

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Criminal Appeal 257 of 2005

(From original conviction and sentence in Criminal Case No. 97 of 2005 of the Senior

Resident Magistrate's Court at Limuru – M.W. Mwai, SRM)

SAMUEL NGURE KABERE APPELLANT

VERSUS

REPUBLIC RESPONDENT

JUDGMENT

SAMUEL NGURE KABERE, hereinafter referred to as the appellant, was arraigned before the Chief Magistrate's Court, at Kibera on two counts. The first count was that of defilement of a girl contrary to Section 145(1) of the Penal Code. On the second count, the appellant was charged with attempted defilement of a girl contrary to Section 145(2) of the Penal Code. The particulars of the offence were given in the charge sheet and I need not reproduce them here.

Following a full trial in which the prosecution presented a total of five witnesses, the trial court found the appellant guilty of the second count and convicted him accordingly. The appellant was however acquitted of the first count under Section 215 of the Criminal Procedure Code. Following his conviction as aforesaid, the appellant was sentenced to ten years imprisonment. The appellant was appalled by the conviction and sentence and instantly lodged this appeal in which he faulted the trial court on four grounds set out in the petition of appeal.

However when the appeal came up for hearing before me on 19th July, 2006, the appellant chose to abandon the appeal on conviction and instead elected to pursue the appeal on sentence only. The state not opposing the course taken by the appellant, I acceded to the request by the appellant. Accordingly the appeal proceeded on sentence only.

In support of his appeal sentence, the appellant submitted that the jail term imposed on him was harsh and excessive. The appellant stated he will have no problem serving a jail term of five years.

Miss Konuche, learned state counsel opposed the appeal on sentence. Counsel submitted that the maximum sentence for attempted defilement is life imprisonment. The appellant was sentenced to ten years imprisonment which according to the learned state counsel was even lenient. Counsel further pointed that the victim was a seven year old child.

I have carefully considered the submissions by the appellant and by the learned state counsel, as well as the facts and circumstances of this case and the law. An appellate court would not ordinarily interfere with the sentence imposed by the trial court unless it can be demonstrated that the trial court imposed an illegal or such harsh and excessive sentence as to amount to a miscarriage of justice, two, that the court acted upon wrong principles, factors or overlooked some material factors and finally that in imposing the sentence, the trial court exercised its discretion capriciously and not judicially. See generally, **OGALO S/O OWUORA V R (1954) 19 EACA 270, JAMES VS REPUBLIC (1970) EA 599 AND WANJEMA VS REPUBLIC (1971) EA 493.**

As correctly pointed out by the learned State counsel, the offence of attempted defilement attracts a maximum of imprisonment of life. The appellant was sentenced to 10 years imprisonment. The sentence in my view is lawful. It is neither harsh nor excessive. Considering the age of the victim and the trauma

she had to undergo, one may even be tempted to say that the sentence was infact lenient. The appellant was not all remorseful. He never offered any mitigation.

In sentencing the appellant as aforesaid I do not discern any misdirection on sentencing principles by the trial Magistrate. On the face of it, one cannot say that the learned Magistrate took into account irrelevant consideration or failed to take into account material factors in arriving at the sentence imposed. In my view the learned Magistrate did not exercise her discretion in sentencing capriciously.

The upshot of the foregoing is that the sentence imposed was well deserved. Accordingly I have no hesitation in coming to the inevitable conclusion that the appellant's appeal against sentence lacks merit. It is accordingly dismissed.

Dated at Nairobi this 11th day of October, 2006.

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MAKHANDIA

JUDGE