a deterrent sentence was called for. The complainants no doubt will suffer trauma and the after effects of the offence for the remainder of their lives. However the sentence imposed was manifestly harsh and excessive as to amount to a miscarriage of justice. It calls for my intervention. The appellant has now served over 2 years of the term and in my view, that is sufficient punishment. Accordingly I reduce the sentence of 7 and 2 years respectively to such a term as will result in his immediate release from prison i.e. the sentence is reduced to the terms already served with the consequence that the appellant shall forthwith be set at liberty unless otherwise lawfully held.

Dated and delivered at Nyeri this 10th day of June 2008

M. S. A. MAKHANDIA

JUDGE