REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Criminal Revision 127 of 2006

Arising from Mombasa CM CR. File No. 2593 of 2004)

FRANCIS JILANI TUNGU …….....……..APPLICANT

VERSUS

REPUBLIC …….....……RESPONDENT

R U L I N G ON REVISION

Francis Jilani Tungu, hereinafter referred to as the applicant was tried and convicted for the offence of defilement of a girl under the age of 16 years contrary to Section 145(1) of the Penal code. He was then sentenced to serve 6 months imprisonment. In exercise of this court's supervisory jurisdiction under Section 65(2) of the Constitution of Kenya and pursuant to Section 362 of the Criminal Procedure Code I called for the records relating to the proceedings which gave rise to the applicant's conviction. In exercising such jurisdiction, this court is to satisfy itself of the correctness, legality or propriety of the findings, sentences or orders recorded or passed and as to the regularity of the proceedings therein.

After carefully perusing the proceedings in respect of Mombasa C.M.CR.C No. 2593 of 2004, I came to the conclusion that the sentence was manifestly low and that the trial court did not tender a sentence in appreciation of Section 145(1) of the Penal. It therefore became necessary for the sentence to be enhanced in conformity with the provisions of the abovementioned law. Any decision to that extent meant that the applicant would be prejudiced and that is when Section 364(2) of the Criminal Procedure Code comes into play. In compliance with Section 364(2) and pursuant to the proviso to Section 365 of the Criminal Procedure Code, I summoned the applicant and the Republic to be heard over the issue.

When the applicant appeared before this court he gave his mitigation and also presented written submissions. He pleaded for leniency and indicated that he was remorseful. He also stated that he was a young person aged 18 years hence he should be given a chance to reconstruct his life. In his written submissions the applicant argued as though the revision was an appeal. He claimed that he was not properly identified and that the evidence tendered by the prosecution were contradictory. He beseeched this court to give him the benefit of doubt.

Mr. Mondah, learned State Counsel urged this court to enhance the sentence because the sentence meted out against the appellant was not commensurate with the offence he committed. He also urged this court to pronounce hard labour over and above the sentence.

I have considered the submissions and mitigation of he applicant. I have also taken into account the submissions given the learned State Counsel. The facts leading to the applicant's conviction are short and straightforward. On the 22nd day of August 2004, FM a girl aged 13 years and another girl by the name Ipra was playing outside the house of F's aunt.

It is while the two girls were playing that the applicant came and called aside FM (P.W.1) and had carnal knowledge with her. the applicant was found doing the act by a passer-by. P.W.1's aunt NA (P.W.2) came to learn about the incident. She beat the complainant after which she revealed what

happened that day. P.W.2 took P.W.1 to Coast General Hospital where she was examined and treated. A P3 Form filled by Dr. Njoroge was produced in evidence by Dr. Chidagaya Swaleh P.W.3. The P3 form revealed that the complainant's hymen was ruptured hence there was evidence of penetration. When faced with this kind of evidence, applicant testified in his defence without calling for any independent witness. He chose to give the details of what happened on 25th August 2004. He did not seek to contest the evidence tendered relating to the incident of 22nd august 2004 in which it was alleged that he had carnal knowledge with P.w.1.

I have re-evaluated the evidence and I am convinced that the evidence tendered by prosecution puts the applicant at the scene of crime and hence he had the opportunity of committing the offence he was convicted for. The complainant (P.w.1) was consistent that the applicant had sex with her behind her aunt's house.

P.W.1's evidence was corroborated by the medical evidence contained in the P3 form. The evidence of P.W.1 confirms that the applicant was somebody well known to her. The applicant lived with his aunt in the neighbourhood of the complainant's aunt. The identification of the applicant was that of recognition.

In the end I find that the offence under Section 145(1) of the Penal Code was established. I am satisfied that the learned Resident Magistrate came to the correct conclusion in convicting the applicant. She however gave a sentence, which was inordinately low and not contemplated under Section 145(1) of the Penal Code. I agree with the submissions of Mr. Mondah that the offence was a serious one, which in the circumstances of this case must attract a sentence severe than that pronounced in this case. I have also taken into account the mitigation tendered before this court by the applicant. I am convinced that the sentence in this case should be enhanced in order to conform with that contemplated by law. In the end and in exercise of revisionary powers I hereby set aside the sentence of 6 months and substitute it with a sentence of 6 years with effect from the date of sentence. The applicant shall serve the sentence with hard labour.

Dated and delivered at Mombasa this 6th day of Junev 2006.

J.K. SERGON

J U D G E