



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Criminal Appeal 212 of 2006

MUTUKU KUNYAE.....APPELLANT

-AND-

REPUBLIC.....RESPONDENT

(An Appeal from sentence imposed by Senior Principal Magistrate Mrs. Mwangi on

21st June, 2004 in Criminal Case No. 4087 of 2004 at the Kibera Law Courts)

JUDGEMENT

The appellant, *Mutuku Kunyae*, was charged with the offence of defilement of a girl under the age of 14 years contrary to s.145(1) of the Penal Code (Cap.63). The particulars were that the appellant, on 27th May, 2004 at ***[particulars withheld]*** in Kajiado District of the Rift Valley Province, had carnal knowledge of ***L W***, a girl under the age of 14 years. The appellant also faced an alternative charge, of indecent assault on a female contrary to s.144(1) of the Penal Code (Cap.63); the particulars being that he, on 27th May, 2004 at ***[particulars withheld]***, assaulted ***L W*** a girl of 13 years of age by touching her private parts.

The trial Court record shows that the substance of the charges and every element thereof was stated by the Court to the appellant herein, in a language that he understands, after which, upon invitation to plead, he replied: "True."

Thereafter, the facts of the case were read out to the appellant herein, as follows. The complainant, who is a pupil at ***[particulars withheld]*** Primary School and aged 13 years, was going home from school, on 27th May, 2004 at 6.00 p.m. when the appellant herein called her, and sent her to a shop to buy certain items for him. After the complainant entered the appellant's house with the items which she had just purchased as requested, the appellant locked the door, and went on to defile here. The complainant shouted as she was being defiled, and the noise attracted a neighbour. The neighbour forced the door open, whereupon the appellant escaped through the window; but members of the public gave chase, and caught him. The complainant was taken for treatment at Ong'ata Ongai Medical Clinic where she was found to have injuries in her private parts. The Police doctor confirmed and made a record that the complainant had been defiled; and a charge was then brought against the appellant herein. The Police doctor's record was produced as exhibit in a P3 form.

To the facts as set out by the prosecution, the appellant acknowledged their correctness, whereupon the

learned Senior Principal Magistrate convicted him on his own plea of guilty.

Subsequently the Court sentenced the appellant to a fourteen-year term of imprisonment with hard labour, after taking into account the fact that he was a first offender. The appellant made no statement in mitigation.

Now in his grounds of appeal the appellant states:

“Since I was convicted on my own plea I request and beg the Honourable Court to be lenient on me and reduce the harsh sentence on humanitarian grounds.

“That I am a first offender and I suffer...illness which the poor environment of the prison has [aggravated]...

“That I am always haunted by a feeling of guilt... for having committed the ...offence and I promise never to [engage in criminality] in the future.”

The appellant repeated those same points in written submissions which he placed before this Court.

Learned State Counsel **Mrs. Kagiri** expressed her opposition to this appeal on sentence, urging that since the offence carried a maximum penalty of life imprisonment, the term of 14 years awarded by the learned Senior Principal Magistrate was entirely lawful and fair. The sentence awarded, counsel urged, was “not harsh or excessive, in view of the seriousness of the offence.” It was submitted that there was “nothing on the record to show that the [Court’s] discretion wasn’t exercised according to law.”

The offence herein was committed at a time when the applicable law, s.145(1) of the Penal Code (Cap.63) had not yet been substituted by the more detailed legislation in the *Sexual Offences Act, 2006 (Act No.3 of 2006)*. The new Act now carries a *minimum* sentence of ten years’, and a maximum of life-imprisonment for the offence of rape. S.145(1) of the Penal Code (Cap.63) which is the pertinent law in respect of the matter before this Court, thus provides:

“Any person who unlawfully and carnally knows any girl under the age of sixteen years is guilty of a felony and is liable to imprisonment with hard labour for life.”

It is clear that the sentence meted out by the learned Senior Principal Magistrate was in every respect in accordance with the law. I would hold also that, given the nature and the gravity of the offence committed by the appellant, the learned Magistrate had exercised her discretion judiciously, in imposing the sentence now appealed against. I have seen no element in the appellant’s case so momentous in law or fact, to warrant an interference with the sentence imposed by the Court below.

Consequently, I hereby dismiss the appellant’s appeal, and affirm the sentence imposed by the learned Senior Principal Magistrate.

Orders accordingly.

DATED and DELIVERED at Nairobi this 26th day of September, 2007

J. B. OJWANG

JUDGE

Coram: Ojwang, J

Court Clerk: Tabitha Wanjiku

For the Respondent: Mrs. Kagiri

Appellant in person