REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
Criminal Appeal 560 of 2003

CHARLES MBUGUA KARANJA…….....….…….APPELLANT

VERSUS

REPUBLIC……...…….....…….RESPONDENT

JUDGMENT

The appellant, Charles Mbugua Karanja was charged with **defilement of a girl under the age of fourteen years contrary to Section 145(1) of the Penal Code**. The particulars of the offence were that on the 27th of June 2003 at [*particulars witheld*] Elburgon, the appellant had unlawful carnal knowledge of VWK, a girl under the age of fourteen years. He was alternatively charged with the offence of **indecent assault of 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 VWK, a girl under the age of fourteen years by touching her private parts. The appellant pleaded not guilty to both charges and after a full trial was found guilty of the alternative charge. He was sentenced to serve ten years imprisonment with hard labour. Being aggrieved by his conviction and sentence, the appellant appealed to this court.

Although the appellant challenged the decision of the trial magistrate both on conviction and sentence, at the hearing of the appeal the appellant abandoned his appeal on conviction. He however pleaded with the court to consider reducing the term of imprisonment imposed on him. He submitted that he had been in prison for two years and two months and while in prison, he had learnt his lesson and had realized the folly of his action. He told the court that he had reformed and would not repeat the offence if released. Mr Gumo, the Assistant Deputy Public Prosecutor submitted that the victim of the attack was a child who was then aged 6½ years. He submitted that the child, who was innocent, would be traumatized for the rest of her life. He urged the court not to disturb the sentence imposed upon the appellant by the trial magistrate.

I have considered the submissions on sentence made before me by the appellant and by Mr Gumo on behalf of the State. I have also considered the facts of this case. The appellant was convicted of indecently assaulting a girl of 6½ years. Having read the proceedings of the case, it is clear that the complainant was traumatized by the ordeal that she underwent in the hands of the appellant. The evidence adduced by the Clinical Officer who examined the complainant after the sexual assault confirmed that there had been no penetration. However there was evidence that the complainant had been infected with a venereal disease as a result of the said sexual assault by the complainant. Now the appellant wishes this court to reduce the sentence imposed upon him by the trial magistrate. He states that this court should exercise leniency on him. He says he had reformed and would not repeat the offence if released.

I have considered the said submissions made. I have also considered the circumstances of this case. The appellant admits to having committed the offence. The appellant's action was deliberate. He indecently assaulted an innocent child. There is no reasonable explanation for the appellant's action. I see no mitigating circumstances that would enable this court review the sentence imposed upon the appellant. However this court notes that the appellant was charged with the offence of indecent assault on the 3rd of July 2003 before the **Criminal Law (Amendment) Act**, **(Act No. 6 of 2003)** came into effect. The said Amendment to **Section 144(1) of the Penal Code** came into effect on the 25th of July 2003. Before the

amendment the maximum punishment for a person who is found guilty of indecently assaulting a woman or a girl was five years imprisonment with hard labour. The amendment increased the maximum sentence to twenty-one years imprisonment.

In this case the appellant having been found guilty of the alternative charge of indecent assault, the maximum sentence that should have been meted out on him was five years imprisonment. In the circumstances of this case, the sentence of ten years imprisonment imposed by the trial magistrate was illegal. I will therefore set aside the said sentence and substitute it with a lawful sentence of this court. I sentence the appellant to serve five years imprisonment with hard labour. Otherwise his appeal on sentence lacks merit and is dismissed save for the substitution in the term of imprisonment imposed.

The said sentence of five years imprisonment shall take effect from the 2nd of December 2003 when the appellant was sentenced by the trial magistrate. It is so ordered.

DATED at NAKURU this 1st day of March 2006.

L. KIMARU

JUDGE