



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Criminal Appeal 36 of 2005

[From the original conviction and sentence in Criminal Case No. 136 of 2005 Chief Magistrate's Court, Nakuru – H. Wasilwa (S.R.M)]

SAMUEL MUMENYA WAINAINA APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

The appellant *Samuel Mumenya Wainaina* was charged with the offence of defilement of a girl contrary to Section 145 (5) of the Penal Code. The particulars of the charge stated that on the 5th day of January 2005 at ***[Particulars withheld]*** Farm, Mau Narok Division in Nakuru District within Rift Valley Province he, unlawfully had carnal knowledge of ***E W N*** a girl under the age of 16 years.

The appellant was convicted on his own plea of guilty and sentenced to ten (10) years imprisonment with hard labour. The appellant has appealed against the sentence. He urged this court to consider that the complainant was his girlfriend for a period of about four months and the complaint in this matter was lodged by the complainant's sisters. He further contended that when he was arrested, he was not able to explain to the police his relationship with the complainant. He pleaded for leniency and said he has suffered a lot in prison where he broke his hand and it is not possible to get appropriate treatment for the broken limb while in Prison.

On the part of the State, the learned State Counsel ***Mr. Mugambi***, opposed this appeal on the grounds that the appellant was convicted on his own plea of guilty. The facts were read to the appellant and he admitted. The sentence of ten (10) years is appropriate considering the gravity of the offence. ***Mr. Mugambi*** submitted that the court should ignore the plea by the appellant that he was tortured by the police. This is because the appellant never said so in the lower court. Similarly, the argument that the complainant was his girlfriend was revealed by the appellant during the trial in the lower court.

I have considered the evidence that was before the trial court especially the facts of the matter which shows that the appellant took advantage of the complainant a girl below the age of sixteen (16) years. The complainant had been sent by her parents to collect milk at ***[particulars withheld]*** Farm in Mau Narok, when she met the appellant who called enticed her to accompany him to his house so that he can give her some green maize. The complainant followed the appellant to his house where he grabbed her and defiled her. Due to the pain, the complainant screamed and neighbours came to rescue her. The appellant was arrested by the members of the public who responded to the screams and caught the

appellant still in the act. The complainant was taken to Mau Narok police station where she was issued with a P3 form and subsequently she went to the hospital. The appellant was charged with the offence of defilement.

This being the first appeal, this court has the mandate to reconsider and evaluate the evidence and arrive at its own determination of whether to uphold the conviction.

[See the case of **Njoroge Vs Republic K.L.R page 19.**

In the present case, the appellant was convicted on his own plea of guilty, the plea was properly taken and the issue to consider is whether the sentence is appropriate and according to the provisions of the Law. The maximum sentence which was provided for is fourteen (14) years with hard labour. The principles to be considered by the court while exercising its jurisdiction to review or utter a sentence imposed by the trial court were settled in the case of **Ogalo son of Owuor [1954] E.A.C.A at page 270** where the Court of Appeal held as follows: -

“The court does not utter a sentence on a mere ground that if the member of the court had been trying the appellant they might have passed a somewhat different sentence and it will not ordinarily interfere with the discretion exercised by a trial judge unless it is evident that the judge acted upon some wrong principle or overlooked some material facts if the sentence is manifestly excessive in view of the circumstances of the case.”

The circumstances of this case show that the complainant was a girl of sixteen (16) years whom the appellant took undue advantage of. The appellant’s behavior and the offence he committed is not only serious, but should also be discouraged.

I have also taken into consideration the impact of this offence on the life and health of the complainant who might suffer irreparable damage as a result of this crime against her. One may not be lost to the fact that this is an error where the complainant could have been infected with life threatening sexually transmitted diseases such as HIV/AIDS or even the stigma of undergoing such an ordeal as well as other psychological traumas.

Taking the totality of the above analysis of this case, am not inclined to interfere with the sentence imposed by the trial court. The appellant should be incarcerated as he is dangerous to members of the public. In the resort, the appeal is dismissed and the sentence is confirmed.

Judgment read and signed on 9th February 2007.

MARTHA KOOME

JUDGE