



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 253 of 2006

(From original conviction and sentence of the Chief Magistrate's Court at Nakuru in Criminal Case No. 1566 of 2003 H.Wasilwa [P.M.]

SAMMY ABEDI ISHMAEL.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Sammy Abedi Ishmael was charged with attempted defilement of a girl under the age of 14 years contrary to Section 145(2) of the Penal Code. The particulars of the offence were that on the 15<sup>th</sup> July 2003 at Ngwataniro village, Mau Narok, the appellant attempted to have unlawful carnal knowledge of Nancy Mugure, a girl under the age of 14 years. The appellant was alternatively charged with **indecent assault on 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 Nancy Mugure, a girl of the age of twelve years by touching her private parts. The appellant pleaded not guilty to the charge. After a full trial, the appellant was found guilty of the main charge and sentenced to serve five years imprisonment with hard labour. The appellant was aggrieved by his conviction and sentence and duly filed an appeal to this court.

Although in his petition of appeal, the appellant raised several grounds challenging his conviction and sentence, at the hearing of the appeal, he abandoned his appeal against conviction. He instead pleaded with this court to exercise leniency on him and reduce the sentence that was imposed on him by the trial magistrate. He stated that at the time he committed the offence, he was immature and stupid. If released, he would not repeat the offence again. He told the court that while he was in prison he had trained tailoring and was now rehabilitated. He told the court that he was now ready to be a useful member of the society. Mr. Mugambi for the State opposed the appeal. He submitted that the sentence that was meted out on the appellant was lenient in the circumstances. He told the court that the trial magistrate had considered the mitigation offered by the accused before she sentenced him. He urged this court not to interfere with the said sentence.

I have considered the plea by the appellant for reduction of sentence. I have also considered the submission made by Mr. Mugambi on behalf of the State in opposing the appeal on sentence by the appellant. The Court of Appeal in **Samuel Githua Njoroge vs Republic CA Criminal Appeal No.53 of 2006 (Nakuru) (Unreported)** held at page 2 as follows;

***“The principles upon which an appellate court can interfere with the discretion of a trial [Magistrate] as regards sentence are well settled. The appellate court can only interfere where the trial [Magistrate] in assessing the sentence has acted on wrong principles or imposed a sentence which is manifestly inadequate or manifestly excessive. (See Diego vs Republic [1985] KLR 621.”***

In the present appeal, the appellant was found guilty of the offence of attempted defilement. According to the evidence adduced by the medical practitioner who saw the complainant after the sexual assault, the complainant was actually defiled by the appellant. The appellant told the court that he regrets his actions at the time as he was still young, immature and stupid. I have however considered the totality of the

evidence adduced in this case, including the submissions made by Mr. Mugambi on behalf of the State. I agree with Mr. Mugambi that the sentence of five years imprisonment that was meted out on the appellant was extremely lenient in the circumstances. The appellant was lucky to have escaped with such a lenient sentence.

The appellant should ride his luck. I will not interfere with the sentence of the trial magistrate. I will uphold the conviction and the sentence of the trial magistrate. The appeal filed by the appellant, lacking in merit, is hereby dismissed. The appellant shall serve the sentence that was imposed by the trial magistrate.

It is so ordered.

**DATED at NAKURU this 31<sup>st</sup> October, 2007**

**L. KIMARU**

**JUDGE**