REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Criminal Appeal 40 of 2006

JOHN IRUNGU KANGETHE……..…...…….....…… APPELLANT

VERSUS

REPUBLIC……..…….. RESPONDENT

(Being an appeal from the judgment of G.K. Mwaura,

Principal Magistrate in Principal Magistrate's

Criminal Case No. 409 of 2005 at Murang'a)

JUDGMENT

The appellant was charged and convicted at the lower court with ***defilement of a girl under the age of sixteen years contrary to section 145 (1) of the Penal Code.*** In the alternative count the appellant was charged with ***indecent assault on a female contrary to section 144(1) of the Penal Code.*** On being convicted of defilement the appellant was sentenced to fifteen years imprisonment. He has brought this appeal against the conviction and sentence. This is the first appeal. In deciding this appeal I am guided by the principles enunciated by the Court of Appeal Case of *Gabriel Njoroge vs Republic (1982 – 88) 1 KAR 1134 at page 1136* where it was stated:

"As this court has constantly explained, it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the question of fact as on the question of law, to demand a decision of the court of the first appeal and as the court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard from the witnesses and make due allowance in this respect (see Pandya v R (1957) EA 336, Ruwala vs R (1957) EA 570)."

PW 1 the mother of the child stated that her child was the second born and was nine years old. She was in Standard two in primary school. On 1st March 2005 at 5 p.m. while in her home a young man she named as Peter Ngari came and told her that he would show her where her daughter was. He took her in a bush where she saw her daughter's shoes and also saw a sack. Peter told her that he had found the appellant defiling her daughter. This witness said that she knew the appellant because he was employed by her neighbour. A search was mounted for the daughter and the villagers found her at a certain bush and brought her to PW 1. The child was first taken to the A.P. camp, later to Murang'a Police Station where they were referred to the hospital. She stated that the appellant often visited her home. After voire dire examination the child gave an unsworn statement. She said that she knew the appellant by the name of Irungu. On her way from school in the company of her brother M the appellant called her and told her to go to their home and bring to him a sack. She did so and on taking the sack to him he spread the sack down and defiled her. She said that she felt pain in her private part and was treated by the doctor. PW 3 was Peter Ngare who said that on 1st March 2005 on his way to the river near a mango tree he heard a child crying. He went there and found the child in the company of the appellant. He noted that there was a sack that was spread on the ground. The appellant on seeing him ran away. The appellant was known to him and he knew that he was employed by mama Wangu who was a neighbour. On being cross examined this witness repeated that he had clearly seen the appellant before he ran away. The Clinical Officer who examined the child said that there had been penetration and in his view the child had been defiled. The appellant on being put to his defence stated that his arrest and the charge were due to a grudge against him. Without indicating who he was referring to the appellant said that people stole his goods and he reported them. That there was a time the complainant had bribed the army to have him arrested. Subsequently he was arrested for this offence. He denied having committed the offence. In my view having reviewed the above evidence I find that the prosecution well met the criminal standard of proof. The child gave clear evidence of being sent by the appellant to get a sack. On getting it the appellant defiled her. The evidence of the child was supported by the evidence of PW 3 and the Clinical Officer. There was clear evidence that the appellant committed the offence. In that regard I do hereby reject the appeal against conviction. On sentence the appellant was sentenced to 15 years imprisonment. He was stated to be a first offender. With that in mind I find the sentence of 15 years to be excessive. I will therefore allow his appeal against the sentence. I therefore dismiss the appellant's appeal against conviction but in respect of the appeal against the sentence I do hereby set aside the sentence of the lower court and instead I substitute it with a sentence of 7 years imprisonment. That sentence will begin to run from the date of conviction by the lower court.

Dated and delivered at Nyeri this 7th day of October 2008.

MARY KASANGO

JUDGE