REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 116 of 2005

(From original conviction and sentence in criminal case No. 1061 of 2005 of the Chief Magistrate's Court at Nakuru – A. B. Mongare {R.M.})

JOSEPH KARIUKI IKOMBE……….…………….……………APPELLANT

VERSUS

REPUBLIC……………………………….………………..RESPONDENT

JUDGMENT

The appellant Joseph Kariuki Ikombe was charged with the offence of defilement of a girl contrary to section 145(1) of the penal code. The appellant also faced a second count of indecent assault on a female contrary to section **144(1)** of the **penal code.** The particulars of the second count for which the appellant was convicted, stated that on the 9th day of April 2005 at ***[particulars withheld]*** estate in Nakuru district within Rift valley province unlawfully and indecently assaulted R K N by touching her private parts namely the vagina. The appellant pleaded not guilty to the charges and after a full trial he was convicted of the second count and sentenced to ten *(10)* years imprisonment with hard labour.

Being dissatisfied with the conviction and sentence the appellant appealed. In the petition of appeal dated 22nd July 2005 the appellant raised several grounds of appeal but during the hearing of the appeal, the appellant pleaded that the sentence imposed be reduced.

This appeal was opposed by Mr. Mugambi the learned counsel for the State. He submitted that the trial court duly considered the mitigation offered by the appellant before the sentence. The sentence imposed by the trial court is within its discretion and there is no justifiable reason why this court should interfere with the sentence.

This being a first appeal and although the appellant did not submit on the other grounds of appeal, this court is mandated to reconsider and re-evaluate the evidence before the trial court and arrive at its own independent determination on whether to uphold the conviction and sentence. In so doing, the court should bear in mind that it never saw or heard the witnesses and give due allowance for that. *See* the case of **Njoroge –vs- Republic [1987] KLR page 19**.

I now wish to briefly review the evidence that was before the trial court which led to the conviction and sentence of the appellant. **R K PW1** the complainant herein was examined by the court and was found suitable to give evidence on oath. She narrated to the court how on 9th April 2005 at about 7.00 p. m. she

was sent by the mother to a nearby shop to buy spices. On her way, she met the appellant whom she said she knew, as a neighbour. He requested her to go back with him to buy milk and she followed him to his house as she thought he had gone to the house to pick money. While in his house, the appellant undressed PW1 and she said that he did 'bad manners' after which she felt pain and started bleeding. She lied to him that she was being called and he let her go. She proceeded to her home and told her mother. They proceeded to the police station and to the hospital where she was admitted for 2 days. PW1 reported this incident in the presence of her mother and the appellant's wife. PW1 was submitted to intense cross-examination in which she confirmed that she knew the appellant as a neighbour.

M W PW2 the mother of the complainant, recalled how on the 9th April 2005 at about 7.00 p. m. she had sent PW1 to buy spices at a nearby shop. At the time, she was sending PW1 she was with the appellant's wife who also testified as DW2. The appellant also joined them but left after five *(5)* minutes. After PW1 did not return from the shop after a long while PW1 started looking for her around the shop. PW2 heard the complainant crying and realized that she was walking with difficulties. Upon enquiring, PW1 told her what had happened. She tried to inquire from the appellant and his wife but the appellant ran away. That is when she took PW1 to the police station and to the hospital. The appellant was arrested the same day by **PC Zachary Openda PW3.**

Dr. Vitalis Kogutu PW4 from the Nakuru Provincial General Hospital produced the P3 form which was completed by Dr. Langat. The examination revealed that PW1 was subjected to non penetrative sexual assault as the outside genitalia was normal and there was no rapture of the hymen. However there was fungal infection.

Put on his defence the appellant gave unsworn statement and denied having committed the offence. He testified that on the material day he came home and found his wife was not at home. He went out to look for her and found her at PW2's compound. He asked her for the house keys and he went home to sleep. Later the police came and forced him to open the door. They arrested him and charged him with the present offence. He also relied on the evidence of his wife **M K DW2**. She testified that on the material day she was at the compound of the complainant's mother when the appellant came and said that he had lost some money but he left saying that he had gone to look for somebody. She confirmed that she was present also when PW1 was sent to the shop and later PW2 called her alleging that the appellant had defiled the child.

The learned trial magistrate evaluated the evidence and disregarded the defence and rightly so, as the testimony of the appellant and his wife is at variance. In deed the evidence of DW2 corroborates that of PW1 and PW2. The trial court accepted the evidence of the complainant and her mother. The medical report showed that the complainant was indecently assaulted.

This court cannot fault the decision by the trial court which found the evidence by the complainant candid. It is the trial court that had a great advantage of assessing the credibility of the witness than the appellate court. As it was held in the case of **Republic Vs Oyier [1985] KLR page 353**;

"***The first appellate court could not interfere with those findings by the lower court which were based on the credibility of witnesses unless to reasonable tribunal could make such findings or it was shown that there existed errors of law***."

When re-evaluating the evidence before the trial court it is also important to bear in mind the provisions of **section 124 of the evidence act Cap 80** which provides that:

"provided that wherein a criminal case involving a sexual offence the only evidence is that a child of tender years who is the alleged victim of the offence, the court shall receive the evidence of the child and proceed to convict the accused person if, for reasons to be recorded in the proceedings, the court is satisfied that the child is telling the truth."

I find that the complainant was able to explain to her mother that she was assaulted. She also detailed the same to the court when she testified. She was also able to identify the appellant by his name and that he

was a neighbour. The assault was confirmed by the medical examination.

On the issue of the sentence the maximum sentence provided for indecent assault is fourteen (14) years. The principles to take into consideration by an appeal court on whether to alter a sentence imposed by the trial court were articulated in the case of **Ogalo s/o Owuor [1954] E.A.C.A at page 270** where the Court of Appeal held as follows: -

"***The court does not alter 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***."

In the view of the above analysis I am satisfied that the trial court properly exercised its discretion on sentence. I find no reason why this court should interfere with the sentence as the law provides for the maximum sentence of 14 years for the offence which the appellant was convicted on. In the result the appeal is dismissed and the conviction and sentence imposed is upheld.

Judgment read and signed on 27th September, 2007

M. KOOME

JUDGE