



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**

**Criminal Appeal 40 of 2006**

*(From Original Conviction and Sentence in Criminal Case No. 57 of 2005 of the Senior Resident Magistrate's Court at Voi: K. Muneeni – S.R.M.)*

**LIVINGSTONE MGARA MJOMBA.....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

LIVINGSTONE MGARA MJOMBA, the Appellant in this appeal was upon trial before the Senior Resident Magistrate at Voi on the charges of defilement of a girl under the age of 14 years contrary to section 145(1) of the Penal Code and Abduction of a girl contrary to section 143 of the Penal Code convicted and sentenced to 18 years imprisonment on the first count and 2 years imprisonment on the second count. He has appealed against the sentences only.

In both his Petition of Appeal and written submissions he says he is a first offender and he is very remorseful. He says the sentence imposed upon him is excessive and pleads for leniency.

This is a sad case of a young girl whose life has been ruined.

The girl is an orphan who at the material time was staying with his uncle PW3. On the 6<sup>th</sup> January 2005 at about 2.00 p.m. his uncle sent her with another girl to Wundanyi to buy sugar. She did not go back home. After seven days the Appellant, his father and another went to the complainant's uncle's home and reported that the girl was at their home and that they had gone there to negotiate and pay dowry. The complainant's uncle could not hear of that. Instead he handed them to his son PW4 who after talking to them asked them to return the following day. In the meantime PW4 talked to the Children's Officer who advised him to report the matter to police.

When the Appellant and his father returned to the girl's uncle's home he was arrested and taken to Wundanyi Police Station and later led the police to his home where the girl was found. On being interviewed the girl said she was in love with the Appellant and that they were married. The Appellant was later charged with defilement and abduction and as I have said after trial he was convicted and sentenced to 18 years imprisonment on count 1 and two years imprisonment on count 2.

I agree with the trial magistrate that a girl under the age of 16 years has no capacity to consent to a marriage let alone a sexual act. The Appellant was therefore properly convicted.

As I have said this is a sad case. Both the Appellant and the girl thought that they could legally marry. Even the Appellant's father and a neighbour also shared in that illusion and boldly went to the girl's home to pay dowry. When interviewed the girl said that for the seven days she was at the Appellant's home and even earlier they had had an amorous relationship and generally stayed as husband and wife.

It would appear that the Appellant comes from a community that encourages child marriages. Such communities should know that those "marriages" are outlawed and the parents themselves should be in the forefront in discouraging them.

Whereas the conviction of the Appellant was, as I have said, proper, there is however one disturbing aspect of this case. The learned trial magistrate did not address his mind to the proviso to section 145(2) of the Penal Code which talks of the apparent age of the defilement victim. It provides that:-

“Provided that it shall be a sufficient defence to any charge under this section if it is made to appear to the court before whom the charge is brought that the person so charged had reasonable cause to believe that the girl was above the age of sixteen years or was his wife.”

Though there is nothing on record to show that the Appellant alluded to the age of the girl but in circumstances like those obtaining in this case where both the accused and the girl are shown to have had some love affair, the court should enquire from the accused if he thought the girl was over sixteen years old. If that enquiry had been made I am sure it could at least have influenced the sentence.

Taking all this into account and the Appellant's conduct in the matter I reduce the sentence on both counts to imprisonment terms that will secure the Appellants' immediate release. The Appellant shall be released forthwith unless otherwise lawfully held.

DATED and delivered this 30<sup>th</sup> day of October 2007.

**D.K. MARAGA**

JUDGE