



REPUBLIC OF KENYA

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

CRIMINAL APPEAL NO. 731 OF 2003

RICHARD ODHIAMBO OSANGO..... APPELLANT

VERSUS

REPUBLIC .....RESPONDENT

JUDGMENT

The Appellant in this appeal, **RICHARD ODHIAMBO OSANGO** (to whom I shall refer to as “***the Appellant***” in this Judgment) was charged with the offence of defilement of a girl contrary to Section 145 (1) of the Penal Code. The particulars of the offence were that on 9<sup>th</sup> day of April, 2003 at [*particulars withheld*] in Kajiado District within the Rift Valley Province, the Appellant had carnal knowledge of **MAO** a girl done the age of 14 years. The Appellant also faced an alternative count of indecent assault of a female contrary to Section 144 (1) of the Penal Code. The particulars being that on the 9<sup>th</sup> day of April, 2003 at [*particulars withheld*] in Kajiado District within Rift Valley Province unlawfully and indecently assaulted **MAO** a girl under the age of 14 years by touching her private parts.

The facts of the case were that the Complainant, a 12 year old girl was on 22.5. 2003 sent by her mother (PW3) to go to the shops and buy paraffin. As it was in the evening, PW3 asked the Appellant, a cousin to the Complainant (being a son of the Complainant’s father’s sister) to escort the Complainant to the shops. The Appellant obliged. However on the way they went via the Appellant’s house whilst the Complainant hesitated getting into the house by standing at the door, the Appellant allegedly pulled her into the house where he proceeded to put her on his bed, removed her pants and then defiled her. When he was through with her, the Complainant ran out of the house but was followed by the Appellant. Together they went and bought paraffin. On the way back, they bumped into the Complainant’s father (PW2) with whom the Complainant went home. She neither told the father or the mother what had transpired fearing that she could be beaten. The following day however she gathered courage and told the mother what the Appellant had done to her. She was taken to hospital and thereafter the matter was reported to the Police who subsequently had the Appellant arrested and charged with the instant offences.

The Appellant upon full trial was convicted on the 1<sup>st</sup> count and sentenced to 7 years imprisonment and 4 strokes of the cane. The Appellant was aggrieved by the conviction and sentence and hence lodged this Appeal citing four grounds. However when the Appeal came up for hearing the Appellant abandoned the Appeal on conviction and elected to proceed with the Appeal on sentence only.

In his written submissions in support of the Appeal and which he preferred to call amended grounds of Appeal, the Appellant stated that he was remorseful and prayed to be forgiven by this Court, that the

sentence imposed of 7 years was harsh and excessive and the Appellant being young, such sentence was most likely to ruin his future life, that he was deceived into lodging the Appeal against both the conviction and sentence by his fellow in-mates, that he was sorry for what he did because the Complainant was his nephew, that he was first offender and if released he was not going to repeat such an offence in future. Finally the Appellant prayed that this Court do reduce the sentence to such term as would be commensurate with the Appellant (sic).

Mr. Makura, Learned State Counsel, opposed the Appeal on sentence. He pointed out that as at the time the Appellant was convicted, the offence carried a maximum sentence of 14 years. The sentence was therefore neither manifestly harsh or excessive as claimed by the Appellant. Counsel further submitted that the trial Magistrate in imposing the sentence considered the Appellant's mitigation and the circumstances surrounding the case. She did not consider anything extraneous in arriving at the sentence. The Court exercised discretion properly. In conclusion the Learned State Counsel submitted that the 7 years jail term imposed was even lenient and this Court not therefore with it.

I have considered the submissions by the Appellant and by the Learned State Counsel, as well as the facts and the circumstances of this case and the law. As correctly stated by the Learned Magistrate when imposing the sentence:-

*“...the offence is however serious. A young girls life was affected by the accused person, for life...”*

Matters of sentence are ordinarily in the discretion of the sentencing Court save for those offences with minimum sentences. Unless it is shown that in exercising the discretion as to the sentence, the trial Court imposed an illegal sentence, or took into account extraneous matters or failed to take into account relevant matters, an Appellate Court should rarely interfere and or tamper with the sentence imposed. In the instant case I do not discern any such misdirections. The sentence imposed was within the law. In imposing the sentence the trial Court duly considered the Appellant's mitigation.

On my own evaluation of the facts and circumstances of the case, I think that seven years imprisonment in the circumstances of this case cannot by any stretch of imagination be viewed as excessive and or harsh. It was certainly lawful and well disserved. I see no reason to interfere with the jail term of seven years. It will stand. The only aspect of the sentence that I will interfere with is with regard to the 4 strokes of the cane. Corporal punishment having been outlawed by virtue of act No. 5 of 2003 the same shall not be meted out on the Appellant. Save for this minor alteration in the sentence the Appeal on sentence is otherwise dismissed.

Dated at Nairobi this 15<sup>th</sup> day of March, 2006.

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**MAKHANDIA**

**JUDGE**