REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL 329 OF 2004

EDWARD MURAGE GITHINJI ……..…..…… APPELLANT

VERSUS

REPUBLIC …… RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No. 2050 of 2003 dated 17th November 2004 by Mrs. E. J. Osoro – SRM)

J U D G M E N T

Edward Murage Githinji, the appellant, was on 17th November 2004 convicted by the Chief Magistrate's Court at Nyeri (E. J. Osoro (Mrs.) SRM) after a full trial for the offence of Defilement of a girl contrary to section 145(1) of the Penal Code and sentenced to **ten (10) years** imprisonment. Although it was mandatory under section 145(1) of the penal code before its repeal by act No. 3 of 2006, the learned trial magistrate did not sentence the appellant to hard labour as required. The appellant was nonetheless aggrieved by the conviction and sentence. Hence he has preferred this appeal.

In his appeal lodged through **Messrs Maina Karingithi & Co. Advocates** the appellant has cited 5 grounds upon which he faults the learned magistrate for his conviction. However since the appellant abandoned the appeal on conviction and elected to pursue the appeal on sentence only, it is not necessary to consider the grounds of appeal as most of them turned on the issue of conviction. However for purposes of this appeal the last ground in which the appellant laments that the sentence meted out was harsh, oppressive and excessive in the circumstances of this case is pertinent and relevant.

In support of his appeal on sentence, the appellant who appeared in person submitted that the 10 years imprisonment imposed on him by the learned magistrate was harsh and excessive. Since imprisonment he had tremendously reformed and had undergone training in masonry and tailoring.

Mr. Orinda, learned state counsel did not support or oppose the appeal. He opted to leave everything to court, a rather unfortunate position to take in such a case.

It is trite law that sentence is a matter that rests in the discretion of the sentencing and trial court; and that on appeal, the appellate court will not easily interfere with the sentence, unless that sentence is shown to be manifestly excessive in the circumstances of the case, or that the trial court overlooked some material factor, or took into account, some irrelevant material, or acted on a wrong principle. See **Ogola**

s/o Owuor v/s Republic (1954) 21 EACA 270, Wanjema v/s Republic (1971) EA 493 and **Bernard Gacheru v/s Republic (Nakuru) Criminal Appeal No. 188 of 2000** (unreported).

On the evidence tendered by the prosecution I do not think that they disclosed the offence charged. Section 145(1) of the Penal Code defines what constitutes a charge of defilement. The section is in the following terms:

"……. **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 …….."**

The section thus makes it clear that the offence of defilement is committed if the act of carnal knowledge of a girl under the age of sixteen years is unlawful. It is clear from the wording of the section that having carnal knowledge perse of a girl under the age of sixteen years is not an offence given what is stated in the proviso to the section. It is perfectly legal for a male to have lawful carnal knowledge of a girl under the age of sixteen years. Accordingly, for a conviction to be founded on the charge the prosecution need to show that the complainant was below the age of sixteen at the time of incident, that the sexual act was unlawful, that the complainant was not a wife of the accused at the time and it does not appear to the court that accused person believed or had reasonable cause to believe the girl to be over sixteen years. As stated by **justice Ondeyo** in the case of **Ngeno v/s Republic (2002) 1 KLR 457** whose conclusion I agree with "……. **A charge under section 145(1) of the Penal Code must in the particulars include the word "unlawful"**. Failure to state in the particulars that the carnal knowledge was unlawful renders the charge fatally defective. The particulars in this case were to this effect "……. **Edward Murage Githinji on 12th day of August, 2003 at Giakeibei area in Nyeri District within Central Province had carnal knowledge of Ann Wanjiru Wachira a girl under the age of 14 years ….."** The particulars of the charge as given do not at all allude to the carnal knowledge being unlawful. That omission was fatal and is not curable by virtue of section 382 of the Criminal Procedure Code.

There is also another aspect in this appeal that has caused me anxiety. The age of the complainant was not empirically established. In cases of defilement it is absolutely necessary to establish the age of the complainant by production of the Doctor's age assessment report and or a birth certificate. It is not sufficient to merely state from the dock that this is my age. In this case it was merely the word of the complainant that she was aged 14 years that carried the day. That fact was disputed by the appellant which meant that the prosecution should have gone for empirical evidence. In the absence of such evidence, the age of the complainant was not thus established so as to bring th charge within the bracket of defilement.

Yes the appellant may have abandoned the appeal on conviction. However it behoves me as the first appellate court notwithstanding the position taken by the appellant to subject the evidence tendered to fresh analysis so as to be convinced whether the conviction is sustainable. On the two grounds that I have attempted to address in the preceding pages of this judgment I am far from being persuaded that the conviction of the appellant was based on sound evidence. Accordingly I would allow the appeal, quash the conviction and set aside the sentence imposed.

Should I order a retrial? I do not think so. A retrial can only be ordered if the original proceedings were defective. In the present case, there was no proper charge before the trial court upon which the proceedings would have been conducted. In those circumstances, a retrial can only assist the prosecution amend the charge to the detriment of the appellant. A retrial can never be ordered as to assist the prosecution rectify their mistake. Considering the term served, a retrial may expose the appellant to prejudice and double jeopardy.

That being my view of the matter, I would allow the appeal both on conviction and sentence. Being the first appellate court and as I have already stated. I am not bound by the grounds advanced by the appellant in his petition of appeal. Even if the appeal is against sentence only I am also bound to look at the conviction and decide whether it was sustainable. It was not in the circumstances of this case. The evidence presented was at variance with the charge preferred. Accordingly the appellant shall forthwith be set at liberty unless otherwise held for good reasons.

Dated and delivered at Nyeri this 31st day of October 2007

M. S. A. MAKHANDIA

JUDGE