

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Criminal Appeal 209 of 2005

(From Original Conviction and Sentence in Criminal Case No 1157 of 2004 of the Senior Resident Magistrate's Court at Kiambu-L.Muhiu SRM).

JOSEPH MUCHURA KIMATHI.....

.....APPLICANT

VERSUS

REPUBLIC.....

....RESPONDENT

JUDGEMENT

The Appellant, ***JOSEPH MUCHURA KIMATHI*** was arraigned before the Senior Principal Magistrate's Court with one count of attempted defilement of a girl contrary to Section 145 (2) of the Penal Code. In the alternative the Appellant was charged with indecent assault of a female contrary to Section 144 (1) of the Penal Code. The trial commenced before L. Muhiu, Senior Resident Magistrate on 29th June, 2004 and ended on 10th January, 2005. A total of 5 witnesses were called by the Prosecution. At the end of it all the Appellant was convicted on the alternative count and sentenced to 15 years imprisonment.

Being aggrieved by the conviction and sentence, the Appellant through Messrs **Kanyi, Koge & Co. Advocates** lodged the instant Appeal setting out 4 grounds to wit:-

- (i). **THAT** the trial Magistrate erred in both law and fact by finding that the Prosecution had proven the case beyond reasonable doubt.
- (ii). **THAT** the trial Magistrate erred in law and fact by failing to find that the evidence of the Complainant was not corroborated, not watertight and incapable of finding a conviction.
- (iii). **THAT** the sentence was also excessive in the circumstances of the case.
- (iv) **THAT** the trial Magistrate erred in law by not finding specifically that the evidence by the Prosecution and the particulars of the charge did not prove the charge.

When the Appeal came up for hearing before me, Mr. Kanyi, Learned Counsel for the Appellant was abandoned the Appeal on conviction but opted to pursue instead the Appeal on sentence only. The state not objecting, the Appellant's prayer was granted and hence the Appeal proceeded on sentence only.

In his submission in support of the Appeal on sentence, Learned Counsel for the Appellant stated that the sentence imposed was exorbitant. That the Appellant was remorseful though. That the Appellant was a first offender and had been incarcerated since 28th February, 2004.

Mrs. Obuo, Learned State Counsel who appeared for the state opposed the Appeal. According to the Learned State Counsel, the sentence of imprisonment imposed was legal. Considering that the Complainant was a 12 year old minor, Counsel submitted that the 15 years imprisonment imposed was

not excessive.

Sentencing is a matter for the discretion of the trial Court. The discretion must however be exercised judicially and not capriciously. The trial Court must be guided by evidence and sound legal principles. The Court must take into account all relevant factors and exclude all extraneous or irrelevant factors. The trial Court's notes on sentence in this matter are sketchy. In a case, as this one, where the Appellant is sentenced to such long prison term, the Court seized of the case is obliged to make detailed notes on the matters the Court has taken into account in arriving at the sentence meted out. Such detailed notes are however not essential in cases where only one sentence is provided by the Penal provisions such as in capital offences.

I have been asked to interfere with the sentence. As I stated earlier sentencing is discretionary and unless it is shown that the sentence is manifestly harsh and excessive, an Appellate Court would hardly interfere. See **WANJEMA VS REPUBLIC (1971) EA 493**. The offence for which the Appellant was convicted carries a maximum jail term of 21 years and hard labour. In the instant case, the Appellant was handed a jail term of 15 years. Although the sentence is legal, however considering that the Appellant was a first offender, it would appear the sentence was excessive. As already stated, the trial Court's notes on sentence were sketchy and consequently, I am unable to tell the basis upon which the Learned Magistrate opted to impose on the Appellant imprisonment for a term of 15 years. That being the case I am obliged to reconsider the facts and circumstances of this case. No doubt the Complainant must have been put through a very harrowing experience by the acts of the Appellant. She is a young girl of 12 years. However this alone did not call for such harsh and excessive sentence. After all the Appellant was a first offender and not a serial defiler or a person who constantly and indecently assaults women. When all these circumstances are considered, I am of the view that the trial Magistrate grossly misdirected herself in the sentence she came to and erred in principle by failing to take into account the core factors of the case and thus arrived at a grossly excessive sentence which calls for interference.

Accordingly, I set aside the sentence of 15 years imprisonment imposed on the Appellant, and substitute therefor a sentence of 7 years imprisonment with hard labour from the date of conviction. Those shall be the orders of this court on this appeal.

Dated at Nairobi this 27th day of September, 2006.

.....

MAKHANDIA

JUDGE