



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Criminal Appeal 112 of 2003**

**(From original conviction and sentence in Criminal Case No. 26 of 2003 of the Senior Resident Magistrate's Court at Molo -R. Kirui[S.R.M.]**

**FRANCIS MUGO.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

The appellant, Francis Mugo was charged with the offence of defilement contrary to Section 145(1) of the Penal Code. The particulars of the offence were that on the 30<sup>th</sup> December 2002 at Kandutura farm, Rongai in Nakuru District the appellant unlawfully had carnal knowledge of Ann Nyokabi, a girl of ten (10) years. The appellant was alternatively charged with indecent assault of a female contrary to **Section 144(1)** of the **Penal code**. The particulars of the offence were that on the same day and in the same place, the appellant unlawfully and indecently assaulted Ann Nyokabi by touching her private parts. The appellant pleaded not guilty to both counts and after a full trial was convicted on the main charge of defilement and sentenced to serve fourteen (14) years imprisonment with hard labour and one stroke of the cane. The appellant was aggrieved by the sentence imposed and has appealed to this court.

In his petition of appeal, the appellant was aggrieved by the sentence of the trial magistrate which he considered to manifestly harsh and excessive putting into consideration his young age. He pleaded with the court to consider his mitigation and the fact that he was a first offender and therefore ought to have been sentenced to serve a non-custodial sentence. During the hearing of the appeal, the appellant pleaded for the leniency of the court. He pleaded that he had been sufficiently punished and would not commit such an offence again as he had learnt his lesson. Mr. Mugambi for the State submitted that the sentence which was imposed was lenient in the circumstances putting into consideration that the maximum sentence for the offence which was committed by the appellant is life imprisonment. It was Mr. Mugambi's view that the sentence imposed ought to be enhanced.

I have carefully considered the plea of reduction of sentence by the appellant. For this court to interfere with the exercise of judicial discretion by the trial magistrate when he sentenced the appellant, it must be established that the trial magistrate exercised his discretion wrongly. The appellant must establish that the trial magistrate either failed to consider a material factor or considered an immaterial factor when he sentenced the appellant. The appellant must also establish that he was sentenced to an illegal sentence which was not in conformity with the law. Finally the appellant may plead that taking into consideration of the facts of the case, the trial magistrate sentenced him to a harsh and excessive sentence in the circumstances that it amounted to an erroneous exercise of judicial discretion.

In the present appeal, the appellant is not appealing against conviction. In fact he admits that he committed the offence. He however pleads with this court to reduce the sentence that was imposed on him. Before the **Sexual Offences Act** came into effect on the 21<sup>st</sup> July 2006, **Section 145(1)** of the **Penal Code** provided the maximum sentence for a person who is convicted of defilement to be life imprisonment with hard labour. **Section 8(2) of The Sexual Offences Act** provides that where a person is convicted for defiling a child of less than eleven (11) years then such a person would be imprisoned for life. The appellant was convicted of defiling a girl who was then aged ten (10) years. It is therefore clear from the foregoing that the sentence which was imposed on the appellant by the trial magistrate was

lenient in the circumstances. The appellant has not placed any reasons before this court that would persuade this court to interfere with the lawful sentence of the trial magistrate. This court will not therefore interfere with the said sentence.

The appeal by the appellant on sentence is hereby dismissed. The conviction and the sentence of the trial magistrate is hereby confirmed.

It is so ordered.

**DATED at NAKURU this 13<sup>th</sup> day of March 2007.**

**L. KIMARU**

**JUDGE**