

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CRIMINAL APPEAL NO. 246 OF 2004

STEPHEN MAINA MITHEKO APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of Senior Resident Magistrate's Court at Kangema in Criminal Case No. 524 of 2004 dated 5th August 2004 by Miss R. N. Muriuki – SRM)

J U D G M E N T

Stephen Maina Mitheko, the appellant, was on 5th August 2004 convicted by the Senior Resident Magistrate's Court at Kangema (R. N. Muriuki (Miss) SRM) on his own plea of guilty to Attempted Defilement of a girl contrary to section 145(2) of the Penal Code and sentenced to **eight (8) years** imprisonment with hard labour. He was aggrieved by the sentence, hence this appeal.

In his appeal lodged in person the appellant complains before me that the sentence was manifestly excessive in the circumstances of the case, that he pleaded guilty to the charge, that he was under influence of alcohol when he committed the offence, that he was a first offender, was remorseful and finally that his parents were all of advanced age and looked upon him for survival.

The facts presented before the trial court and which were fully accepted by the appellant were very brief. On the 2nd August 2004 at 7.00 a.m. the complainant **Jackline Nduta** aged six years left home to attend school but on the way she met the accused standing near a tree at a tea buying centre. The accused grabbed the complainant and took her inside the buying centre. The complainant began crying and this attracted the attention of the members of the public who rushed to the scene and the accused upon seeing them ran away. They raised an alarm and the accused was chased and apprehended as he ran away. They took the accused and the complainant to the police station and the accused was then charged with the offence before court.

In support of the appeal the appellant merely reiterated what he had set out in his petition of appeal aforesaid; the only addition being that he had already served 3 years out of the 8 years imprisonment imposed.

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 a criminal matter.

It is trite law that sentence is a matter that rests in the discretion of the 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 facts of the case as narrated by the prosecution I do not think that they disclosed the offence charged. I do not think that the mere fact that the appellant grabbed the complainant and took her inside the buying centre could without more amount to attempted defilement. The appellant could have grabbed the complainant for any other reason good or bad without necessarily intending to defile her. It could

have been for her own safety even. Further there is no empirical evidence of the age of the complainant so as to attract the charge of defilement. This was a fatal omission on the part of the prosecution and the court.

In my view the facts led not having proved the charge laid, the sentence imposed was illegal. Small wonder then that the learned state counsel opted to leave the matter in the hands of the court. That option must have been informed by this reality. That being my view of the matter, I would allow the appeal both on conviction and sentence. Being the first appellate court 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 supportable. It was not in the circumstances of this case. The facts presented were 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 29th day of October 2007.

M. S. A. MAKHANDIA

JUDGE