

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Criminal Appeal 355 of 2002

(From original conviction and sentence of the Senior Principal Magistrate's Court at

Naivasha in Criminal Case No. 2574 of 2002- L. K. Mutai [R.M.]

PAUL NGANGA MWORIA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

JUDGMENT

The appellant, Paul Nganga Mworua was charged with defilement of a girl under the age of sixteen years contrary to **Section 145(1) of the Penal Code**. The particulars of the offence were that on diverse dates between the 12th of August and the 17th of October 2002, at [*particulars withheld*], Gilgil, the appellant unlawfully had carnal knowledge of M N a girl aged fourteen years. He was alternatively charged with indecent assault of a female contrary to **Section 144(1) of the Penal Code**. The particulars of the offence were that on diverse dates between 12th of September and the 17th of October 2002 at [*particulars withheld*], Gilgil, the appellant unlawfully and indecently assaulted M N a girl aged fourteen years by touching her private parts. The appellant pleaded not guilty to the offence and after a full trial was found guilty on the main charge of defilement. He was sentenced to serve nine years imprisonment with four strokes of the cane. He was aggrieved by his conviction and sentence and has appealed to this court.

Although in his petition of appeal, the appellant challenged his conviction and sentence by the trial magistrate, at the hearing of the appeal he abandoned his appeal on conviction and instead mitigated on sentence. He told the court that he regretted committing the offence as he had done so under the influence of the devil. He submitted that since he was imprisoned in 2002 he had become sick and was suffering from ulcers and had lost his eye sight. He told the court that he had learnt upto the fourth form while in prison and had also undertaken a course in carpentry upto grade II. He was currently undertaking a course in carpentry grade I. He pleaded with the court to reduce his sentence so that he could go back to the society. Mr Koech, Learned Counsel for the State left the issue of sentence to the court.

This being a first appeal, this court is mandated to reconsider and to reevaluate the evidence adduced by the witnesses in the trial before the magistrate's court and reach its own independent determination whether or not to uphold the conviction of the appellant. Further where the appellant is challenging his sentence, this court is required to put in mind that in sentencing an accused person a trial court is exercising judicial discretion which can only be interfered with on appeal if it is established that the said discretion was exercised unlawfully or without due regard to the facts and the circumstances of the case.

In this case the appellant admits that he defiled the complainant who according to the evidence adduced before the trial magistrate was his step-daughter. The appellant did not defile the complainant once but severally and over a period of time. When the complainant was examined by Dr. Ngoitsi (PW6) of the Gilgil Hospital on the 19th of October 2001, the complainant was found to have been impregnated by the appellant. The appellant defiled the complainant in the absence of her mother, Margaret Wangare

(PW4) who had attended a funeral of a relative at Eldama Ravine. From the facts of this case, it is clear that the appellant abused the trust placed on him by the society to take care of his daughter by defiling her. He took advantage of the absence of the complainant's mother to commit his heinous act.

The appellant did not put into consideration the feelings of the complainant neither did he consider that he was psychologically damaging the complainant by defiling her. In my considered opinion the sentence of nine years imprisonment that was meted out on the appellant was too lenient in the circumstances. I will however not interfere with it in view of the fact that the State did not ask for its enhancement and further in view of the fact that the appellant was convicted before the **Criminal Law (Amendment) Act 2003** came into effect on the 25th of July 2003. I will however set aside the corporal punishment which was ordered to be meted out on the appellant by the trial magistrate since corporal punishment was outlawed by the said **Criminal Law (Amendment) Act 2003 (Act No. 6 of 2003)**.

I therefore find no merit with the appeal on sentence filed by the appellant and consequently dismiss it. The appellant shall serve the sentence ordered by the trial magistrate. The conviction and sentence of the trial magistrate is hereby confirmed. It is so ordered.

DATED at NAKURU this 10th day of May 2006.

L. KIMARU

JUDGE