



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Criminal Appeal 1081 of 2003**

**PAUL NGURE NGIGE .....APPELLANT**

**VERSUS**

**REPUBLIC.....RESPONDENT**

**JUDGMENT**

**PAUL NGURE NGIGE**, the Appellant herein was convicted by M. W. Wachira (SPM) on his own plea of guilty. He had been charged with the offence of defilement of a girl contrary to Section 145 (1) of the Penal code. The particulars being that on the 30<sup>th</sup> day of November, 2003 at [*particulars withheld*], Kiambu District of the Central Province the Appellant had carnal knowledge of **JMM**, a girl under the age of sixteen (16) years. The Appellant also faced an alternative count of indecent assault contrary to Section 144 (1) of the Penal Code. The particulars given were that on the 30<sup>th</sup> day of November 2003, at [*particulars withheld*], Kiambu District of the Central Province, the Appellant unlawfully and indecently assaulted **JMM** girl under the age of sixteen years by touching her private parts.

Upon conviction, the Appellant was sentenced to life imprisonment on the main Count. The Appellant was aggrieved by the conviction and sentence. He consequently lodged this Appeal. He advanced 4 grounds in his petition of Appeal to wit:-

- (i). **THAT** the sentence imposed was very harsh and punitive.
- (ii). **THAT** the Appellant was pressurized into pleading guilty.
- (iii). **THAT** although the Appellant pleaded guilty to the charge, he prays for a retrial because the trial Magistrate did not warn him of the consequences of pleading guilty of the charge.
- (iv). **THAT** no other evidence was germinated (sic) in the Court to support his confession to the crime.

When the Appeal came up for hearing before me, the Appellant informed the Court that he was abandoning his Appeal on conviction. However he was going to pursue the Appeal on sentence only. The state did not object to the turn of events. In the result then I heard this Appeal on sentence only.

In support of his Appeal on sentence, the Appellant submitted that he was jailed for life. That the said sentence was therefore harsh and excessive. That he was a first offender and remorseful.

Miss Gateru, Learned State Counsel appeared for the state. Counsel conceded to the Appeal on sentence. She submitted that although life sentence was lawful, the same was nonetheless harsh and excessive

considering the circumstances of the case. The Appellant was a 1<sup>st</sup> offender who readily pleaded guilty to the charge thereby saving the Court's time. Awarding maximum sentence on the Appellant was in the circumstances high handed. Counsel concluded her submissions by urging this Court to interfere with the sentence imposed as it deemed appropriate.

Matters of sentence are really discretionary and unless it can be shown that in exercising the discretion the Court imposing sentence took into account extraneous matters or failed to take into account material factors, the Appellate Court would rarely interfere with the sentence imposed. The other consideration is ofcourse that if it can be shown that the sentence imposed was unlawful the Appellate Court could interfere. Thirdly, if the sentence imposed is manifestly excessive in view of the circumstances of the case as to amount to a miscarriage of justice, the Appellate Court would readily interfere. (see generally OGALO S/O OWUORA VS REPUBLIC (1954) 21 EACA 270, JAMES VS REPUBLIC (1950) 18 EACA 147 and STEPHEN ONDIEKI NYAKUNDI VS REPUBLIC, CRIMINAL APPEAL NO. 91 OF 2005 (UNREPORTED))

It should always be remembered that the power of the Appellate Court to interfere with the sentences imposed by the subordinate Courts in an important safeguard against the apparent injustice in the Magistrate's Court and it is a recognition of the principal that the sentence should fit the crime as well as the offender. However it should be exercised sparingly and not capriciously.

No doubt the offence committed by the Appellant is morally repulsive to the society. He defiled a girl of 4 years leaving her with permanent injuries. Indeed in sentencing the Appellant to life imprisonment, the Learned trial Magistrate in her sentencing notes remarked:-

***".....The offence is a very serious one. There are no mitigating factors. The child victim has been subjected to permanent injuries. In my opinion, the crime committed by the accused is one worse than a beastly behaviour....."***

I totally agree with this sentiments by the Learned trial Magistrate. No doubt the Appellant's act was and is reprehensible. However to have imposed a life sentence on the Appellant who was a first offender would appear to me to be harsh and excessive. To my mind, maximum sentence should be left to those who are serial criminals. For instance, in this case if it had been shown that the Appellant was a serial child molester and or defiler, life sentence would have been well deserved. I may go further and state that even if it had been shown that the Appellant though not a serial defiler but had a record of sorts, then the sentence imposed would not have looked out of place. In matters of sentencing we should never loose sight of the fact that imprisonment is meant to reform and or rehabilitate the convict. I do not see how we can achieve the foregoing with a life sentence. Finally, the Learned Magistrate should have considered the fact that the Appellant had readily pleaded guilty to the charge and thereby saved the Court its valuable time as a mitigating factor.

No doubt the sentence imposed was harsh and excessive considering the circumstances of the case. The Learned State Counsel was therefore right in conceding to the Appeal on sentence. I will therefore intervene with sentence and alter it to the extend that the Appellant shall now suffer imprisonment for a term of 15 years with hard labour effective from 8<sup>th</sup> December, 2003.

Orders accordingly.

Dated at Nairobi this 6<sup>th</sup> day of April, 2006.

.....

**MAKHANDIA**

**JUDGE**